(1932) 08 CAL CK 0031

Calcutta High Court

Case No: Appeal from Original Decree No. 439 of 1928

Manohar Mukherji		APPELLANT
	Vs	
Bhupendranath Mukherji		RESPONDENT

Date of Decision: Aug. 19, 1932

Judgement

Mukerji, J.

The appeal, in connection with which this Reference has been made, has arisen out of a suit for the construction of a will, for establishment of title to shebaitship of a debattar estate and for other incidental reliefs. The will concerned was executed by one Jagamohan Mukherji, in 1247 B.S. (= 1840 A.D.). By it, Jagamohan made a testamentary disposition of all his properties and created a debattar in respect of some of them. As regards the office of shebait, he directed, in effect, that his eldest son should be the first shebait and, after the death of the said eldest son, his other sons in the order named, successively, and, after the death of all his sons, the eldest male member of the family amongst the sons, sons'' sons and so on, from generation to generation, daughter or daughter''s son being excluded, so long as there would remain any male member as aforesaid, would be shebaits. The Appellant, Manohar Mukherji, is the eldest male member of the family and was the first Defendant in the suit. The Plaintiff Bhupendranath Mukherji is a son of Raja Pyarimohan, who was a. grandson of the testator Jagamohan by his eldest son Jaykrishna. He disputes the right of Manohar to succeed to the shebaitship under Jagamohan''s will. For the purposes of this Reference, it is not necessary to refer to the pleadings or the points in controversy in the suit, beyond what may be gathered from the questions formulated for consideration, which are the following:-

(1) Whether the founder of a Hindu debattar is competent to lay down rules to govern the succession to the office of shebait ?

(2) Whether a person succeeding to the shebaiti under such rules is a grantee or donee of property and whether his right to succeed to the office is subject to the rule that a gift cannot be made by a Hindu to a person not in existence at the time of

the gift ?

(3) Whether rules for the succession to the office of shebait are rendered invalid by reason that they provide for the office to be held by some one among the heirs of the founder to the exclusion of others in a succession differing from the line of Hindu inheritance ?

(4) Whether Sreepati Chatterjee v. Krishna Chandra Banerjee (1924) 41 C.L.J. 22. was correctly decided in so far as it was in that case held that the rule laid down in Tagore''s case (1872) 9 B.L.R. 377 ; L.R. IndAp Sup. 47. prohibiting a Hindu from creating a line of succession unknown to Hindu law does not apply to the appointment of a shebait of a family Thakur ?

(5) Whether Promotho Nath Mukherjee v. Anukul Chandra Banerjee (1924) 29 C.W.N. 17. was correctly decided in so far as it was, in that case, held that, as regards persons not in existence in the founder''s lifetime, a direction could not validly be given by the founder in his will that the person senior in age among the heirs of the first shebait should succeed to the office of shebait ? and

(6) Whether the provision contained in the will of Jagamohan Mukherj to the effect that the eldest male member of his family should be the sole shebait, is in law ineffectual to entitle the Appellant Manohar Mukherji to the office, in view of the fact that he was not in existence until after the testator''s death ?

2. The provisions in the will, which have given rise to these questions are the following:

From the profits of the Collectorate taluks, patni taluks, and rent-free lands, etc., which I specify in No. 5 of the schedule at the foot of this will and set apart for meeting the expenses of the sheba of the deities Sridhar Thakur and Gopaleshwar Shiba Thakur established by me and the annual Durga Pooja and sradh, etc., of the ancestors and other pious acts, the sheba and pooja, etc., of the said Thakurs shall be performed and the surplus money shall be devoted to the suitable maintenance of the childless widows in the family and the construction of roads, etc., for public use and excavation of tanks and other pious acts ; but as a provision against drought and other providential calamities money sufficient for the payment of one year''s revenue shall be gradually accumulated from the surplus money, and Government promissory notes shall be purchased therewith and kept in stock and then the surplus shall be applied suitably to the construction of roads, etc., and other pious acts. I appoint my eldest son Jaykrishna Mukherji, and Haranath Chatterji, a resident of Uttarparha, as "attorneys" for the performance of duties of the shebaits of the said deities. The said "attorneys" shall make settlements and hold possession of all the said properties as maliks thereof, and shall carry into effect the above terms. And neither they nor their heirs shall be competent to alienate the said properties by sale or gift. After the death of Jaykrishna Mukherji, Rajkrishna Mukherji shall be appointed in his place. After the death of the said

Rajkrishna, his stepbrother Nabakrishna Mukherji and after the death of the said Naba-krishna, his step brother Bijaykrishna shall be appointed to the office of ""attorney." After the death of my sons, Jaykrishna and others, amongst their sons, son''s son and so on in succession, the eldest male member in the family shall alone be appointed as "attorney" for the time being and shall perform the abovementioned Deb-sheba and other pious acts. As long as there will remain any male child living in this family no daughter''s son or daughter shall be appointed to the office of "attorney" for the performance of the said acts. Again, Haranath Chatterji the other "attorney" of the said fund, shall continue as "attorney" during his lifetime and acting in concert with the other "attorney" my son shall perform the said sheba and other acts. After the death of the said Chatterji "attorney" his heirs shall have no concern with the said office of "attorney." My sons and their heirs in succession do the duties in the manner aforesaid.

3. The group of properties described in item No. 5 of the schedule were thus made a debattar mehal; and it was also provided that certain other properties detailed in item No. 4 of that schedule would also be included in the said debattar mehal if a certain contingency happened.

4. In Tagore v. Tagore (1872) 9 B.L.R. 377 (394); L.R. IndAp Sup. 47., their Lordships of the Judicial Committee laid down that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and the gift must fail and the inheritance take place as the law directs, that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law, as a general principle, a person who is to take must, either in fact or in contemplation of law, be in existence at the time when the gift or bequest is to take effect, and the estate to be taken must be an estate recognised by that law. Their Lordships, in dealing with the case, observed:-

The questions presented by this case must be dealt with and decided according to the Hindu law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property, or the right of inheritance or succession thereto. Various complicated rules, which have been established in England, are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance.

5. The questions referred to the Full Bench, therefore, mainly depend on the question whether shebaitship in Hindu law is property of any kind, to which Tagore v. Tagore (1872) 9 B.L.R. 377 ; L.R. IndAp Sup. 47. (supra) may apply, or is merely an office to which the founder of an endowment is competent to appoint or nominate persons in any order of succession, which may have the effect, so far as the founder is concerned, to use the words of Lord Justice Turner in Soorjeemoney Dossee v.

Denobundoo Mullick (1857) 6 M.I.A. 526, 555., of "creating a "new form of estate or altering the line of succession "allowed by law, for the purpose of carrying out his "own wishes or views of policy.

6. For a correct appreciation of the incidents of the office of a Hindu shebait, a slight digression is necessary into the history of Hindu religious institutions and endowments. Literature bearing on them is somewhat scanty. Nevertheless, a study of such materials as are available enables one to form a reasonably clear idea of the general characteristics of the powers and duties, or rights and obligations, of shebaits or persons holding offices more or less analogous to those of shebaits.

7. Dealing with a case from Southern India, the particular institution concerned in that case being a math of which the head used to be called the Panddra Sannadhi or Matathipathi (Vidya Varuthi Thirtha v. Balusami Ayyar) (1921) ILR 44 Mad. 831 (839); L.R. 48 IndAp 302 (311), their Lordships of the Judicial Committee had occasion to consider the general nature of Hindu religious institutions. Their Lordships said thus:-

It is also to be remembered that a " trust " in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple. Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system ; to brahmans, goswamis, sanyasis, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law, the image of a deity of the Hindu pantheon is, as has been aptly called, a ""juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same " juristic " capacity, and gifts are made to them eo-nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of math were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct, depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a " trustee," in the English sense of the term, although, in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration.

8. This decision removed a misconception that the powers and duties of the holders of the office referred to above were very similar to, if not in all respects the same as,

those of "trustees" in the English sense, which had till then prevailed in India and had found expression in numerous decisions of the Indian courts. Words used in some of the previous decisions of the Judicial Committee, wrongly understood, contributed in no small measure to encourage such misconception. In Vidya Varuthi''s case (1921) ILR 44 Mad. 831 ; L.R. 48 IndAp 302. (supra), their Lordships referred to their earlier decision in Ram Parkash Das v. Anand Das (1916) ILR 43 Calc. 707 ; L.R. 43 IndAp 73., in which their Lordships had described the Mohunt of an asthal or math as one holding the properties in trust for the math, and observed that they had used the term "trustee" in a. general sense, as in previous decisions of the Board, by way of a compendious expression to convey a general conception of the obligations attaching to his office, but that they did not attempt to define the term or to hold that the word in its specific sense was applicable to the laws and usages in this country. Their Lordships further pointed out that it was, in view of this fundamental difference between the juridical conceptions, on which the English law relating to trusts is based and those which form the foundation of the Hindu system, that the Indian legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope the rules of law applicable to Mussalman wakf and Hindu religious endowments. But this decision of the Judicial Committee is still more important for the purposes of the questions which we are now considering, because in it a definite pronouncement was made, as will appear from the portion of the decision quoted above, that so far as religious institutions are concerned, they possess a juristic capacity and gifts are made to them eo-nomine and the persons who are heads or superiors of the institutions have ample discretion in the application of the funds of these institutions subject to certain obligations and duties governed by custom and usage, and that, in the case of a gift directly made to an idol or a temple, the seisin, to complete the gift, is necessarily completed by human agency, and that the manager or the custodian of the idol of the institution is, in almost every case, given the right to a part of the usufruct, the mode of enjoyment and the amount of usufruct depending again on usage and custom. This pronouncement; clearly shows that the idea of a manager or custodian of the idol or its endowed property having a right to a part of its usufruct far from being repugnant to the Hindu notion of a religious endowment, is but a normal feature of it.

9. In Vidyd Varuthi''s case (1921) ILR 44 Mad. 831 ; L.R. 48 IndAp 302. (supra), their Lordships referred to certain Madras cases which, though they are not cases of gift to idols, have brought this feature of Hindu religious endowments prominently to relief and are, therefore, not wholly irrelevant. To some of these and a few others I shall now refer. In Sammantha Pandara v. Sellappa Chetti (1879) ILR 2 Mad. 175, 179., it was observed:-

The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment but the superior has a large dominion over it, and

is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution * * *. We do not of course mean to lay down

that there are not mattams which may have been established for purposes other than those we have described, nor that the property may not in some cases be held on different conditions and subject to different incidents. We have described the nature of the generality of such institutions and the incidents of the property which is devoted to their maintenance.

10. In Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran (1887) ILR 10 Mad. 375., the learned Judges pronounced that the head of the institution held the matham under his charge and its endowment in trust for the maintenance of the math, for his own support, for that of his disciples and for the performance of religious and other charities in connection therewith according to usage. In the case of Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami (1904) ILR 27 Mad. 435., Subrahmania Ayyar J. and Bhashyam Ayyangar J., in two very learned judgments and after an elaborate examination of English institutions, which they conceded to be analogous to Hindu maths, held that while the dharmakarta or custodian of temple is a mere trustee and has no beneficial interest in the endowment but occupies the fiduciary position of a mere trustee, in the case of maths, though there are idols connected therewith the worship of which is quite a secondary matter and the principal purpose of such an institution being the maintenance of a line of competent religious teachers, the swami or spiritual teacher or acharjya is a real owner or a life-tenant and not a mere trustee. [See in this connection Srinivasa Chariar v. Evalappa Mudaliar (1922) ILR 45 Mad. 565 ; L.R. 49 I.A. 237.]. Vidyapurna''s case (1904) ILR 27 Mad. 435. (supra) was considered to be in conflict with the two earlier ones cited and, accordingly, a reference was made to a Full Bench in the case of Kailasam Pillai v. Nataraja Thambiran (1909) I. L. R. 33 Mad. 265, 286, 287. Two of the Judges constituting the Full Bench held that the incidents attaching to the properties of the endowment depended in each case upon the conditions on which they were given or which might be inferred from long-continued and well-established usage and! custom of the particular institution and it is on them that one could say whether the head of the math was a trustee or a life-tenant. The third Judge, Sankaran Nair J., pointed out that, in the case of these maths,--
Any surplus, therefore, that remains in the hands of the Pandara Sannadhi, he is expected to utilize for the spiritual advancement of himself, his disciples or of the people.

* * *

He is not accountable to any one and is not bound to utilize the surplus. He may leave it to accumulate.

11. And the learned Judge also observed:-

It is also true in my opinion that he is under a legal obligation to maintain the math, to support the disciples and to perform certain ceremonies which are indispensible. That will only be a charge on the income in his hands and does not show that the surplus is not at his disposal.

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In the absence of evidence to the contrary, the Pandara Sannadhi, as such, is not a trustee. He is not also a life-tenant for the reasons already given.

12. In Muthusamier v. Sreemethanithi Swamiyar Avergal (1913) ILR 38 Mad 356., Miller J. said that a mathathipathi (head of a math), being the owner of an inheritance is not a tenant for life but is in the position of one who, though in certain sense is owner in fee simple, yet in many respects, has the powers of a tenant for life; and Sadasiva Ayyar J. observed that the position of a mathathipathi is neither that of an absolute heir as he cannot ordinarily alienate the corpus, nor that of a mere tenant for life as he represents fully the ownership of the matham properties for certain purposes, and is, therefore, in many ways, analogous to that of the estate of a Hindu female heir to a male''s estate. Another case referred to is the case Sathianama Bharati v. Saravanabagi Ammal ILR (1894) Mad. 266, 276., in which a village had been granted to the head of a goswdmi math to be enjoyed from generation to generation and the deed of gift provided that the grantee was to improve the math, maintain the charity and be happy; the office of the head of the math was hereditary; and from usage it was found that the trusts of the institution were the upkeep of the math, the feeding of pilgrims, the performance of worship, the maintenance of a water-shed and the support of the descendants of the grantee. Muttusami Ayyar J., Best J. concurring, observed as follows:-
The evidence does not show that at each generation the village was divided subject to the obligation of contributing to the cost of maintaining the charities, or that any portion of the village was specially set apart as trust property and the rest as partible property as would ordinarily be the case if the villages were granted for the personal benefit of the grantee and his heirs, subject to the fulfilment of certain trusts annexed to the grant. The conclusion to which we come is that the village wag granted as an endownment for the math and the charities connected with it, and that what might remain after due execution of those trusts was intended to be applied to the maintenance of the grantee or his descendants. * * * The Subordinate Judge considers that only money payments should have been made and that no lands ought to have been allotted. We do not concur in this opinion ; whether maintenance is provided by an assignment of land or paid in cash from time to time, there is no difference in principle, provided the allotment is purely by way of providing maintenance.

13. The cases referred to above deal exclusively with the position of the superior of a math in relation to its endowment. But their Lordships in Vidya Varuthi''s case (1921) ILR 44 Mad. 831 ; L. R. 48 I. A. 302. (supra) also referred to certain other decisions respecting the powers of the managers of religious institutions generally. Amongst them one was the case of Mahomed v. Ganapati (1889) ILR 13 Mad. 277, 280. in which Shephard J. (Muttusami Ayyar J. concurring) held as regards the dharmakarta of a temple, that he does not derive his title from his predecessor and is not bound by his acts and that:

Subject to the law of limitation, the successive holders of an office " enjoying for life the property attached to it are at liberty to question " the dispositions made by their predecessors.

14. In support of this proposition the learned Judge relied upon Papaya v. Ramana (1883) ILR 7 Mad. 85. (lands attached to and forming the emoluments of the office of a karnam), Jamal Saheb v. Murgaya Swami (1885) ILR 10 Bom. 34. (lands attached to a math but forming the service emolument of the jangam or presiding lingait priest of the math) and Modho Kooery v. Ram Chunder Singh (1882) ILR 9 Calc. 411. (lands appertaining to a ghatwali mehal).

15. These cases sufficiently show that some amount of personal interest, wherever it is permissible either by the terms of the grant or by custom or by usage of the institution, has never been regarded as militating against the essence of a Hindu religious endowment. Indeed, such a. position is not merely not in conflict with, but, on the other hand, is in entire conformity with Hindu notions. The religion of the Vedas differs widely from the present popular religion of the Hindus and the forms of worship that prevailed in the Vedic age were also widely different from those prevailing at present under popular practice. Max Muller says:-

The religion of the Vedas knows of no idols. The worship of idols in India is a secondary formation, a later degradation of the more primitive worship of ideal Gods.

16. Dr. Bollensen is prepared to question the correctness of this assertion on the ground that the texts of the Vedic hymns contain clear reference bo images of the gods''. But as Pandit Prannath Saraswati has pointed out,--

It is not necessary to enter into any detailed examination of these texts, but it will be sufficient to say that they do not necessarily and irresistibly lead to the desired conclusion, but are quite susceptible of the meaning, quite in harmony with the traditions of oriental commentators and with the opinion deliberately expressed by so eminent an authority on the Vedas as Max Muller. The gods are described in the hymns with many human attributes,--a necessity of the human mind and language,--but it does not necessarily follow therefrom that images of these gods clothed in such human attributes were artificially prepared and worshipped. (Tagore Law Lectures, 1892, page 36.)

17. The learned Pandit has said, however, that in later Vedic literature there is unequivocal evidence of the existence of images of gods and temples raised for their accommodation (ibid page 38). Another learned commentator on Hindu law, Mr. J.C. Ghose, whose commentaries on Hindu law have often been referred to in Indian decisions and were also relied upon by the Judicial Committee in Vidya Varuthi''s case (1921) ILR 44 Mad. 831 ; L.R. 48 I.A. 302. (supra), has said,--

It is only from the time of Buddha that we find mention of temples'' monasteries, hospitals for men and beasts, and of endowments for religious and charitable purposes * * * There were no images of Buddha during his lifetime. But after his death, the introduction of Tantrikism both in Buddhism and Hinduism led largely to the erection of temples and setting up of images. (Tagore Law Lectures, 1904, Volume II, page 19.)

18. Whatever might have been the exact forms of Hindu endowments at different periods of history, what Mr. Mayne appears to have said in his Hindu Law and Usage (paragraph 393) las their origin, namely that gifts to religious and charitable purposes were naturally favoured by the Brahmins as they are everywhere by the priestly class, can hardly be maintained. It has been demonstrated by Hindu jurists of eminence that the present system of Hindu endowments is the evolutionary product of the religious history of the people from the most ancient times and its roots can be traced back even to the Vedas. Their genesis may be traced to a more natural source, that is to say, the common feelings of human nature, namely, charity, and the desire to acquire religious merit. The sages of yore made a distinction between ishta or sacrificial gifts, and purta or charity, and they said that the former led to heaven and the latter to salvation (ishtena lavatey swarga purtena moksham apnyuat) and in that way. placed charity on a higher footing than religious ceremonies and sacrifices. The distinction between religious and charitable endowments, so far as the State and the courts were concerned, is of comparatively modern origin. In one of the cases already cited [Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami (1904) ILR 27 Mad. 435.] a distinction was drawn between temples and maths, it being held that the custodian of a temple is a mere trustee, the property being deemed vested in the presiding God treated as a juristic person, but the head of a math is not a mere trustee but a "corporation sole" having an estate for life in the permanent endowments of the math and an absolute property in the income derived from its offerings, subject, only to the duty of maintaining the institution. Jurists have pointed out that the idea of corporate bodies or "corporation sole" is not to be found in the Smritis, though in West and Buhler''s Hindu Law (see pages 185, 201, 553, 556) it is said that Hindu law, like Roman law and those derived from it, recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members, but juridical persons or subjects called foundations. See also Manohar Ganesh Tambekar v. Lakhmiram Govindram (1887) ILR 12 Bom. 247. Unfortunately, in courts which are familiar with doctrines of western jurisprudence, Roman legal conceptions and English notions of trust

permeated a good deal too freely into the law of Hindu religious endowments, taking, of course, the expression to include charitable endowments as well.

19. Endowments and trusts were unknown in early times, and yaga, which, according to the Mimansa, is the parting of a thing that it might belong to the deity, was all that one cared for, offering it to the fire to which was entrusted the duty of carrying it to the gods after making them fragrant. Gifts to charities were made out and out. And as Mr. J.C. Ghose has observed,--

When this once universal practice of the fire fell into disuse, and images of deities came into vogue, the performance of their daily worship became an object which had to be secured by those who set it up. It was necessary to preserve the property dedicated and not to throw it to the fire, and endowments had to be created. But originally there were no trust deeds. Certain ceremonies were prescribed for making the offering or dedication, amongst which the pouring of a libation of water was indispensible among Hindus and Buddhists. (Tagore Law Lectures, 1904, Volume II, page 91.)

20. In later times, Hindu law made property dedicated for pious uses, impartible. Of this, reference is to be found in various texts and authorities which are found collected in Pandit Prannath Saraswati''s Hindu Law of Endowments (Tagore Law Lectures, 1892, pages 177-179) and there is also to be found there a discussion as to the meaning of the expression yoga kshemam, in Manu IX, 219, about which there is a considerable conflict, --some authorities maintaining that the expression indicates the notion of a fund for religious or charitable purposes and others denying that that is the meaning of the expression. It is unnecessary to go into the details of this controversy here.

21. Religious endowments or debattar are of two kinds, public and private. In a public endowment, the dedication is for the use or benefit of the public. But when property is set apart for the worship of a family god, in which the public are not interested, the endowment is a private one. Courts have given effect to results logically following from such a distinction. For instance, in Doorganath Roy v. Ram Chunder Sen (1876) ILR 2 Calc. 341 ; L.R. 4 IndAp 52., the Judicial Committee observed:-

When the temple is a public temple the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction.

22. Chatterjea and Page JJ., in the case of Chandi Charan Das v. Dulal Chandra Paik (1926) ILR 54 Calc. 30., held that, in order to convert the absolute debattar property of a family Thakur into secular property, it is necessary and that a consensus of all persons interested in the worship of the deity including all the members of the family, male and female, should ''be obtained, but doubted whether Doorganath Roy''s case (1876) ILR 2 Calc. 341 ; L.R. 4 I.A. 52. (supra) was not incompatible with

the true spirit that moves a pious Hindu to make such a debattar. And in Mr. Golapchandra Shastri''s well-known book on Hindu Law (page 778) it has been cynically put, as a corollary following from this decision of the Judicial Committee, that if all the members of the family renounce Hinduism and choose to throw the family god into the waters of the Ganges, and themselves enjoy its property, no outsider can raise any objection, the endowment being a private one. That the family god is not so very helpless has, fortunately, been held by the Judicial Committee in Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1925) ILR 52 Calc. 809 ; L.R. 52 I.A. 245. This distinction, however, is not to be found in the original texts of Hindu law and is a distinction of comparatively recent origin, based, no doubt, on sound principle and necessitated presumably by change of social conditions.

23. To find out the real incidents attaching to sheaditship one must investigate into the question as to what is the true effect of dedication of property in Hindu law. The principles underlying the dedication are the same both in the case of institutions and in the case of idols, though the details of the rituals are different and diverse. The two cardinal essentials are the sankalpa or the formula of resolve and the utsarga or the renunciation, By the dedication, the donor divests himself of his proprietary rights absolutely, but so long as there is no appropriation of the property for the purpose for which it is dedicated there is an obligation on him to see to its preservation, and, accordingly, a corresponding right of control so long as the property itself exists. The erudite scholar Mandalik in his Hindu Law, Appendix II, page 337, on public charities, says thus:-

The repair and control of the things thus dedicated, and the ownership of which has been renounced, generally vest with the renouncer according to the usage of the country. Mitra Misra in the Viramitrodaya, Vyavaharadhyay, in discussing the ownership remarks as follows:-But ownership, so far as protection is concerned, does exist in the donor even when his ownership, consisting of the power of disposition at pleasure, has been withdrawn (by renunciation) until the final accomplishment of the purpose of the donor, who seeks a certain merit according to precepts (on gifts); for the act imported by the word gift will not be complete until the ownership of another has arisen. The ownership will in this instance (exist) in the same way as (it does in) the case of substances sacrificed lest sin arising out of the prohibitions about their being touched by prohibited (animal or person) should stick (to the sacrifice). In this way (i.e., on the above hypothesis), the possibility of a stranger appropriating (a thing given in the former case) and of the forbidding (an unclean touch) being precluded (in the latter case) will not arise, although the ownership of another (viz., the donee) has not arisen in the thing given. The practice of the learned too, in both cases in respect of protection is based on that (limited kind of ownership which has been referred to before).

The above supports the usage of the country as to the dedicator''s rights I in regard to a sort of guardianship over the thing dedicated.

24. The dedicator no doubt gives up all his rights, so much so that, in the case of a tank which is dedicated, some say that the water, which has been renounced, should be given up by the renunciator and not used by him, like the agneya purodasa (a certain portion of the boiled sacrificial rice), but others say that since the renunciation has been in view of all beings including himself, and, therefore, he is one of the objects indicated, the non-inclusion of one''s self would lead to hie love for the work being lost and therefore he should use the water; and the same is the case with fruits produced in a renounced grove (Ibid page 336, quoting Mayukha). As regards an idol, after it has acquired existence as a juridical personage, the sankalpa or the resolve makes the deity himself the recipient of the gift, and the utsarga divests the donor of his proprietorship, though by judicial decisions it is now settled that the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator''s death and does not make such a bequest void. See Bhupati Nath Smrititirtha v. Ram Lal Maitra (1909) ILR 37 Calc. 128. Deeds not being in use it was one form of dedication that applied to all endowments, public and private, the effect whereof was to transfer the property dedicated from the donor to the donee, the deity. But this analogy of a, human transfer need not be carried too far, for the deity is not in need of property, nor does it hold any: what is given to the deity become available to all.

25. The deity is the recipient of the gift only in an ideal sense; the dedicated property belongs to the deity in a similar sense; in reality the property dedicated is in the nature of an ownerless thing. In ancient times, except in cases of property dedicated to a brotherhood of sanyasis, all endowments ordinarily were administered by the founder himself and after him his heirs. The idea of appointing a shebait is of more modern growth. When a. Hindu creates an endowment, its management is primarily in him and his heirs, and unless he appoints a shebaitr he himself fills that office and in him rests that limited ownership,--notwithstanding that, on the one hand, he is the donor and, on the other, the recipient on behalf of the deity, the juridical person,--which has to be exercised until the property offered to the deity has been suitably disposed of. The true principle of Hindu law is what is mentioned in the Chhandogya Upanishada, namely, that the offerings to the gods are offerings for the benefit of all beings (Chap. 5, p. 24, K. 2-5). And Raghunandan has quoted a text of Matsya Sukta which says:-

Having made offerings to a God, the sacrificial fee also should be given to the god. The whole of that should be given to a Brahmin, otherwise it is fruitless.

26. In the distribution of prasad and matters of that character, the shebait has, in practice, a very large discretion. The discretion must necessarily, from the very

nature of things, be much larger in the case of a private than in the case of a public debattar. This idea of limited ownership is the essence of the position of the manager or custodian of a. dedicated property, by whatever name he may be called. That this idea is the only basis on which decisions of the highest authority as regards the rights and powers of shebaits may be justified will be seen hereafter when some of these decisions will be referred to.

27. But, before referring to these decisions, it will be convenient to deal with an argument which has been put forward on behalf of the Appellant and which has got to be very carefully considered. The argument is that, under Hindu law, property is either bhu (land), nibandha (translated as ''corody'') and drabya (thing); that slaves, inasmuch as they go with land, are classed with bhu, which is land or immoveable property; that drabya is moveable property, and certain hereditary offices carrying emoluments are classed under nibandha; but that the office of a shebait, which carries no emolument at all, cannot be classed within the category of nibandha. Certain texts from Yajnavalkya and Dayabhaga were cited in support of this contention, and some cases also have been referred to.

28. The cases may be dealt with first. In Keshavbhat v. Bhagirathiadi (1866) 3 Bom. H.C.R. (A.C.) 75., which was a suit by the widow of one of the descendants of the grantee of a varshasan or annual allowance paid from the Government treasury for the performance of religious service in a Hindu temple to recover the arrears due to her husband''s branch of the family from another descendant who had received the whole stipend, all that was decided and has any bearing on the question before us was that, by the usage of the family, the duties of the office had been performed in rotation and the stipend distributed amongst the descendants of the grantee in certain fixed proportions and that it was not competent to the Defendant to raise the question of nondivisibility of the varshasan. In Raiji Manor v. Desai Kallianrai Hukmatrai (1869) 6 Bom. H.C.R. (A.C.) 56., it was held, following Maharana Fatesangji v. Desai Kalyanraya (1867) 4 Bom. H.C.R. (A.C.) 189., which was the case of a todagiras hak and was good law till then, that where a hak is not charged upon or payable out of land, a suit for its recovery must be brought within 6 years from the last payment made on account of it. The hak in that case was a pagdi allowance which was not payable out of land. The question in that case was whether the hak was money or immoveable property for the purposes of limitation prescribed by Act XIV of 1859. In Krishnabhat bin Hiragange v. Kapabhat bin (1869) 6 Bom. H.C.R. (A.C.) 137., a similar question of limitation arose and it was held that, in a suit between Hindus, the office of hereditary priest to a temple, though not annexed to or held by virtue of ownership of any land, yet, being by Hindu law classed as immoveable property, should be held to be immoveable property within the meaning of the Limitation Act. The authorities, in the shape of Sanskrit texts, cited before us, on behalf of the Appellant are referred to in the judgments of Couch C.J. and Gibbs J., in that case. In Balvantrav T. Bapaji v. Purshotam Sidheshvar (1872) 9 Bom. H.C.R. 99., a similar view was taken as regards fees payable to the incumbent of an hereditary

office of a village joshi. The case was decided by a Full Bench over which Westropp C.J. presided and the meaning of the term immoveable property as used in Hindu law was elaborately discussed by him. In Government of Bombay v. Gosvami Shri Girdharlalji (1872) 9 Bom. H.C.R. 222., it was held that, in considering with reference to prescription whether an allowance not being incidental to hereditary office is or is not immoveable property, the Bombay High Court had generally followed the test, --"Is or is not the allowance *** a charge upon land "or other immoveable property ?"'' In all these cases the subject-matter was brought within the meaning of the word "nibandha", which in Hindu law ranks with immoveable property. The subject-matters of these cases, however, were either allowances or hereditary offices to which emoluments are attached. Maharana''s case (1873) 13 B.L.R. 254 (264); L.R. 1 I.A. 34 (51). (supra) went up to the Judicial Committee. It was heard in 1873, after all the aforesaid cases of the Bombay High Court had been decided, and their Lordships observed thus:-

Whether a toda giras huq be nibandha within the strict sense of the term is, in their Lordships'' opinion, a question not free from doubt. The original text of Yajnyavalkya, which is the foundation of all the other authorities, cited by Chief Justice Westropp implies that the subject rendered by the word corody in 2 Colebrooke''s Digest, placitum XXXIV, is sometimes created by royal grant. This, too, is included in Professor Wilson''s definition of nibandha. That the word in the subsequent glosses on Yajnya-valkya''s text is used in a wider sense may be due to the want of precision for which Hindu commentators are remarkable. It is, however, unnecessary to consider this point because their Lordships are of opinion that the question whether toda giras huq is an interest in immoveable property within the meaning of Act XIV of 1859, is one which ought not to be determined by Hindu law.

29. Subsequent to the decision of the Judicial Committee, quoted above, a question of limitation again arose in the Bombay High Court [See Collector of Thana v. Krishnanath (1880) ILR 5 Bom. 322.] in connection with an annuity granted by a Hindu Sovereign, the Peishwa, to a Hindu temple which was not made a charge upon the land. The two learned Judges in that case differed in their interpretation of the observations of the Judicial Committee in the aforesaid case. Sargent J. was of opinion that the question should be determined upon the meaning of immoveable property as understood in Hindu law notwithstanding the decision in Mahdrdnd''s case (1873) 13 B.L.R. 254 (264); L.R. 1 I.A. 34 (51). (supra), while Melvill J. took a contrary view. This difference does not concern us. But Sargent J. held that it is the fixed and permanent character of the allowance, from whatever source derived, which by Hindu law entitles it to rank with immoveables and if the grant could be deemed to be one in perpetuity and the fund out of which the perpetual allowance was derived forms a permanent source the allowance has all the characteristics of permanency and durability which is essential to bring it, according to Hindu law, within the term immoveable property. He held that such allowances came within the meaning of the word nibandha. Melvill J. referred to the proposition laid down by

the Judicial Committee in Maharana'' s case (1873) 13 B.L.R 254 (265); L.R. 1 I.A. 34 (52). (supra):-

Their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the status, race, character or religion of the parties to the suit.

30. And then observed,--

But there may be cases in which the test prescribed by the rule fails, or is very difficult of application; and then will come in the operation of the exception to the rule, and it may become the duty of a court to seek for guidance in some arbitrary definition contained in the religious law of the claimant. Conspicuous among such cases (and, indeed, it is the only case in which the Judicial Committee has expressly approved of the application of the exception) is an instance of a hereditary office in Hindu community incapable of being held by any person not a Hindu. It is clear that this is a kind of incorporeal hereditament which it would be very difficult to classify with reference to the connection of a particular hereditary office with land. Such a classification may be possible in rare instances in which questions regarding hereditary offices or dignities may arise in England (Company Litt. 20a); but the multiplication of hereditary offices of every description is a peculiarity of Hindu communities, and most of them are of such a character that it would be scarcely possible to say whether they savour of the realty or not. In every considerable Deccan village there are, at least, twelve such offices; and a court might well find it impossible to determine, upon general principles, and without reference to Hindu law, whether the office of a hereditary blacksmith, potter or astrologer, is or is not immoveable property.

31. With all deference to the argument based on the authority of these cases, I must say I do not see that such an argument leads us anywhere. Assuming that a hereditary office, to which no emolument is attached or to which no emolument arising out of land is attached is not nibandha under the Hindu law, and so, on that ground, is not immoveable property under that law, what has yet to be considered is whether the right of a shebait is property in the sense in which property is understood in Hindu law.

32. Macnaghten in his principles and precedents of Hindu Law, Volume 1, page 1, says,--

Property according to the Hindu law, is of four descriptions, real, personal, ancestral and acquired. I use the term real and personal, in preference to the terms moveable and immoveable, because although the latter words furnish a more strict translation of the expression in original, yet the Hindu law classes amongst things immoveable property which is of an opposite nature, such as slaves and corodies or assignments of lands.

33. He has quoted Jagannatha, Digest, Volume II, where it is said, following, the nyaya doctrine, that,-

Ownership is a relation between cause and effect, attached to the owner who is predicated of a particular substance, and subsisting in the substance by connection with the predicable.

34. An unlimited or an unrestricted power to deal with or of disposal over the thing is not necessarily an incident of the right to property in Hindu law. On the other hand, as Strange in his Elements of Hindu Law, 1825 Edition, Volume 1, page 14, has pointed out,--

The principle that seems to pervade the Hindu law is that all property is held in trust not for the exigencies of the State merely, but for those of a man''s family, in so much that proprietary right cannot be said to be inherent in a Hindu, but with considerable limitation and restriction.

35. Though the element of limitation or restriction is carried to a greater degree in the case of that kind of right which the head of an endowment or a shebait exercises over endowed property, the right is none the less a kind of property, which the Hindu law, as far as may be gathered, has never refused to recognise. Whether a restricted or a wider meaning should be given to the word nibandha is a matter which we need not enquire into, for, on that point, opinions differ and differ very considerably. But I can find no authority for the proposition that the limited ownership which a shebait, in ordinary cases, exercises over debattar property is not property in the eye of Hindu law. On the other hand, there is ample authority the other way. In Elberling''s Treatise on Inheritance, page 96, paragraph 205, it is said:

Privileges and rights belonging to the family are generally heritable and divisible amongst the heirs, like other property. Endowed lands and property given to pagodas, Thakurs, or for other religious and public pur-poses are not heritable, as the property belongs to the debatd of the institution ; such property cannot therefore be divided, and if a division has been made, it is void. But the surplus of the income, after all proper and necessary expenses have been defrayed may be divided by the heirs according to their respective shares.

36. It has already been observed that the distinction between public and private debattar is a thing of comparatively modern growth.

37. In Strange''s Hindu Law, 1825 Edition, Volume II, page 302, is to be found the opinion of Mr. Colebrooke:-

The hereditary privileges of the family, with the income arising from them, axe divisible amongst heirs like other patrimony, under the general rules of inheritance. At most of the religious establishments of the Hindus, and at their great temples, the various offices attached to them are considered as hereditary, together with perquisites belonging to them.

38. The question as to what is the nature of the rights which the founder of a religious endowment or his heirs are competent to exercise over the property of the endowment appears to have been canvassed in some of the earlier decisions of this Court, e.g., Elder Widow of Chutta Sein v. Young Widow of Chutta Sein (1807) 1 Mac Sel. Rep. 239., Juggut Chunder Sein v. Kishwanund (1814) 2 Mac. Sel. Rep. 160., Radha Bullubh Chund v. Juggut Chunder Chowdree (1826) 4 Mac. Sel Rep. 192., Kissnonund Ashrom Dundy v. Nursingh Doss Byragee (4). Not much assistance can be derived from the decisions in these cases. In Radha Bullubh Chund''s case (3), an investigation was seriously started to find out the exact nature of the rights, but eventually it came to nothing, because the opinions of the pandits who were consulted were conflicting and the Court, suspecting that the Hindu law was entirely silent on the subject, preferred to decide the case under the Regulations and the previous Vyavasthas. In Kissnonund''s case (1863) 1 Marsh. 485., it was observed that it was competent to persons, upon whom the management of lands dedicated to religious purposes devolved, to separate by mutual consent and form distinct religious establishments and that it was no breach of the trust for religious purposes, if the manager with the funds in his possession formed an independent religious establishment. It was said that such an act may have been, an infraction of. the rights of property, but did not amount to the seizing of the subsistence of priests within the meaning of the text of Adi Purana cited in Colebrook''s Digest, Book 2, Chapter 4, Section 2, Article I, xxxvii. It was observed that the manager as shebait, may not have possessed an estate in the property of the original foundation sufficient to enable him to bind his successor by a gift but the question between his successor on the gadi and the shebait of the newly formed establishment was a mere question of property.

39. The decision last mentioned, in my opinion, sufficiently negatives the contention that shebaitship in Hindu law is a mere office and no property and, on the other hand, sufficiently establishes that, having regard to the rights which ordinarily attach to the office of a shebait the office and the property of the endowment go together and that when it is a question between two persons one claiming and the other disputing a right to be the shebait, the question is a question of property.

40. To pass on to later cases, a suit for the partition of the right to perform the religious services of an idol has always been regarded as a suit for partition of property. Couch C.J. in the case of Mitta Kunth Avdhicarry v. Neerunjun Audhicarry (1874) 14 B.L.R. 166, 169., said:-

I think that the reasons for which it has been held that one of such joint owners of property is entitled to a partition apply to this ease. The circumstance that it is a right to perform the worship of the idol is not one which deprives any of the joint owners of the right to a partition, which compels the Court to say that they shall be obliged to perform the service jointly, and to undergo the many inconveniences which might arise from such a state of thing.

41. Another passage from the judgment of Couch C.J. in this case has been quoted with approval by the Judicial Committee in the case of Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1925) ILR 52 Calc. 809; L.R. 52 I.A. 246. It runs thus:-

The suit is founded on the right of the Plaintiff, as property, to a partition. No doubt the Plaintiff is entitled to that.

42. The religious office itself, of course, cannot be the object of sale, and jewels and other materials used in religious worship, to custody of which the alleged vendor is entitled and to the careful custody of which he is bound, are by all systems of law and by the Hindu law more emphatically than by any other, absolutely extra commercium. [See Varma Valia v. Kottayath (1873) 7 Mad. H.C.R. 210.) In the absence of custom or usage to the contrary a right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder. [See Vurmah Valia v. Ravi Vurmah Kunhi Kutty (1876) ILR 1 Mad. 235; L.R. 4 I.A. 76. and Ors. cases cited in the judgment of this Court in Mahamaya Debi v. Haridas Haldar (3).] But palas or turns of worship may be by custom heritable, divisible and bequeathable, the heir who inherits being male or female, and they may also by custom be transferable with certain restrictions, as in the case of the shrine at Kalighat where the custom of such transfers is confined to the co-shebaits or the members of families to whom a shebait can give his daughter in marriage. (See Mahamaya Debi v. Haridas Haldar (1914) ILR 42 Calc. 455, 461. (supra).] It is the essence of a family endowment amongst Hindus that no intruder shall be permitted to intrude himself into the management of the endowment and on the death of a member who enjoys the right without heirs, his right to a turn of worship and other privileges devolve on the other surviving members of the joint family. Ukoor Doss v. Chunder Sekhur Doss (1865) 3 W.R. (C.R.) 152. In a family governed by the Mitakshara law a person on his birth becomes entitled jointly as shebait of debattar property held by the family. Ram Chandra Panda v. Ram Krishna Mahapatra (1906) ILR 33 Calc. 507. Gifts of shebaitship in favour of a co-shebait has been recognised [Radharani Dasi v. Doyal Chand Mullick (1920) 33 C.L.J. 141.], though this is not allowed except on the ground that such a transfer is for the benefit of the endowment. Gobinda Kumar Roy Chowdhury v. Debendra Kumar Roy Chowdhury (1907) 12 C.W.N. 98. And in the case of Tripurari Pal v. Jagat Tarini Dasi (1912) ILR 40 Calc. 274; L.R. 40 I.A. 37., Lord Macnaghten spoke of a clause in a will that he had to construe, as meaning an absolute gift of the shebaitship, though the words in the will were only these: "My present begotten son "Mukunda Murari will be shebait for the performance "of the ceremonies." His Lordship overruled the interpretation which the High Court had put on the document that a right to shebaitship for life was meant and held that the absolute gift was not cut down by anything that followed. The right of management may form the subject-matter of a family arrangement and if the manager has taken its benefit the arrangement is upheld by the Court; Ramanathan Chetti v. Murugappa Chetti (1906) ILR 29 Mad. 283; L.R. 33 I.A. 139. The right to the office of a

shebait may, no other difficulties standing in the way, for all practical purposes be acquired by adverse possession. As an instance of this may be cited the case of Jagan Nath Das v. Birbhadra Das (1892) ILR 19 Calc. 776. which was a suit to oust a shebait from his office the appointment to which had! been made by nomination and in which Prinsep and Banerjee JJ. held that if no suit is brought within the period prescribed by Article 120 of Schedule II to the Limitation Act, the shebait would, by reason of his holding the office for that period, acquire a complete title for the purpose of any litigation, or anything connected with affairs of the endowment. The right to the land such as a shebait has is only secondary to and dependent on his office and if the right to recover the office is barred the right to recover the land is also barred. [Tammirazu Ramazogi v. Pantina Narsiah (1871) 6 Mad. H.C.R. 301., Kidambi Ragava Chariar v. Tirumalai A sari Nallur Ragavachariar (1902) ILR 26 Mad. 113.] It is in the shebait and not in the idol that the right of suit in respect of the endowed property vests and he it is whose minority counts for the purposes of the law of limitation. Jagadindra Nath Roy v. Hemanta Kumari Debi (1904) ILR 32Calc. 129; (1902) ILR 26 Mad. 113 : L.R. 31 I.A. 203.

43. Broadly speaking, there are three kinds of endowments that may be had in respect of a private debattar: (1) where the whole property and its income are dedicated to the idol; (2) where properties are dedicated to the idol but a portion of the usufruct is given to the beneficiaries including the shebait; and (3) where the secular property is charged with the expenses of the worship of the idol. The extent of the right which a shebait enjoys in respect of each of these classes of endowment is different, but I venture to think that the nature of the right in respect of all these classes is fundamentally of the same character. In some cases the shebait has a larger discretion than in others, and in some cases, again, he has also a proprietary right to the usufruct or a part of it upon the very terms of the endowment which he has not got in others but in all such cases he has, as such shebait, certain rights of a limited character in the endowed property. It is not quite easy, in all cases, to determine within which of the three classes aforesaid the endowment falls. A gift may be addressed to a particular person and it may be provided that out of the income of certain properties, he should perform the worship of certain family idols. In such a case, if no provision for a permanent arrangement has been made, it may be inferred that there was no gift, express or implied, to the idols. See Gopal Lal Sett v. Purna Ghandra Basak (1921) ILR 49 Calc. 489. L.R. 49 I.A. 100. Speaking of the nature of these private endowments, Sir Arthur Wilson in his judgment in the case of Jagadindra Nath Roy v. Hemanta Kumari Debt (1904) ILR 32 Calc. 129 (140, 141) ; L.R. 31 I.A. 203 (209). 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. 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 dedication of a less complete character. The cases of Sonatun By sack v. Juggudsoondree Dossee (1859) 8 M.I.A.

66. and Ashutosh Dutt v. Doorga Churn Chatterjee (1879) ILR 5 Calc. 438; L.R. 6 I.A. 182. are instances of less complete dedications, in which, notwithstanding a religious dedication, property descends (and descends beneficially) to heirs subject to a trust or charge for the purpose 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, * * * *.

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.

44. It is not the words of the deed of endowment but rather its effect that one has to construe in trying to find out to what extent the dedication is intended to be complete or absolute, and no fixed rule can be laid down as applicable to the construction of endowments. In a case in which there was no deed, namely, the case of Ram Parkash Das v. Anand Das (1916) ILR 43 Calc. 707; L. R. 43 I. A. 73., their Lordships said,--

But these rules, so to be inferred, must not in'' their Lordships'' view be inconsistent with or repugnant to the very nature and purpose of the en-dowment.

45. For instance in the case of Jadu Nath Singh v. Thakur Sita Ramji (1917) ILR 39 All 553 (55 560); L.R. 44 I.A. 187 (190, 191, the Judicial Committee, while holding that the deed in that case should be read just as it appeared, observed:-

If the income of the property had been large, a question might have been raised, in the circumstances as'' throwing some doubt upon the integrity of the settlor''s intention, but as the entire income is only 800 rupees it is obvious that the payment to these ladies is of the most trifling kind and certainly not an amount which one would expect in a case of this kind. * * * There is, in the beginning, a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple, and then the rest is only a gift to the idol sub modo by a direction that of the whole which had already been given, part is to be applied to the upkeep of the idol itself and the repair of the temple, and the other is to go to the upkeep of the managers. There was no reason why the disposer should not nominate the members of his family as his managers, as he has done so. And there is nothing in that which militates against the propriety of his ear-marking a certain part of the money to remunerate them as managers so long as they should so continue.

46. So in the case of Har Narayan v. Surja Kunwari (1921) ILR 43 All. 291; L.R. 48 I.A. 143., their Lordships said that in determining whether the will of a Hindu gives the testator''s estate to an idol subject to a charge in favour of the heirs of a testator, or makes the gift to the idol a charge upon the estate, there is no fixed rule depending upon the use of particular terms in the will; the question depends upon the

construction of a will as a whole; and that the circumstance such as that the ceremonies to be performed were fixed by the will and would absorb only a small proportion of the total income may indicate that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes indicated. This case, in my opinion, is a clear authority for the proposition that notwithstanding a dedication in favour of an idol of an entire estate a reservation of a portion of the income of the endowed estate for the remuneration of the manager will not invalidate the endowment either as a whole or as to the extent of the income so reserved. So also, it has been held by the Judicial Committee in the case of Gnanendra Nath Das v. Surendra Nath Das (1920) 24 C.W.N. 1026., that a provision for the residence of the shebait in a part of the'' endowed property set apart for the family idols is a perfectly valid and reasonable provision. In an unreported judgment of this Court cited in Mr. J.C. Ghose''s Hindu Law, Volume I, page 936, Banerjee J. said on a construction of a grant, that though--

It is true that the grant in one place says that the village is made debattar property of the idol, and though it is also true that the document further provides that if it is discovered that the grantee is neglecting the sheba he will be dismissed, when one looks at the substance of the thing one finds that the enjoyment of the usufruct is left with the grantee and his successors and so the property was held to be the property of the grantee and his successors subject to the performance of certain duties.

47. That even though a grant is not a personal grant but one primarily intended for the maintenance of a religious endowment, there can be a beneficial interest in the grantee and his heirs by whom the endowment is administered is sufficiently recognised in the following decisions:-Kolandai v. Sankara (1882) ILR 5 Mad. 302., Rupa Jagshet v. Krishnaji Govind (1884) ILR 9 Bom. 169., Bishen Chand Basawat v. Nadir Hossein (1887) ILR 15 Calc. 329; L.R. 15 I.A. 1., Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen (1897) ILR 25 Calc. 112., Mahim Chandra Sarkar v. Hara Kumari Dasee (1914) ILR 42 Calc. 561., and other cases too numerous to mention. Of course, if there are specific trusts, the shebait will have to carry them out to the letter, or if any specified amounts are to be spent for some particular items of worship they too have to be spent in the manner directed, but if the only provision is that the worship is to be carried on, the shebait, so long as be does carry them on, in accordance with the usage of the particular debattar or such custom as may have attached thereto, and has not committed acts which may amount to maladministration or mismanagement, must, naturally have a very large discretion as to what to spend and in what way. The expenses to be incurred must, of course, be consistent with the dignity of the endowment. The deity would not take or consume anything; and to take an extreme case, if, offering the income to the worship of the deity, the shebait distributes it amongst the beneficiaries, there is hardly any reason to say that he has not discharged his duty. This is why in the case of family endowments of the present nature, it has sometimes been said that an

account from the shebait is impossible. An idea of the extent to which shebaits can think of going may well be gathered from what was claimed on behalf of the shebaits of a public endowment in the well-known Dakor case [Manohar Ganesh Tambekar v. Lakhmiram Govindram (1887) ILR 12 Bom. 24] and was fortunately overruled by West J., though on the analogy of the law of trusts, I am not suggesting for a moment that the decision is not absolutely correct even apart from the law of trusts, but only quoting an extract from the judgment to show the character of the claim:-

The Defendants take the position that they, as a body, are the owners, for all secular purposes, of the idol, whom, in the spiritual sense, they serve. The offerings made at the shrine, the cattle, and even the land presented by devotees are, they assert, their property free from any secular obligation, as none has ever in practice or in the intention of the donors been annexed to the gifts by which religious merit was sought and gained. They held the properties thus acquired, and have for centuries held it, as a sort of sacred guild with hereditary succession to the several members. It is not held on any trust for the support of ceremonies or with any obligation annexed to it that can be enforced in any secular court. The duty of providing a regular worship of the deity is of a purely moral kind, which they discharge merely to satisfy their consciences only, the nature and limits of which have never been settled otherwise than by their own will and judgment.

48. I should not, however, be understood as suggesting that even the shebaits of a private endowment can ever be permitted to go so far.

49. Nowhere have the duties of a shebait in his relation to the worship of the deity been more vividly enumerated than in the judgment of Mookerjee J. in the case of Rambrahma Chatterjee v. Kedar Nath Barterjee (1822) 36 C.L.J. 478, 483. He says:-

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 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 servants. The daily routine of life is gone through with minute accuracy: the vivified image is regaled with the neces-saries and luxuries of life in due succession, even to the changing of clothes, the offering of the cooked and uncooked food, and the retirement to rest.

50. He is the manager of the idol''s properties and is the ministrant and custodian of the idol itself.

The person founding a deity and becoming responsible for these duties is de facto and in common parlance called shebait. The responsibility is, of course, maintained by a pious Hindu either by the personal performance of the religious rites or as in

the case of svdras, * * * * * by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death, or his successors likewise, may confer the office of shebait on another [Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1925) ILR 52 Calc. 809 (816); L. R. 62 I. A. 246 (251).]

51. Appointed by the founder of the endowment in whom and whose heirs all these duties lie he is but an "attorney," and not unhappily is that word used in the will that is under consideration. As was said by Lord Hobhouse in Gossami Sri Gridhariji v. Romanlalji Gossami ILR (1889) Cal. 3 (20); L.B. 16 I.A. 137 (144).:-

According to Hindu law, when the ownership of a Thakur has been founded,, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution.

52. And as the Judicial Committee has pointed out in the ease of Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1925) ILR 52 Calc. 809 (816); L.R. 52. I.A. 245 (251)., a similar principle appears in Jagannath Prasad Gupta v. Runjit Singh (1897) ILR 25 Calc. 354., Sheoratan Kunwari v. Ram Pargash (1896) ILR 18 All. 227., and Jai Bansi v. Chattar Bhari Singh (1870) 5 B.L.R. 181. That this rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view, in establishing the worship, is emphasised by the decision of the Judicial Committee in the case of Mohan Lalji v. Gordhan Lalji Maharaj (1913) ILR 35 All 283. In the case of Ramanathan Chettiv. Murugappa Chetti (1906) ILR 29 Meal 288 (289); L.R. 33 I.A. 139 (144.), in which the office of manager of a Hindu temple was vested by inheritance in eight male descendants of the last holder by his two wills, four by each, Lord Macnaghten said:-

The manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property, the manager is in the position of. a trustee. But 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 or dignity which may have been originally conferred on a single individual, but which in course of time has vested by descent in mere than one person.

53. It has now been held by all. the Indian courts that when the shebaitship does revert to the heirs they have the right to nominate a fresh shebait, presumably on the ground that the right of nomination is appurtenant to the right of management. See Boidyo Gauranga Sahu v. Sudevi Mata (1917) ILR 40 Mad. 612.. Where, however, a course of devolution has been proved which makes it certain that the usage has not been according to the ordinary rules of Hindu law, a Plaintiff seeking to be declared a shebait cannot succeed under such rules. Janoki Debi v. Gopal Acharjia Goswami (1882) ILR 9 Calc. 766; L.R. 10 I.A. 32.

54. Shebaitship, in its true legal conception, involves two ideas: the ministrant of the deity and its manager; it is not a bare office but an office together with certain rights attached to it. A shebait''s position towards the debattar property is not similar to that in England of a trustee towards the trust property: it is only that certain duties have to be performed by him which are analogous to those of trustees. In Prosunno Kumari Debya v. Golab Chand Baboo (1875) 14 B.L.R. 450 (459); L.R. 2 I.A. 145(152)., their Lordships did not say that the powers of a shebait are in all respects the same as those of the manager of an infant heir, as defined by Knight Bruce L.J. in Hunoomanpersaud Panday v. Babooee Munraj Koonweree (1856) 6 M.I.A. 393, 423., but only this that, in this respect, namely, in respect of the power to bind the idol''s estate by making a loan, such power was analogous to that of the manager of an infant heir. And their Lordships further said:-

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

55. 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, though not the full rights of property, in it, the legal property vesting in the idol. Though he cannot alienate the property of the deity except for legal necessity, he may create proper derivative tenures and estates conformable to usage [Shibessouree Debia v. Mothooranath A charjo (1869) 13 M.I.A. 270.] and an alienation without necessity will enure only for the period of the tenure of his office [Abhiram Goswami v. Shyama Charan Nandi (1909) ILR 36 Calc. 1003 ; L.R. 36 I.A. 148., Palaniappa Chetty v. Devasikamony Pandara Sannadhi (1917) ILR 40 Mad. 709 ; L.R 44 I.A. 147., Vidya Varuthi Thirtha v. Balusami Ayyar (1921) ILR 44 Mad. 831 (855); L. R. 48 I. A. 302 (327).] as though he were a limited owner. It is in him and not in the idol that the right of suit is vested, and it is his minority that counts for the purpose of limitation [Jagadindra Nath Roy v. Hemanta Kumari Debt (1904) ILR 32 Calc. 129; L.R. 31 I.A. 203.]. In the case of Gossami Sri Gridhariji v. Romanlalji Gossami (1889) ILR 17 Calc. 3 (22); L.R. 16 I.A. 137 (146), in which a person, as Plaintiff, claimed to be a rightful shebait and, as an incident thereto, claimed the things which had been offered to the idol and the possession of a temple in which the idol had for some time been located, Lord Hobhouse said,--

Even apart from the sixth and seventh paragraphs of the plaint which expressly put forth his spiritual character as the foundation of his claim, the nature of the suit is for the proper conduct of the Thakur''s worship. It rests quite as much on the right of the Thakur to have the conduct of his worship and his own custody placed in the right hands, as upon the personal right of the Plaintiff to the properly.

56. The endowment we are now considering was before the Judicial Committee in the case of Peary Mohan Mukerji v. Manohar Mukerji (1921) ILR 48 Calc. 1019 ; L.R. 48 I.A. 258. and the office of the shebait of this endowment was in that case described by their Lordships as an office made up of the close intermingling of duties and personal interest. Peary Mohan''s case (7) (supra) was one of the cases cited before the Judicial Committee in the case of Srinivasa Chariar v. Evalappa Mudaliar (1922) ILR 45 Mad. 565 (581); L.R. 49 I.A. 237 (251)., which was the case of the dharmakarta of a temple. Their Lordships said,--

The position of dharmakarta is not that of a shebait of a religious institution, or of the head of a math. These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of a beneficial character. In the very learned judgments delivered in Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami (1904) ILR 27 Mad. 435., the distinction between these functionaries is explained.

57. Such being the nature of the right of a shebait in Hindu law, it is impossible to regard it as anything else than property within the meaning of that law. In the case of Trimbak Bawd v. Narayan Bawa (1882) ILR 7 Bom. 188, 190. the learned Judges of the Bombay High Court, while dealing with a question of limitation, said:-

We think that in endowments of this nature, where the founder has vested in a certain family the management of his endowment, each member of such family succeeds to the management, to use technical language, per formam doni, his right being unaffected by what his predecessor does.

58. This doctrine was examined by the Judicial Committee in the case of Gnanasambanda Pandara Sannadhi v. Velu Pandaram (1899) ILR 23 Mad. 271 (279); L.R. 27 I.A. 69 (77). The facts of that case would appear from the judgment of the Madras High Court reported in Velu Pandaram v. Gnanasambanda Pandara Sannadhi (1895) ILR 19 Mad. 243, 244. From the facts as reported there the following appears:-

The charity in question was alleged to have been founded by the ancestors of the Plaintiff and second Defendant and the lands described in the plaint schedule attached to it were granted by them for the use of the charity in order that the income thereof might be appropriated and employed for the worship and the celebration of certain festivals. It was further alleged that it had been arranged that the management of this charity and the property so granted should vest in the members of their own family from generation to generation.

59. It does not appear that there were any emoluments expressly attaching to the office of the manager. Shortly put, the claim of the Plaintiff was to get rid of two alienations each of a half share of the management,--one made in 1860, by the mother and guardian of the second Defendant Chockalinga''s father, in favour of the predecessor-in-title of the first Defendant Gnanasambanda, and the other made by

his own father Nataraja, in 1869, in favour of the said first Defendant. Nataraja died in 1884, leaving the Plaintiff, his son, a minor. The Plaintiff was born in 1873 or 1874, 4 or 5 years after the sale by Nataraja, and attained majority in 1891. The Plaintiff sued the two Defendants to establish his right to the management of an endowment connected with a temple and to the possession of the lands forming its endowment either absolutely or jointly with Chockalinga. The Plaintiff''s contention was that the endowment had been founded by the ancestors of himself and of the second Defendant, that it was arranged that only the members of their family should hereditarily hold the properties, that he did not derive his rights from or through his father Nataraja, that on the death of Nataraja, in 1884, a fresh right to sue accrued to him and limitation began to run from that date or rather from the date on which he'' attained majority. The trial Court held that the Plaintiff was entitled to recover his father''s half share in the management but that his claim to the other half share which had belonged to the second Defendant''s father was barred. That court passed a decree giving the Plaintiff joint possession of the management and property with the first Defendant. On appeal, the High Court held that the right of the Plaintiff accrued on the death of his father and not before and in that view made a decree in his favour entitling him to the sole management and possession of the endowment and its properties. On appeal to the Judicial Committee, their Lordships first of all premised the position that notwithstanding the assignments, title remained with Chockalinga and Nataraja, but the possession which the purchaser had taken was adverse to them. This necessitated a consideration of the question of limitation. They first of all took up the question of Chockalinga''s title and held that, under Article 124 of Schedule II of Act XV of 1877, Chockalinga had 12 years from the date of the assignment or 3 years from his attainment of majority to sue for the office, and that he had not done so, and so his title was extinguished. They then said,--

Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other but if there is, Article 144 of the same schedule is applicable to the property. That bars the suit after 12 years adverse possession.

60. Up to this point their Lordships were dealing with Chockalinga''s title, and they held that Chockalinga had lost his title to the office under Article 124, and as he could not recover the office he could not also recover the property because the one is attached to the other, but if the two are not attached to each other and are separate then also he could not recover the property by reason of Article 144. Their Lordships then said that Nataraja also was barred and his right was extinguished. It is clear that the only way in which the Plaintiff Velu could succeed was by showing that he did not claim through his father Nataraja. On his behalf reliance was placed on Trimbak''s case (1882) ILR 7 Bom. 188. (supra), in which the view was taken that when the founder of an endowment has vested in a family the management of it, each member succeeds to the management per formam doni, and if this principle

be correct, Velu could found his right to the management on his father''s death not as having been inherited by him from his father but independently of him and say that though Chockalinga and Nataraja were barred, he was not. Their Lordships proceeded to deal with this position. They held that as the origin of the endowment is not known it was to be assumed as having been by a gift from the founder. They held that as it was a gift and Tagore case (1872) 9 B.L.R. 377 ; L. R. I.A. Sup. 47. applying to it, the Hindu law did not permit the creation of successive life estates in it, and so Velu''s contention as well as the view propounded in Trimbak''s case (1882) ILR 7 Bom. 188., on which it was founded, namely, that each successive holder might claim per formam doni, could not prevail. So far, there was no decision in their Lordships'' judgment as to what was the correct position for Velu to take under the Hindu law, namely, whether he took from his father or whether he took from the founder. So far, their Lordships had only said that under the Hindu law he could not possibly say that he took through his father because such an estate in him would contravene Tagore v. Tagore (1872) 9 B.L.R. 377; L.R. IndAp Sup. 47.. Then their Lordships proceeded to say:-

The Respondent Velu can only be entitled as heir to his father Nataraja and from and through him and consequently his suit is barred by Article 124. In their Lordships'' opinion the ruling in Tagore v. Tagore (1872) 9 B.L.R. 377; L.R. I.A. Sup. 47. is applicable to an hereditary office and endowment as well as to other immovable property.

61. The question is what does this pronouncement mean? The Order of Reference takes the view that "their Lordships do not* more than put a construction "on the Limitation Act and apply Article 124 to the "case of an office which is hereditary in the ordinary "Hindu sense." With very great respect, I venture to think that the passage in the decision just quoted goes further than that: in my opinion, it means that the only title which would be a good title in Velu would be one claimed by him as heir of his father and from and through him, but that to such a claim Article 124 was a bar. And I think their Lordships made it further clear by pointing out that Tagore v. Tagore (1872) 9 B.L.R. 377; L.R. I.A. Sup. 47. was applicable to an hereditary office and endowment as well as to any other immovable property, thus negativing the possibility of a title per formam doni being set up. In my judgment, this decision directly decided that the rule in the Tagore case (1872) 9 B.L.R. 377; L.R. I.A. Sup. 47. applied to such an office as that of a shebait and it is not reasonable to read it merely as deciding a question of limitation.

62. There is no doubt whatever that the aforesaid decision of the Judicial Committee has always been understood as meaning that Tagore v. Tagore (1872) 9 B.L.R. 377; L.R. IndAp Sup. 47. is applicable to such an estate as is involved in a hereditary office attached to an endowment. A few decisions of this Court only may briefly be referred to in this connection. Gopal Chunder Bose v. Kartick Chunder Dey (1902) ILR 29 Calc. 716., in which, in interpreting a will, Macpherson and Hill JJ. negatived a

contention before them that they were merely considering an appointment of persons to superintend an endowment and not dealing with an actual bequest or gift of immoveable property, saying that it would appear from Gnansambanda''s case (1899) ILR 23 Mad. 271; L.R. 27 I.A. 69. that the ruling in the Tagore case (3) is applicable to a hereditary office and endowment, as well as to other immovable property. And Lord Macnaghten, in affirming that decision, observed that the High Court had given a perfectly correct interpretation of the will and no other interpretation was possible. Tagore v. Tagore (1872) 9 B.L.R. 377; L.R. IndAp Sup. 47. was not applied in the case of an endowment in Manorama Dassi v. Kali Charan Banerjee (1903) ILR 31 Calc. 166., not because it was not applicable but because the contingency which would make the disposition bad had not yet come to pass. In Ram Chandra Panda v. Ram Krishna Mahapatra (1906) ILR 33 Calc. 507., Ganasambanda''s case (2) was relied upon, in the case of the shebait of a Mitakshara debattar, as indicating that the same rule applies to an hereditary office as to the family property. In the case of Bisseswar Prasanna Sen v. Bhagabati Prasanna Sen (1906) 3 C.L.J. 606., while it was affirmed that under Gnanasambanda''s case (2), Tagore''s case (3) applied to a hereditary office such as that of a shebait, on the facts, as they actually stood, the provision did not offend the rule. It was applied in Kunjamani Dassi v. Nikunja Bihari Das (1915) 20 C.W.N. 314., a case of a family debattar, holding that Gnanasambanda''s case (2) was an authority for its application. In Rambrahma Chatterjee v. Kedar Nath Banerjee (1922) 36 C.L.J. 478., it was held that a share in the bhoge or food offered to the deity was not an interest in property and so the rule did not apply. In Promotho Nath Mukherjee v. Anukul Chandra Banerjee (1924) 29 C.W.N. 17., on a review of many of the previous decisions it was affirmed that Gnanasambanda''s case (1899) ILR 23 Mad. 271; L.R. 27 I.A. 69. was a distinct and clear authority for the application of the rule. There are only two decisions in which a different view has been taken of the applicability of the rule. In the case of Mathura Nath Mukherjee v. Lakhi Narain Ganguly (1922) ILR 50 Calc. 426, 434, 437., while considering that the managership of an endowment is "property" a distinction was made on the ground that "it was "property of a special kind; the manager has in "theory no beneficial interest in the endowment," and a view was taken that "the rule in Tagore''s case (1872) 9 B.L.R. 377; L.R. I.A. Sup. 47. "was a general rule to which there may be exceptions," and that the nomination of shebaits was an exception to that general rule. The judgment was delivered by Richardson J., who got over Gnanasambanda''s case (2), as being a decision on the question of limitation only, and observed:-

> The observation [meaning in Gnanasambanda''s case (2)] has little or no bearing on the question with which we have to deal. We are not dealing with the nature of the estate which a shebait takes in his office but with the question whether the widow could lawfully appoint the first Defendant to be her successor.

63. With the utmost respect, I venture to think that the distinction is unauthorised and I also confess that I do not follow what the last portion of the observation

quoted above exactly means. In the case of Sreepati Chatterjee v. Krishna Chandra Banerjee (1924) 41 C. L. J. 22., Chakravarti J., Greaves J. concurring, expressed the view that the shebait has no right to the property but is merely an officer with the rights and limitations applicable to the guardian a minor and that the rule in Tagore''s case (4) does not apply to the appointment of shebait of a family Thakur. The learned Judge was to a considerable extent pressed by a text which he referred to in support of the proposition that a gift to a Thakur cannot be misappropriated. In Colebrooke''s Digest, Vol. II, Chapter IV, Section II, Article I, xxxvii, the text appears thus:-

But he who seizes the subsistence of priests, whether given by himself or by another, is born of a reptile in ordure for fifty-thousand years.

64. Colebrooke''s comment on it is as follows:-

It is shown by the texts cited in the Ekadasitawa (xxxviii and xxxix) that a man seizing holy property is guilty of crime equal to the murder of a priest; and seizing the property of a Kshatriya and the rest he is guilty of a crime equal to the murder of a soldier and so forth.

65. The text, in my judgment, has no application to the case of a shebait who fails not to perform the duties attached to his office but who, after performing the worship of the deity with gifts made in His favour, takes such temporal benefits out of them as is not forbidden by law but is sanctioned by usage or custom. The text, as already stated, was referred to in the case of Kissnonund Ashrom Dundy v. Nursing Doss Byragee (1863) 1 Marsh. 485.

66. As observed by the Judicial Committee, in the case of Vidya Varuthi Thirtha v. Balusami Ayyar (1921) ILR 44 Mad 831 ; L.R. 48 I.A. 302., there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions and it would be a serious inroad into their rights if the rules of Hindu and Mahomedan laws were to be construed with the lights of legal conceptions borrowed from abroad, unless where they are absolutely, so to speak, pari materia. The necessity of keeping apart the provisions of Hindu law as regards gifts has also been emphasised by the Judicial Committee in various other cases, amongst which may be referred Tagore v. Tagore (1872) 9 B.L.R. 377; L.R. I.A. Sup. 47., and also the case of this very debattar, in Peary Mohan Mukerji v. Manohar Mukerji (1921) ILR 48 Calc. 1019 ; L.R. 48 I.A. 258.. And in the case ...of Muhammad Rustam Ali v. Mushtaq Husain (1920) ILR 42 All. 609 ; L.R. 47 I.A. 224., Lord Buckmaster was very careful to point all that arguments based upon a supposed position that heads of religious'' endowments--in that case a mutawalli--makes a strong appeal to those who are accustomed! to administer the English law with regard to trustees. The questions raised, therefore, have to be decided on notions of Hindu law. And giving them the best consideration I can, I have come to the conclusion that the questions referred

to us should be answered as follows:-

Q. 1.-- A. Yes, but subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law.

Q. 2.-- A. Yes.

Q. 3.-- A. Yes.

Q. 4.-- A. No.

Q. 5.-- A. Yes.

Q. 6.-- A. Yes.

C.C. Ghose, J.

67. I was a party to the order of reference in this case; but, having had an opportunity of hearing the fuller discussion that has taken place before us and having had the advantage of reading the judgment prepared by my learned brother Mr. Justice Mukerji, I agree with him in the answers which he proposes to give to the questions set out in the order of reference.

Mitter, J.

68. I have had the pleasure and advantage of seeing beforehand the judgment of my learned brother Mr. Justice Mukerji which has just been read. I concur with him that the answers to the questions referred to the Full Bench should be as he has stated and I agree with the reasons upon which he has based those answers. The questions referred to the Full Bench are involved in some difficulty. The difficulty is partly occasioned by the fact that principles which at first sight seem to be in conflict have to be interpreted and reconciled. The language used in some of the cases in describing a shebait as a trustee has also contributed to the diffieulty. The words shebait and trustee are used as synonymous and convertible terms not only in early decisions but also in the observations made by such great authority on Hindu law as Mr. Mayne; the difficulty is further enhanced by the paucity of Hindu law texts as to the true nature of the office of the shebait of a Hindu ''deity. But notwithstanding the difficulties to which I have referred!, on the state of the authorities which have been discussed in very great detail by my learned brother Mr. Justice Mukerji, it is impossible to arrive at any other conclusions than those reached by him. I desire to draw prominent attention to the fact that the nature of the office of shebait of this very debattar estate created by Jagamohan Mukherji, in the year 1840, was described by their Lordships of the Judicial Committee of the Privy Council in terms which would go to show that a shebait of a Hindu deity is not a bare trustee in English sense of the term. Lord Buckmaster, who delivered the judgment of the Judicial Committee in the case, expressed himself thus:-

The grounds for removing a shebait from his office may not he identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest which together make up the office of shebait may well prevent the closeness of the analogy.

69. See Peary Mohan Mukerji v. Manohar Mukerji (1921)I.L.R. 48 Calc. 1019 (1027); L.R. 48 IndAp 258 (264).. As has been observed in Vidya Varuthi Thirtha v. Balusami Ayyar (1921) ILR 44 Mad. 831 ; L.R. 48. I.A. 302.,--

When the gift is directly to an idol or temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enioyment and the amount of the usufruct depending again on usage and custom.

70. From these observations of their Lordships of the Judicial Committee, it would seem to follow that a shebait has some sort of beneficial interest in the endowment or the debattar estate. I agree, therefore, that the right of a shebait is some sort of property under the Hindu law, although it is not necessary on the terms of the reference to determine the precise nature of the property. The office of shebait in the present case is an hereditary office and the ruling in Tagore v. Tagore (1872) 9 B.L.R. 377; L. R. I. A. Sup. 47. has been made applicable to an hereditary office and endowment as well as to other immovable property by their Lordships of the Judicial" Committee of the Privy Council in the case of Gnansambanda Pandara Sannadhi v. Velu Pandaram (1899) ILR 23 Mad. 271 ; L.R. 27 I.A. 69.. The rule of succession, therefore, to the shebaitship laid down by Jagamohan Mukherji, in so far as it created an estate unknown to the Hindu law, must be regarded as ineffectual in law.

Guha, J.

71. I agree entirely with my learned brother Mr. Justice Mukerji in the answers he has given to the questions referred to the Full Bench. I also agree with the reasons stated by my learned brother and the conclusions arrived at by him1 in his judgment.

M.C. Ghose, J.

72. I agree with the judgment of my learned brother Mr. Justice Mukerji.

73. Per Curiam. The case will now go back to the Division Bench with the answers returned by the Full Bench. As regards the costs of the hearing before the Full Bench we are of opinion that there should be no order as to costs.