
Sm. Angurbala Mullick Vs Debabrata Mullick

None

Court: Calcutta High Court

Date of Decision: Feb. 9, 1949

Citation: (1949) 02 CAL CK 0007

Judgement

Mukharji, J.

This is a suit by the widow of Mrintunjoy Mullick deceased against his minor son Debebrata Mallick who is the sole

defendant in this suit appearing through his guardian ad litem Goloke Nath Mullik appointed under order of this Court dated 21st November 1947.

The plaintiff asks for a declaration that she is the sole shebait of the Deity Sri Sri Iswar Nitya Gopal Jiu or alternatively for a declaration that she is

the joint shebait with the defendant and for construction of an indenture dated 10th October 1934 and for other reliefs No evidence has been led

by any of the parties to this suit and questions raised in this suit have been argued on questions of law on the construction of the said indenture and

interpretation of Hindu Women's Rights to Property Act (XVIII [18] of 1937) as amended by Act (XI [11] of 1938).

2. The issues raised are the following:

1. Is the plaintiff entitled to be the sole shebait of the deity as alleged in Para. 8 of the plaint?

2. Alternatively are the plaintiff and the defendant joint shebait of the said deity?

3. Is the defendant the sole shebait as alleged in para. 3 of the written statement?

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

3. The material part of the genealogical table which is relevant for the determination of the questions raised in this suit is set out hereunder:

4. Mritunjoy and Sm. Nitto Sundari executed an indenture dated 10th October 1934. The indenture recites inter alia the death intestate of

Dhananjoy on 28th August 1907 leaving him surviving Sm. Nitto Sundari and Mritunjoy. Mritunjoy was the adopted son of Dhananjoy and Sm.

Nitto Sundari. Mritunjoy was 32 years of age at the time of the execution of the indenture.

5. It is also recited in the indenture that premises No. 14 Sakrapara Lane, Calcutta, was purchased by Sm. Nitto Sundari in her own name on 13th

January 1920 out of the monies belonging to Dhananjoy and conveyed to Mritunjoy by another indenture of even date with the indenture in suit.

The Deity Sri Sri Iswar Nitya Gopal Jiu was established, consecrated and located at No. 14 Sakrapara Lane by Sm. Nitto Sundari with the

consent and concurrence of Mritunjoy.

6. The indenture proceeds to dedicate to the said deity properties described in Schs. "A" and "B" thereof including premises No. 14 Sakrapara

Lane.

7. The properties were conveyed by the indenture to Sm. Nitto Sundari as trustee on certain trusts in respect of No. 14, Sakrapara Lane,

Calcutta, and other properties in Sch. "A" separately and more particularly described in the said indenture.

8. After having declared the trusts the indenture proceeds to make provisions for the devolution and succession of the shebait. The material

provisions on this point may be summarised as follows:

(1) Sm. Nitto Sundari was constituted and appointed as the first shebait for the term of her natural life.

(2) After her death her son Mritunjoy was to become the shebait of the deity.

(3) After Mritunjoy's death his wife Sm. Kironbala and after her death the heirs of Mritunjoy shall be and act as the shebait or shebait of the said

Thakur.

9. As I have said before, Dhananjoy died intestate on 28th August 1907. Nitto Sundari died in or about the year 1938. Sm. Kironbala was the

wife of Mritunjoy and she was the person referred to in the said indenture. Mritunjoy and Sm. Kironbala had their son the defendant Sm.

Kironbala died on 14th January 1942. Mritunjoy married again within about a month's time and married the plaintiff on 25th February 1942.

Mritunjoy died within a few months thereafter on 4th July 1942.

10. It is necessary at this stage to refer to a will which is pleaded in the written statement. It was alleged that two days before the death of

Mritunjoy he executed a will on 2nd July, 1942 and probate of the said will was granted in September 1942. But on 18th June 1942 (1947?) such

probate was revoked and the matter was set down as a contentious cause being testamentary Suit No. 3 of 1947. Such testamentary suit was

pending at the date of the written statement but has since been dismissed with the result that Mritunjoy is to be taken as having died intestate. The

present suit was filed on 29th August 1947.

11. Issue No. 1-Learned Counsel appearing for the plaintiff has argued: (1) That on proper construction of the clause in the said indenture which

provides ""after his death his wife Sm. Kironbala Dassi"", the words Sm. Kironbala Dassi are merely descriptive of the word wife, that it was not

intended by that clause to make Kironbala a person designate but whoever happened to be the wife of Mritunjoy and whoever answered that

description was the person intended to be the shebait after Mritunjoy's death: (2) That in any event the plaintiff was the natural guardian of the

defendant and as such by the clause in the said indenture to which I will refer later the plaintiff was entitled to be the shebait of the deity during the

defendant's minority.

12. The first proposition of the Learned Counsel for the plaintiff is one of construction. Reliance was placed on the decision in Mt. Lali v.

Muralidhar in 33 I.A. 97 : (28 ALL. 488 P.C.) and the passage in the judgment of Sir Andrew Scoble at p. 104. There the Judicial Committee

was construing a wazib-ul-arz which contained the words: ""I adopted my sister's son Murli. He is my heir and will be the owner."" Their Lordships

of the Privy Council held that the word ""Murali"" was merely descriptive and the right of Murli to inherit was based entirely on the fact of his

adoption and as the adoption failed the gift made to him by the document failed.

13. The earliest decision on this line of reasoning is Nidhoomani v. Sarada Pershad, 3 I.A. 253 : (3 Sar. 653 P.C.) where the words were ""to

Kaibullo whom I have adopted"" and these words were construed in favour of the validity of the gift contained in the document in spite of the fact

that the adoption transpired to be invalid. The next case is the one reported in Fanindra Raikat v. Rajeswar Das, 12 I.A. 72 : (11 Cal. 463 P.C.)

where the words used were: ""I authorise you to offer "Pinda" by virtue of your being my adopted son"". On a construction their Lordships of the

Privy Council held that the gift failed because of the invalidity of the adoption. The next in succession is the case of Surendro v. Doorgasundari,

reported in 19 I.A. 108 : (19 Cal. 513 P.C.) where on a construction of the words used there their Lordships held the gift to be effective in spite of

the invalid adoption.

14. The analysis of these various decisions shows that the ratio decidendi is that if the assumed fact of adoption was the reason and motive of the

gift then a gift to the adopted person must fail if the adoption fails and that whether the words are words of mere description or words of limitation

will depend on that distinction which Sir Richard Couch in Fanindra Raikat v. Rajeswar Das, 12 I.A. 72 at p. 89 : (11 Cal. 463 P.C.) drew

between what is descriptive only and what is the reason or motive of the gift or bequest"". That learned and eminent Judge pointed out that it is

distinction which ""may often be very fine but it is a distinction which must be drawn from a consideration of the language and the surrounding

circumstances"". .

15. The language and the surrounding circumstances therefore are the determining factors. Each document has to be construed in accordance with

the language used and with due regard to the surrounding circumstances. In my judgment on a question of construction and interpretation of a

document the caution enjoined by Jessel M.R. in *Aspden v. Seddon*, reported in (1875) 10 Ch. A. 394 at p. 397 : (44 L.J. Ch. 359) cannot be

over-emphasised and that caution is in the following terms:

No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say I

think it is the duty of a Judge to ascertain the construction of a document before him and not to the construction put by another Judge upon an

instrument perhaps similar but not the same. The only result of referring to authorities for that purpose is confusion and error.

Lord Wright in *Luxor v. Cooper*, 1941 A.C. 103 130 : (1941-1 ALL E.R. 33) deprecated in general the attempt to enunciate decisions on the

construction of agreements as if they embodied rules of law and the learned Lord said that the decision on each instrument must depend on the

consideration of the language of the particular instrument read in the light of the material circumstances the parties had in view when the instrument

was made.

16. Approaching this particular question of construction of the clause in the indenture before me in the light of the above decisions and bearing: that

wholesome caution in mind I do not find the decision in *Mt. Lali v. Muralidhar*, 33 I.A. 97 : (28 ALL. 488 P.C.) to be of any assistance to the

plaintiff. As I have shown from the other decisions of the Judicial Committee similar instruments were construed with very different result which

only show that the language and the circumstances of each particular document have to be carefully construed and considered. I do not consider

that the gift to Kironbala in this case by that clause was a gift which could mean any wife of Mritunjoy and not necessarily Kironbala. In the first

place here no question arises as to the validity of the status of Kironbala as the wife of Mritunjoy such as was the case in the decisions I have

referred to above including the one in *Mt. Lali v. Muralidhar*, 33 I.A. 97 : (28 ALL. 488 P.C.) relied upon by Learned Counsel for the plaintiff.

Kironbala was the wife of Mritunjoy and no question of the validity of marriage between Kironbala and Mritunjoy is in issue in this case. In the

second instance there are serious difficulties in the way of construing the words ""Sm. Kironbala Dassi"" as words of mere description of a wife and

not words of limitation confined to Kironbala alone. Such difficulties in my judgment are:-(a) The indenture uses the words ""Sm. Kironbala Dasi

after wife only (once?) and that is in this particular clause. If the words ""Kironbala"" are specifically added after the word wife, then they must in my

opinion be given a meaning: (b) If surrounding circumstances are an important consideration in this question of construction as pointed out by the

Privy Council as well as by Lord Wright, then Kironbala alone could have been intended at the date when the indenture was executed for the

simple reason that the plaintiff could never be in the contemplation at that date as a probable second wife of Mritunjoy.

17. In my judgment the specific name of Kironbala used in this clause excludes the general class of wife. To construe that clause and to give it the

meaning which the plaintiff wants is to make the words ""Kironbala Dasi"" completely redundant, an extreme consequence which I am not prepared

to create unless there are very cogent reasons for doing so. I find no cogent reason in this case. On the contrary I find compelling reasons against

such a construction. The clause which follows to provide for the contingency of Mritunjoy dying without any issue describes the persons who shall

be the shebait after the death of his ""said wife as aforesaid"". These words in the inverted commas can in my judgment refer only to the particular

wife Kironbala Dasi. It is a cardinal rule of interpretation of a document that every word should if possible, be given a meaning and no word should

ordinarily be treated as surplusage. I find in this case it is not only possible to give a meaning to the words ""Kironbala Dasi"" but also it is must

reasonable and natural to interpret these words as meaning Kironbala only.

18. The second proposition of the Learned Counsel for the plaintiff on this issue is based on the clause: ""Provided always that if at any time any

person who may be entitled to be a shebait shall be a minor then his natural guardian according to the Hindu law shall be shebait of the said Thakur

during his minority"".

19. It is, therefore, argued that as the defendant is a minor, the plaintiff is the shebait because she is the natural guardian according to the Hindu

law. The soundness of this argument depends on the correctness of the assertion that the step mother according to the Hindu law is the natural

guardian of her step-son. On a consideration of the authorities and the original texts bearing on this question, I have come to the conclusion that a

step-mother is not the natural guardian of her step-son.

20. Sir Ernest Trevelyan in his Law relating to Minors, Edn. 6 at p. 49, says:

The Hindu Law does not seem to prescribe any positive rule with respect to the right of guardianship but by practice and custom the rights of

certain relations of a Hindu minor have now almost acquired the force of law. For instance the rights of the father and of the mother, after the death

of the father, have been so long and universally acknowledged as to be now indisputable.

21. Dr. Priya Nath Sen in his Tagore Law Lectures on Hindu Jurisprudence published by the University of Calcutta in 1918 at p. 301 says

as regards the guardianship of a minor the father of course has the first claim, after him comes the mother and if neither be alive the elder brother

takes the place.....Ultimately the King is the guardian of all and Manu enjoins that when a boy has neither father nor mother he should take steps

to protect the property of the boy until he attains majority and returns from the house of his preceptor to take charge of it himself.

22. That eminent and learned jurist in support of his proposition has relied on the following original texts. The first is the text from Narada cited in

Viramitrodaya on Kriyapada and is as follows:

Tayorapi Pita Sreyan Bija Prodhanya Darsanat Abhave Bijino Mara Tadebhavetu Purbaja

The second text is from Manu, VIII 27:

Baladoyika Riktam Tabad Raja Anupalayet Jabat Sa Sat Samabrittya Jabat Cha Atita Saisaba.

23. The original texts indicate that father is the natural guardian and in his absence the mother is the natural guardian and as Narada points out in

the absence of either the elder brother is the natural guardian. The text from Manu shows that where a boy is an orphan that is who has neither his

father nor his mother living then the King comes to his protection. That in my judgment indicates that the King or his substitute the Court will have

to appoint another guardian in his place during his minority. But neither of these texts includes or mentions a step-mother as the natural guardian of

her step-son.

24. It has been held by the authorities that where both father and mother are dead the stepmother is not the legal guardian and at any rate in

preference to his paternal relations. In 1821 it was held by the Bombay Sadar Court in the case, Lakshmi v. Amarchand, 7 Bom. SC 144, that the

stepmother in preference to the paternal uncle is the legal guardian of a minor. There is a similar decision by a single Judge of the Sadar Court of

the North Western Frontier Province. But a Division Bench of the Bengal High Court is Maharani Rambunsee Koonwari v. Maharani Soobh

Konwari, reported in 7 W.R. 321, that the paternal grandmother has the right of guardianship of a Hindu minor in preference to the stepmother.

The learned Judges in that case discussed another verse from Manu being Chap. 9, verse 188 as well as the observation of Sir William

Macnaghten in his famous treatise on Hindu Law and the Vavastha Darpana which stated that the step-mother is the legal guardian on failure of a

father. I respectfully agree with the decision in that case and the reasons given there for holding that the step-mother is not the legal guardian.

25. In coming to this conclusion in law, I find it agrees and accords with social and natural justice. The step-mother has no relationship of blood

with her step-son and it is in the fitness of things that she is not regarded in Hindu law as the natural or legal guardian of her stepson. Her interest in

the step-son at best be ethical and ideal but as a matter of social justice it must give way in my opinion to the overwhelming natural and instinctive

interest of the paternal or even maternal relations of the son by reason of their blood connection. The fact that in Hindu law the step-mother is not

the heir to her step-son may not be conclusive on the question but it is certainly a significant pointer to the view I take. This conclusion however

does not mean that a step mother can never be appointed by the Court as a guardian of her minor step-son. In a fit and proper case, the Court

after consideration of all the relevant factors and win the best interest and welfare of the minor may think the step-mother to be the fit and proper

person to be the guardian of her step-son and in that case there is no fetter on the Court in appointing such a step-mother to be a guardian and

indeed an ideal step-mother with affection and interest for her step-son is not unknown in Hindu society. But then she has to be appointed by the

Court on a consideration of all the circumstances and this does not mean that she is the natural or the legal guardian of the step-son according to

Hindu law.

26. Her Learned Counsel criticised the decision in Rambunsee Koonwari v. Soobh Konwari, 7 W.R. 321, and has drawn my attention to the case

of Ranganaiammal v. Ramanuja, reported in 35 Mad. 728 735 : (11 I.C. 570). This Madras decision doubts the dictum of Rambunsee Koonwari

v. Soobh Konwari, 7 W.R. 321, that the right to dispose of a girl by marriage (which was under consideration in that case) is different from the

right of guardianship. But that Madras decision is not a case of a step-mother at all. It is necessary to notice another decision reported in

Venkatisami Naicker v Muthusami Pillai, 34 M.L.J. 177 : (A.I.R. 1919 Mad. 1102) which was relied upon by the Learned Counsel for the

plaintiff. There it was held that the step-mother of a minor was competent to act as his guardian in the absence of nearer relations. I do not

however find the case very helpful having regard to the observations made by that erudite Judge, Seshagiri Ayyar J. at p. 181 where he says that

this question was not very fully argued and he did not propose to express any definite opinion upon the question whether the step-mother was the

natural guardian of her minor step-son in Hindu law. The learned Judge also said that in the absence of nearer relation the step-mother is entitled to

act as the guardian of her step-son. It has not been argued before me in this case that there are no other nearer relations. The opinion of Seshagiri

Ayyar J. is entitled to the great respect. But having regard to the fact that he himself did not express any definite opinion on this point and having

regard to the fact as he says that the point was not fully argued before him I do not consider that case to be an authority for the proposition that is

intended for and on behalf of the plaintiff.

27. In a recent decision, AIR 1948 100 (Nagpur) , a Division Bench of that High Court at p. 460 made the following observations:

Under the Hindu Law the guardianship of the minor vests in the sovereign as parens patriae. This duty is no doubt delegated to the child's relation

of whom the father and next to him the mother would be the natural guardian. Any other relative cannot be a natural guardian but one deriving his

authority from the Court. See S. 231 p. 299, Mayne on Hindu Law and Usage, 10th Edn.

28. I respectfully agree with those observations as laying down the correct law on this subject. Sadasiva Ayyar J. in Thayammal v. Kuppanna

Koundan, reported in 38 Mad. 1125 : (AIR 1915 Mad. 659) gives expression to the same view which I have taken. The learned Judge at p. 1126

of that Report says:

I hold that under the Hindu Law nobody else than the father and mother of a minor (with probable exception in favour of the elder brother and the

direct male and female ancestors of the minor) is entitled in the matter of natural right to be and to act as guardian of a minor's person and

property. Recourse must be had to the Court (representing the right of king which is paramount to even the rights of the parents) where there is no

natural guardian alive.

There in that case even the paternal aunt was held not to be the natural guardian.

29. The language used in the indenture in the present case before me is "natural guardian according to Hindu law". On the texts and authorities

quoted above, I am of the opinion that the plaintiff as the step-mother is not the natural guardian of the defendant. I accordingly answer issue No. 1

in the negative.

30. Issue No. 2.-The plaintiff contends that in any event on a proper construction of the indenture she is the joint shebait with the defendant. This

argument is developed on two grounds. The first ground is the clause in the indenture which provides:

This indenture further witnesseth that the said Nitto Sundari doth hereby constitute and appoint herself shebait of the said Thakur for and during

the term of her natural life and doth hereby declare that after her death her son the said Mritunjoy shall become the shebait of the said Thakur and

after his death his wife Sm. Kironbala and after her death the heirs of the said Mritunjoy shall be and act as the shebait or shebaites.

31. It is argued that the grant of shebaity to Kironbala having failed as Kironbala died before Mritunjoy and there being no provision made, heirs of

Mritunjoy would be entitled to the shebaity: AIR 1943 89 (Privy Council) . It is also urged that in any event the deed provides that after the death

of Kironbala the heirs of Mritunjoy shall be the shebaites.

32. The second ground that is thereafter called in aid of the plaintiff's contention is that shebaity is property and therefore under the Hindu

Women's Rights to Property Act (Act XVIII [18] of 1937) as amended by Act XI [11] of 1988 the widow is entitled to a share in this property

(shebaiti) along with the son by reason of S. 3 of the said Act. In other words, "heirs of Mritunjoy" should be determined with reference to the said

Act and not according to ordinary general Hindu law and the plaintiff should be considered as the heir of Mritunjoy under the said Act.

33. I propose to deal with this argument first from the point of view of construction of the indenture and secondly from the point of view as to how

far, if at all, the Hindu Women's Rights to Property Act operates on shebaiti considered as property.

34. In construing an indenture or document one of the main principles of construction to be followed is to read the document or the instrument as a

whole: AIR 1943 115 (Privy Council) and AIR 1936 281 (Privy Council) . In doing so one is faced with this clause which appears later in the said

indenture:

In case the said Mritunjoy shall happen to die without any issue the shebaitship of the said Thakur after the death of his wife shall devolve upon his

heirs under the Hindu law.

35. That provision indicates in my opinion that if there is an issue of Mritunjoy such issue alone is to be a shebait. It is only where no such issue is

available then alone heirs of Mritunjoy will be entitled to the shebaitship. In this case Mritunjoy has left his son and heir the defendant and in that

view of construction I cannot displace him from the shebaitship or make him shebaiti joint with the plaintiff. It appears to me that the intention

gathered from the language of the indenture is clear and that is in favour of the defendant as the issue of Mritunjoy. In other words, where there is

an issue of Mritunjoy no other possible heirs of Mritunjoy, whether, according to the Hindu Women's Rights to Property Act or otherwise, can

compete with such issue for the shebaitship and the language of the indenture shows preference for the issue against such other heirs of Mritunjoy.

36. I now come to the other important question which has been raised in this suit. That is the question how far Hindu Women's Rights to Property

Act can be said to apply to shebaiti considered as property. Of late the law relating to shebaitis has been a subject of considerable thought and

reflection of different Courts. In the recent decision of the Privy Council in AIR 1943 89 (Privy Council), their Lordships have said:

It must now be taken that the shebaiti is property, that it is not a catena, of successive life estates but is heritable-heritable property which in the

first instance is vested in the founder... It is only with some difficulty that any theory can successfully hold together the two elements of office and

property but the shebaiti right involves both and neither element is to be discarded.

37. On this subject the Full Bench decision of the Calcutta High Court, in *Monohar Mukherjee v. Bhupendra Nath*, 60 Cal. 452 : (AIR 1932 Cal.

791) discussed at great length the nature or species of property that is meant by shebaiti. At p. 494 of that Report it is said that,

shebaitship in its true legal conception involves two ideas; the ministrant of the deity and its manager; it is not a bare office but an office together

with certain rights attached to it.... Sufficient has already been said before to establish that the shebait deals with the property in his custody or

management as if he has some property, although not the full rights of property, in it, the legal property vesting in the idol.

38. The word property has diverse legal connotations. Not every property has similar incidents and characteristics. While its basic incidents are

sufficiently crystallised, yet in its finer and subtler implications it has been an elusive concept and a controversial subject of juristic enquiry. Salmond

who has given his most elaborate categories of property says in his famous work on Jurisprudence, 10th Edn. edited by Dr. Williams at p. 423.

the term property possesses a singular variety of different applications having different degrees of generality.

It is not possible to fit in the concept of shebaiti as property with any of the orthodox categories on the subject and, as the Judicial Committee

pointed out, analogies in the conception of property dealing with shebaiti are apt to be misleading. This conception of shebaiti as property is not a

new heresy in Hindu law. Sir George Rankin in AIR 1943 89 (Privy Council) said that law relating to shebait was not materially altered by the Full

Bench decision of Monohar Mukherjee v. Bhupendra Nath, 60 Cal. 452 : (AIR 1932 Cal. 791). I consider the concept of shebaiti as property to

be a very distinctive contribution of Hindu law to the jurisprudence of the world. It is a species of property with its peculiar characteristics and

limitations which cannot be compared to the accepted and to the other known notions of property in jurisprudence. For instance, the proprietary

part of shebaiti cannot be detached from that part of it which is called the office. Again it is a kind of property which the owner namely the shebait

can be deprived of, if there is mismanagement of debutter estate, a consequence which the owner of ordinary property will never have to face

despite the grossest mismanagement. I will discuss later on other peculiar incidents and limitations of shebaiti considered as property. I proceed to

discuss now how far this special property known as shebaiti comes within the ambit of the operation of the Hindu Women's Rights to Property

Act.

39. An analysis of the different sections of that statute shows in my opinion the nature of property within its contemplation. The preamble shows

that it was intended to give "better rights to women" and the statute was not therefore intended either to be a codifying Act or even a sweeping

amendment of the general and ordinary Hindu law of inheritance. Section 3 of the statute gives the widow the same share as a son and confers on

her the right to claim partition but her share is still that limited interest known as Hindu women's estate in Hindu law. Shebaiti in my view is not

amenable to this treatment of property in the sense contemplated by the statute. In my judgment shebaiti is not such property which can be

partitioned in the sense that it is not partible in the ordinary way, Monohar Mukherjee v. Bhupendra Nath, 60 Cal. 452 487 : (AIR 1932 Cal. 791

F.B.), while mere palas or turns of worship can certainly be partitioned. I do not consider shebaiti to be a mere pala or turn of worship, Monohar

Mukherjee v. Bhupendra Nath, 60 Cal. 462 486 : (AIR 1932 Cal. 791 F.B.) Shebaiti is not in my opinion a property which can be enjoyed as the

limited interest known as Hindu women's estate. Nor is shebaiti as property alienable in my opinion, in the same way and under the same

limitations as a Hindu widow can alienate her Hindu woman's estate. A Hindu widow has a far larger choice of grounds than a shebait for

alienating the property and she is a much larger owner of her Hindu women's estate than a shebait is of his shebaiti: (see Nagendra Nath v.

Robindra Narain, 63 Cal. 132 154, 155 : (AIR (13) 1926 Cal. 490); Janaki Ammal v. Narayanaswami Aiyar, 43 I.A. 207 209 : AIR 1916 P.C.

117 and Mulla's Hindu Law, Edn. 10 pp. 179, 187 and cf. pp. 500, 502). While shebaiti enures for the life of each particular shebait yet as

observed in Bhabatarini Debi v. Ashalata Debi, 70 I.A. 57 66 : (AIR (30) 1943 P.C. 89) it is not a catena of mere life estates. These provisions in

the Statute in my view indicate that the word "property" used in the Act is property in its ordinary meaning. In other words, the word "property" in

the Act should be construed and interpreted to mean property in its common and ordinary acceptance and not to include that special kind or

species of property known as shebaiti and the words "any property" in S. 3(1) of the Act, have not that unqualified import as the word "any"

would ordinarily and otherwise indicate. Section 5 of the Act which was added by the amending Act XI [11] of 1938 gives a meaning to the

words "dying intestate" and that a person is "deemed" to die intestate according to that section, in respect of all property of which he has not

made a testamentary disposition which is capable of taking effect. That provision in my judgment shows that the property over which the Act is

intended to operate must be a "testamentable" property i.e., property capable of being disposed of by will. I do not consider that it is competent

for a shebait to dispose of his shebaiti by will for the simple reason that the shebaiti of a particular shebait only enures for the life of that shebait. He

cannot in my judgment by his own act alter the line of succession or devolution of shebaiti. It is true that there may be a "reverter" to the heirs of

the founder and as the Privy Council pointed out in AIR 1943 89 (Privy Council) that if the original grant did not exhaust or terminate the founder's

interest, then on the death of the grantee the shebaiti reverts to the founder because the heritable interest of the founder ceases to be qualified by

the grant. But that right is in the founder as the owner of a full estate of inheritance which does not in my opinion enable a shebait qua shebait (not

in the capacity of the founder as owner of such estate of inheritance) to dispose of such right by will.

40. In AIR 1945 25 (Federal Court) Varadachariar J. at pp. 34, 35 makes the following observations:

That the Act (Hindu Women's Rights to Property Act) was intended to deal only with private property is shown by the provision of sub-s. (3) of

S. 3 to the effect that the interest devolving on a Hindu widow shall be only the limited interest known as a woman's estate. This provision will be

appropriate enough in relation to private property where the woman's estate is different from the interest taken by a male heir. But in respect of

trusteeship or other similar office, the law makes no difference between the interest taken by a male heir and the interest taken by a female heir.

41. The learned Judge came to that interpretation of the Act notwithstanding the fact which he observes at p. 34 that "the Hindu law has no doubt

regarded trusteeship as property for certain purposes" and was of the opinion that the Act was intended to apply only to property beneficially

owned by the propositus and not by anything in the nature of a trusteeship. Learned Counsel for the plaintiff has submitted that the question of

shebaiti was not argued before the Federal Court in the case I have just quoted. I cannot accept that submission. I find at p. 5 of that report that

the Advocate-General of India argued before the Federal Court that with regard to trust properties, the question is on whom does the office of

shebait devolve. The ordinary law of succession governs succession to shebaitship also. In any event, I consider the declaration of the law by the

Federal Court of India on this point at pp. 34, 35 and 47 as binding on this Court under S. 212, Government of India Act.

42. On the authority of that decision of the Federal Court and for the reasons I have given above, I hold that the Hindu Women's Rights to

Property Act is inapplicable to the special kind of property known as shebaiti in Hindu law, and although property in its extended meaning given by

the Full Bench decision of this High Court, *Monohar Mukherjee v. Bhupendra Nath*, 60 Cal. 452 : (AIR 1932 Cal. 791 and Privy Council

decision in AIR 1943 89 (Privy Council) , include shebaiti, the Hindu Women's Rights to Property Act does not affect this class of property.

43. I, therefore, hold that the plaintiff is not the heir of Mrintunjoy in respect of the shebaiti of the said Deity and accordingly answer the second

issue in the negative.

44. Issue No. 3-It follows from my findings on issues 1 and 2 that the defendant is entitled to be the sole shebait and I accordingly answer issue 3

in the affirmative, but with this qualification that the defendant cannot act as shebait at the present time during his minority. The minority clause in the

said indenture referred to above provides that as long as the defendant remains a minor his "natural guardian according to Hindu law" will act as

shebait during the defendant's minority. Such natural guardian therefore will act as shebait during defendant's minority. Learned Counsel for the

defendant has argued that the minority clause is void because it creates an estate or interest unknown or repugnant to Hindu law. I cannot accept

that argument. I consider a clause which says that that the "natural guardian according to Hindu law" will act as shebait during the minority of the

defendant is not repugnant or unknown to Hindu law.

45. Issue No. 4-In para. 9 of the plaint the plaintiff claims to reside at and occupy premises No. 14, Sakrapara Lane. That claim is denied on

behalf of the defendant in para. 9 of the written statement. In my opinion the plaintiff is entitled to occupy and reside at 14, Sakrapara Lane on the

strength of the following clause in the said indenture:

As regards the said premises No. 14, Sakrapara Lane...upon trusts...to permit Sm. Nitto Sundari and Mritunjoy and his wife and family and the

shebait or shebait for the time being...with his or their family to use and occupy free of rent the said premises No. 14, Sakrapara Lane for her, his

or their residence.

The words "his wife and family" are according to the true intent and construction sufficient in my opinion to include the plaintiff.

46. I hold, therefore, that the plaintiff is entitled to this relief namely that she is entitled to use and occupy free of rent the said premises No. 14,

Sakrapara Lane, for her residence, in the same way as the other persons named in this particular clause of the said indenture.

47. This disposes of all the contentions argued on behalf of the plaintiff in this suit before me. No question of accounts or framing of a scheme

although claimed in the plaint arises in this suit.

48. The plaintiff in my judgment fails on all the prayers in the plaint except that for construction of the said indenture. As the issues raised in this suit

are of great and general importance and as I consider the plaintiff's contentions to be bona fide contentions regarding construction of the indenture

and statute, I am of the opinion that the costs of this suit as between attorney and client should come out of the debutter estate.

Certified for two

counsel.