# Profulla Chorone Requitte & Ors vs Satya Chorone Requitte on 2 March, 1979

## Equivalent citations: 1979 AIR 1682, 1979 SCC (3) 409, AIR 1979 SUPREME COURT 1682, (1979) SCR 431 (SC), 1979 BLJR 257, 1979 UJ (SC) 854, 1979 (3) SCC 409, (1979) 2 SCJ 436

## Author: Ranjit Singh Sarkaria

## Bench: Ranjit Singh Sarkaria, V.D. Tulzapurkar

PETITIONER:
PROFULLA CHORONE REQUITTE & ORS.

Vs.

RESPONDENT:
SATYA CHORONE REQUITTE

DATE OF JUDGMENT02/03/1979

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
TULZAPURKAR, V.D.

CITATION:
1979 AIR 1682 1979 SCC (3) 409
CITATOR INFO :
F 1985 SC 905 (13)

ACT:
Interpretation of Wills-Common ancestor of plaintiffs and defendants created absolute debutter of his house in favour of family deity-By two wills devised and bequeathed the house to the trustees for service and worship of the deity-Shebaiti rights-Whether vested in trustees or descendants of the testator.

HEADNOTE:
The common ancestor of the plaintiffs and the defendant owned a big residential house (the suit property) in which he had his family deity. By two wills-one dated June 4, 1898 in respect of his properties in British India and another, dated June 6, 1898 in respect of the house property in

Chandrangore-he appointed his wife, two sons and nephews as trustees of the estate. By these wills he provided that in the event of vacancy occurring in the office of trustees the continuing trustees might appoint any other person or persons to be a trustee or trustees. By his will of June 6, 1898 the testator created an absolute debutter in favour of the family deity. This will also stated that he "devised and bequeathed" the Chandranagore house to the trustees named therein as a dwelling house "upon trust to stand possessed of" and "to hold, retain and use the premises as an endowed or debutter property for the service and worship of" the family deity.

In 1934 rival claims of the sons and grandsons of the testator to their residence in the debutter property were referred to an arbitrator. The arbitrator allotted rooms nos. 72 and 82 which had been in his use and occupation from before to the defendant (respondent) and allotted certain other rooms to the other sons and grandsons of the testator.

The then trustees (plaintiffs) filed a suit in 1959 claiming that the dwelling house at Chandranagore being absolute debutter property belonging to the deity none other than the trustees had any legal right in it, and since the award of the arbitrator was not binding on the deity the defendant should be ejected from the rooms forcibly occupied by him.

The defendant on the other hand claimed that he was in occupation of the rooms in dispute in his own right as a shebait and that the plaintiffs had no right to represent the deity and so had no locus standi to maintain the suit as trustees.

Dismissing the suit the trial court held that on the death of the testator it was not the trustees but the descendants of the testator who became shebaits and who had the shebaiti rights in the endowed property and that the defendant being the descendant (grandson) of the testator, had a right, as a co-shebait, to occupy the rooms in the suit property.

The District Judge, on appeal, affirmed the decision of the trial court.

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On second appeal the High Court decreed possession of certain rooms to the plaintiffs but not in respect of the rooms under the occupation of the defendant.

On further appeal to this Court it was contended on behalf of the plaintiffs that from the language used in the will dated June 6, 1898 the intention of the testator was clearly to constitute the trustees as shebaits of the property with exclusive right to manage the debutter.

On the other hand on behalf of the defendant it was contended that the two wills should be read as complementary to each other, and so read, they made it clear that the testator did not wish to part with his shebaiti rights, which were heritable property, in favour of the trustees to

the exclusion of his natural heirs under the Hindu Law.

Allowing the defendant's appeal and dismissing the plaintiffs' appeal.

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HELD: 1. A conspectus of the various provisions of the two wills makes it clear that the testator left the shebaitship undisposed of with the presumed intention that it devolved on his natural heirs who would have the right to use the suit house as their family dwelling house. The rights conferred on the trustees may amount to curtailment of the right to manage the endowed property which a shebait would otherwise have; but such curtailment by itself would not make the ordinary rules of Hindu Law of succession inapplicable in regard to the devolution of shebaitship. Therefore, the defendant and other descendants of the testator became co-shebaits of the deity by the operation of the ordinary rules of Hindu Law. [445 A-B]

2(a) It is well established that property dedicated to an idol vests in it in an ideal sense only. The shebait is the human ministrant and custodian of the idol, its authorised representative entitled to deal with all its temporal affairs and to manage its property. Under Hindu Law, property absolutely dedicated to an idol, vests in the idol and not in the shebait. Yet almost in every case a shebait has a right to a part of the usufruct, the mode of its enjoyment and the amount of the usufruct, depending on usage and custom, if not devised by the founder. [439 F-G]

(b) In the conception of shebaitship both office and property are blended. A shebait has, to some extent, the rights of a limited owner. Shebaitship being property, it devolves like any other species of heritable property. Where the founder does not dispose of shebaiti rights in the endowment created by him, the shebaitship devolves on the heirs of the founder according to Hindu Law, if no usage or custom of a different nature is shown to exist. [440 D-E]

Gossamee Shree Greedhareejee v. Rumanlaljee, 19 I.A. 137; Doorganath Roy v. Ram Chander Sen L.R. 4 I.A. 52; Pramatha Nath Mullick v. Pradyumna Kumar Mullick, 52 I.A. 245; referred to.

3(a) The words "to hold, retain and use the premises endowed or debutter property for the service and worship of my family thakur or idol" used in the will, merely create a trust or endowment and indicate the nature and purpose of the endowment. They do not touch or deal with shebaiti rights. [442 G]

(b) The two wills are complementary to each other. The will of June 4, refers the family house as having been endowed to the family deity and

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would be used by the testator's heirs for their residence. By using the words "wife and sons and sons' wives and other relatives of mine" who shall reside in my residential house in Chandranagore the testator meant that all the descendants

and heirs of his should reside in the house. In other words although the entire family house was formally endowed to the family idol, his intention was that his heirs and descendants would also be entitled to use this house as their family dwelling house, apart from the room where the idol was enshrined. [443 A; H 444 A]

(c) The will also provided that although the trustees were provided with funds for the Sewa-puja of the family deity and for other festivals out of the estate of the testator, they were not expressly constituted as shebaits of the deity. The intention of the testator apparently was that these funds would be expended for the purpose indicated by him through the shebaits. [444 E]

(d) Even assuming that originally the trustees were regarded as having been constituted as shebaits, then, too, those among them who were not family members or descendants of the founder had renounced and relinquished their shebaiti right, if any, in favour of the descendants of the founder. Such a relinquishment in favour of the co-shebaits will be valid. [446 E]

(e) The shebaitship of the family deity remained solely with the descendants of the founder and the defendant being the grandson of the founder, had been regarded as one of the shebaits and therefore was entitled to reside in the disputed rooms. [446 F-G]

(f) Moreover in this case the trustees accepted the award of the arbitrator allotting the disputed rooms to the defendant and the plaintiffs described the defendant as a shebait of the deity. [446 D]

(g) The trustees by themselves have no right to maintain the suit in respect of the debutter property. The legal title to the debutter property vests in the idol and not in the trustees. The right to sue on behalf of the deity vests in the shebaits. All the shebaits having not been made parties, the suit was not properly constituted and was liable to be dismissed. [446 G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1873- 1874 of 1970.

From the Judgment and Decree dated 21-7-1969 of the Calcutta High Court in Appeal from Appellate Decree No. 30/67.

Lal Narain Sinha and Sukumar Ghosh for the Appellant in C.A. 1873/70 and Respondent in C.A. 1874/70.

A. K. Sen (In C.A. 1874/70) and D. N. Mukherjee for the Respondent in C.A. 1873/70 and Appellant in C.A. 1874/70.

The Judgment of the Court was delivered by SARKARIA, J. These two appeals on certificate arise out of the appellate judgment and decree, dated July 21, 1969, of the High Court at Calcutta. The facts of the case are as follows:-

Late Babu Durga Charan Requitte was the grandfather of Satya Charan Requitte, defendant, and plaintiffs 1 and 2. He owned consi-

derable immoveable property. He was an inhabitant of Chandernagore (then a French territory). The suit property is situated in Chandernagore. Among others, it included a big residential house containing about 84 or 85 rooms with extensive grounds, gardens and tanks. In this house, which he was occupying for his residence, he had his family Deity Sree Sree Iswar Sridhar Jiew.

Durga Charan made and published two Wills, one dated June 4, 1898 with regard to his properties in the then British India, and the other dated June 6, 1898 with regard to his properties situated in the French territory of Chandernagore. By these two Wills, Durga Charan appointed his wife, Saraswati Dassi, his two sons, Shyama Chorone Requitte and Tarini Chorone Requitte and his nephews, Ashutosh Das and Bhola Nath Das, executrix and excutors and trustees of the estate left by him. The Wills provided that the trustees would hold the bequeathed properties left by the testator according to the terms of the Wills for the legatees and the beneficiaries mentioned therein. The Wills also provided that in case of death or retirement or refusal or incapacity to act of any of the trustees, the continuing trustees of trustee for the time being, or the executors or administrators of the last acting trustee might appoint any other person or persons to be a trustee or trustees in place of the trustee or trustees so dying or desiring to retire from or refuse etc. But, in no case, the number of the trustees should be less than two.

By his Will, dated June 6, 1898, Durga Chorone created an absolute Debutter in favour of the said family Deity and devised and bequeathed to his executors and trustees named therein, his dwelling house with gardens and tanks appertaining thereto situated in Chandernagore, "upon Trust to stand possessed of and to hold, retain and use the premises and endowed or Debutter property for the service and worship of" his said family Deity. By that Will, he further directed that this family idol "shall be located in my said house in Chandernagore which said house and premises shall be appropriated and devoted solely and exclusively to the Thakur or Idol."

The testator died on August 27, 1898. Thereafter, the Will, dated June 6, 1898, was duly probated and the trustees came into possession of the Debutter properties and carried on the administration of the estate and the Sewa and Puja, as directed in the Will.

Smt. Saraswati, widow of Babu Durga Chorone, who was one of the trustees named in the Will, died on October 30, 1913, while herson, Shyama Chorone, another trustee,

died on December 21, 1925.

Thereupon, Tulsi Chorone son of Shyama Chorone was appointed a new trustee in place of his father, Bhola, the other co- trustee, refused to act as such. Therefore, his son, Devindra was appointed as trustee by the continuing trustees. Tarani Chorone died on or about May 29, 1939 and the continuing trustees appointed his son, Profulla Chorone as a trustee. Tulsi Chorone died on August 17, 1952 and the continuing trustees similarly appointed Bhagwati, son of late Shyama Chorone as a new trustee. Debendranath Das died on or about March 7, 1956, and the continuing trustees appointed Satish Chandra Das, a son-in-law of late Shyama Chorone as a new trustee in his place.

In or about the year 1934, the descendants of the settlor, Durga Chorone, some of whom were the then trustees, referred certain disputes with regard to the endowed property to the arbitration of one Bhringeswar Sreemany. The disputes referred to the arbitrator included rival claims by the sons and grandsons of Durga Chorone, to their residence in the Debuttor property belonging to the family Deity. The Arbitrator made an Award on September 6, 1934, whereby he allotted rooms Nos. 72 and 82 to Satya Chorone, respondent, who had been in use and occupation from before. The Arbitrator made similar allotments of other rooms in the said house in favour of the other sons and grandsons of the settlor.

On April 20, 1959, Profulla Chorone Requitte, Bhagwati Chorone Requitte and Satish Chorone Das, the then trustees instituted Title Suit No. 28 of 1959 in the Court of the Subordinate Judge, Ist Court, Hooghly. The plaintiffs prayed for two reliefs in the plaint: (i) Possession by ejectment of the defendant, Satya Chorone Requitte, primarily from all the six rooms, alleging that the defendant had been occupying the same as licensee under the plaintiffs and the said licence had been revoked: (ii) in the alternative, for possession of the four rooms mentioned in Item No. 1 of Schedule 'B' of the Plaint, which had not been allotted to him under the award.

The plaintiffs' case, as laid in the plaint, was that since the dwelling house belonging to the Deity, had a large number of rooms the trustees allowed temporarily the sons and grandsons of Durga Chorone to occupy and use for their families some of the rooms in the said dwelling house as licensees. It was further alleged that in the year 1966, the defendant illegally and forcibly occupied Room Nos. 63, 35, 46 and 57 in the aforesaid house without the knowledge and consent of the trustees causing serious inconvenience in the due performance of the religious ceremonies of the Deity according to the terms of the Will. It was further contended somewhat inconsistently that the dwelling house at Chandernagore being absolute Debutter belonging to the Deity, no person, except the trustees, has any legal right in the said house which can only be used for the Sewa Puja of the family Deity located in the house; that the arbitration award of 1934 is not binding on the Deity and/or the trustees who were not parties to the arbitration; that the award was beyond the scope

of the reference and was adverse to the Trust, itself.

In his written statement, the defendant traversed the material allegatious in the plaint and asserted that he was in use and occupation of the rooms in dispute in his own right as a Shebait. He further pleaded that the plaintiffs had no right to represent the Deity and had no locus standi to maintain the suit as trustees; that since all the Shebaits had not been joined as parties the suit was incompetent.

The subordinate Judge dismissed the suit holding, inter alia, that:

(i) By his Will, Babu Durga Chorone had absolutely dedicated the property in dispute to the family Deity, Sree Sree Iswar Sridhar Jiew, but he had not under that Will made any testamentary disposition of his Shebaiti rights in respect of this Debutter property which, on the death of the testator, devolved under Hindu Law upon his descendants, who in consequence, were entitled to reside in the house as Shebaits.

(ii) The Trustees were not Shebaits. Only the descendants of Babu Durga Chorone had become Shebaits and had Shebaiti right in the endowed property.

(iii) The award made by the arbitrator, Bhringeswar Sreemany, was valid and binding upon the plaintiffs.

(iv) The plaintiffs could not recover possession from the defendant as trustees.

(v) The plaintiffs were not entitled to represent the Deity and had no locus standi as trustees to maintain the suit on behalf of the Deity.

(vi) The defendant had a right to occupy the rooms in suit as co-shebaits.

(vii) The plaintiffs having not claimed any relief in terms of the arbitration award, were not entitled to any relief in respect of Room Nos. 35, 46, 57 and 63.

Aggrieved, the plaintiffs preferred an appeal to the District Judge, who dismissed the same and affirmed the decision of the Trial Court.

Against the appellate decree of the District Judge, the plaintiffs carried a Second Appeal to the High Court at Calcutta. The Division Bench of the High Court, by its judgment dated July 21, 1969, allowed the appeal, in part, and granted the plaintiffs' a decree for Khas possession of Room Nos. 35, 46, 57 and 63 in the said dwelling house; but not in respect of Room Nos. 72 and 82 mentioned as Item No. 1 of Schedule 'B' to the Plaint.

After obtaining the certificate under Article 133(1)(b) of the Constitution, as it then stood, the plaintiffs have filed Civil Appeal 1873 of 1970 against the partial dismissal of their claim in respect of Room Nos. 72 and 82; while the defendant has filed Civil Appeal 1874 of 1970, praying that the

plaintiffs' suit ought to have been dismissed in respect of Room Nos. 35, 46, 57 and 63 also. Both the appeals will be disposed of by this common judgment.

The following pedigree table which has been compiled from the material on record by the learned counsel for the appellant, will be helpful in understanding the relationship of the parties and other connected facts:-

Durga Chorone died on 27-8-1898
_____|_____ | | |
Saraswati (Widow). Shyama Chorone Tarani Chorone Executrix died (Son) (Son).

on 30-10-1913. Executor, died on 21-12-25 Executor died on 29-5-39.
_____|_____ |
| | | | |
Hari Tulsi Satya Bhagwati |
| Wife Chorone Chorone |
| Two sons & (Defdt.) (Plff.2) |
| their fami- | | |
| lies & one | | |
| unmarried | | |
| daughter. | | |
Three Wife,six Wife,five |
sons & sons and sons & two |
their families daughters |
families. and five (one un- |
daughters married). |
(one un- |
married). |

_____|___ | | Profulla Chorone Amulya (Plff. 1). (not a party) | | | | Wife 4 Wife, 2 sons daughters. & 6 daugh-

ters (3 un- married.) The principal question that falls to be determined in these appeals is, whether the settlor had constituted the same set of persons as Shebait as well as Trustees. This question turns on a construction of the Will.

Mr. Lal Narain Sinha, learned Counsel for the appellant in Civil Appeal No. 1873 of 1970 submits that the answer to this question must be in the affirmative because the Settlor, Durga Chorone Requitte had by express words in the Will, (Ex. 6/6A), dated June 6, 1898, imposed an obligation on the trustees to hold, manage and use the suit property which he had thereby absolutely dedicated to the family idol, for the service and worship of the idol. It is maintained that although the word 'Shebait' is not used in the Will, yet the said obligation cast on the Trustees by inevitable implication clothed them with the character of Shebaits, also.

As against this, Mr. Ashok Sen contends that the answer to the question posed must be in the negative. It is urged that the words "to hold, retain and use the premises... for the service and

worship of my family deity", on which Mr. Sinha's argument rests, do not necessarily mean that the Testator had disposed of his Shebaitship rights, also, and vested them in the Trustees. It is stressed that there are no words in the Will which, expressly or necessary implication, constituted the Trustees as Shebaits; that the testator has not used the word 'Shebait' anywhere in the Will; nor did he employ the word 'manage' or 'manager' anywhere in the Will while charging the Trustees to hold and use the premises as Debutter property of the idol. According to the learned counsel, if the Will is construed as a whole in the light of the surrounding circumstances, it would be clear that the trust created was not a continuing trust but one which would terminate as soon as the Executor-Trustees handed over the bequeathed properties to the beneficiaries. It is pointed out that the two Wills, one dated June 4, 1898, and the other dated June 6, 1898, should be read as complementary to each other. The necessity of executing two separate Wills arose, because the properties bequeathed by the Will (Ex. 6) were situated in the then French territories, while those covered by the Will dated June 4, 1898, were situated in the British India. There were several beneficiaries under these Wills, and the family idol was one of them. The recitals in these Wills- according to the counsel-particularly in the Will dated June 4, 1898, show that the testator had kept, in tact, the right of residence of his widow and daughters-in-law and other heirs in the property dedicated to the idol. This, says Mr. Ashok Sen, is a sure indication of the fact that the founder did not want to part with his Shebaiti rights, which were heritable property, in favour of the Trustees, to the exclusion of his natural heirs under Hindu Law.

Mr. D. B. Mukherjee, appearing for the appellants in Civil Appeal No. 1874 of 1970, further submitted that the words "to hold, retain and use the premises as endowed or debutter property for the service and worship of my family deity", if properly construed in the context of the Will as a whole and surrounding circumstances, mean that the Executors and Trustees would hold the property in trust for the benefit of the deity and the shebaits. In the alternative, counsel submitted that even if it is assumed arguendo that they were so appointed, the line of succession set out in the Will would be hit by the principles laid down in Tagore v. Tagore(1), Ganesh Chandra v. Lalit Behary(2); Jagadindra v. Rani Hemanta Kumari(3) and by the Rule against perpetuities (Manohar v. Bhupendra) (4). It is further contended that since the founder did not dispose of the Shebaitship but only founded the worship of the Thakur, Shebaitship would vest in the heirs of the founder. For this proposition, reliance has been placed on Gossamee Shree Greedhareejee v. Rumanlaljee(5).

In reply to this, Mr. Sinha submits that trusteeship with power to nominate successor is an estate recognised by law, and in such a case the founder does not create an estate of inheritance contrary to Hindu Law of Succession, nor does the question of the rule of perpetuity arise because the founder does not determine the choice of the succeeding Trustees. Reference has been made in this behalf to I.L.R. 24 Madras 219, and Underhill's treatise on "Trusts", 12th Ed. pp. 534-35 at 23-31. It is maintained that the Trust in question is a continuing trust; it did not come to an end when the Trustees had fully performed their duties and obligations as executors of the Will, that the general principle underlying Section 77 of the Trust Act is applicable to the case in hand. It is further submitted that of the two Wills, the later must prevail and reference to the earlier Will, for the purpose of determining whether the heirs of the Settlor had been given a right of residence in the suit property, is irrelevant.

Before dealing with these contentions, it will be appropriate to have a clear idea of the concept, the legal character and incidents of Shebaitship. Property dedicated to an idol vests in it in an ideal sense only; ex- necessitas, the possession and management has to be entrusted to some human agent. Such an agent of the idol is known as Shebait in Northern India. The legal character of a Shebait cannot be defined with precision and exactitude. Broadly described, he is the human ministrant and custodian of the idol, its earthly spokesman, its authorised representative entitled to deal with all its temporal affairs and to manage its property. As regards the administration of the debutter, his position is analogous to that of a Trustee, yet, he is not precisely in the position of a Trustee in the English sense, because under Hindu Law, property absolutely dedicated to an idol, vests in the idol, and not in the Shebait. Although the debutter never vests in the Shebait, yet, peculiarly enough, almost in every case, the Shebait has a right to a part of the usufruct, the mode of enjoyment, and the amount of the usufruct depending again on usage and custom, if not devised by the founder.

As regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office; but even so, it will not be quite correct to describe Shebaitship as a mere office. "Office and property are both blended in the conception of Shebaitship". Apart from the obligations and duties resting on him in connection with the endowment, the Shebait has a personal interest in the endowed property. He has, to some extent, the rights of a limited owner.

Shebaitship being property, it devolves like any other species of he able property. It follows that, where the founder does not dispose of the shebaiti rights in the endowment created by him, the Shebaitship devolves on the heirs of the founder according to Hindu Law, if no usage or custom of a different nature is shown to exist [Gossamee Shree Greedharejee v. Rumanlaljee, (ibid.)] Then, there is a distinction between a public and private debutter. In a public debutter or endowment, the dedication is for the use or benefit of the public. But in a private endowment, when property is set apart for the worship of a family idol, the public are not interested. The present case is one of a private debutter. The distinction is important, because the results logically following therefrom have been given effect to by Courts, differently.

According to English Law, the beneficiaries in a private Trust, if sui juris and of one mind, have the power or authority to put an end to the trust or use the trust fund for any purpose and divest it from its original object. Whether this principle applies to a private endowment or debutter created under Hindu Law, is a question on which authorities are not agreed. In Doorganath Roy v. Ram Chunder Sen(1), it was observed that while the dedication is to a public temple, the family of the founder could not put an end to it, but "in the case of a family idol, the consensus of the whole family might give the (Debutter) estate another direction" and turn it into a secular estate.

Subsequently, in Pramatha Nath Mullick v. Pradyumna Kumar Mullick(1), the Judicial Committee clarified that the property cannot be taken away from the idol and diverted to other purposes without the consent of the idol through its earthly agents who, as guardians of the deity, cannot in law consent to anything which may amount to an extinction of the deity itself.

Although, Shebaitship is heritable property, yet, it cannot be freely transferred by the Shebait. But there are exceptions to this general rule. Some of such exceptions recognised in several decisions, are: alienation in favour of next shebait, or one in favour of the heir of the transferor, or in his line of succession, or in favour of a coshebait, particularly when it is not against the presumed intention of the founder. (See Nirod Mohini v. Shibdas(2) and Mancharan v. Pranshankar (2).

The Bombay High Court has also pointed out in Radhu Nath v. Purnanand (4), that if any one of the Shebaits intends to get rid of his duties, the proper thing for him to do would be to surrender his office in favour of the remaining Shebaits. In the case of such a transfer in favour of co-shebait, no policy of Hindu Law is likely to be affected, much less the persumed intentions of the founder.

Now, let us deal with the problem in hand in the light of the principles cited above.

The first question that falls for determination is:

> Whether the founder's intention was to confer rights of Shebaitship on the persons designated by him as 'trustees' in his Will ? In other words, did he by the Will, dated June 6, 1898 (Ex. 6/6A), dispose of the Shebaitship of the deity, also ? If the answer to this question is found in the negative, shebaiti rights in this endowed property will devolve, according to Hindu Law, on all the heirs of the founder, including the defendant. In that situation, the defendant with his family, like the other co-Shebaits, will be taken as residing in the debutter property, in his own right. If, however, the answer to the said question is found in the affirmative, the further question to be considered would be with regard to the effect of the Award dated June 29, 1934 (Ex. C) on the respective claims of the parties.
>
> We will now take up the first question.
>
> Mr. Sinha, learned counsel for the appellants, submits that since by his Will, dated June 6, 1898, the founder had "devised and bequeathed" the Chandernagore house to the plaintiffs-trustees 'upon Trust to stand possessed of" and "to hold, retain and use the premises as endowed or debutter property for the worship of the family Thakur", his intention was to constitute the trustees as Shebaits of the property having the exclusive right to manage the debutter, to serve the idol and to preserve its property. It is submitted that the founder had by these express words, invested the trustees both with the legal title and Shebaitship, although the beneficial title (in an ideal sense) was vested in the idol.

The passage in the Will on which Mr. Sinha relies for the construction propounded by him, runs as under:

> "I desire, devise and bequeath to my Executors and Executrix and Trustees hereinafter named... my dwelling house with garden and tanks appertaining thereto situate in Lal Bagan in Chandernagore. Upon trust to stand possessed of and to hold,

> retain and use the premises an endowed or Debutter property for the service and worship of my family Thakur or idol Sreedhar Jew, which I hereby direct shall be located in my said house in Chandernagore which said house and premises shall be appropriated and devoted solely and exclusively to the Thakur or Idol."

(Emphasis supplied) The crucial words are those that have been underlined. It may be observed that this Will, in English, appears to have been drafted in pursuance of legal advice by an expert draftsman. The omission of the words "management", "manager", "custodian of the idol" or "ministrant of the idol" from the Will, therefore, cannot but be intentional.

It seems clear to us that the underlined words in the above extract, by themselves, merely create a trust/or endowment and indicate the nature and purpose of the endowment. These words do not touch or deal with Shebaiti rights. This inference receives support from the surrounding circumstances.

Further, in arriving at the true import of the words "to hold, retain and use the premises an endowed or Debutter property for the service and worship of my family Thakur', it will not be improper to look to the conduct of the Trustees and the members of the family of the founder.

There is no antagonism between the two Wills, one dated June 4, 1898 and the other dated June 6, 1898, of the founder. Indeed, in a sense they are complementary to each other. There is a reference in the Will, dated June 4, 1898, to the Testator's dwelling house at Chandernagore, which under the Will (Ex. 6) was endowed to the family deity. From the following provisions in the Will, dated June, 4, 1898, it is clear that the testator intended that the dwelling house at Chandernagore would be used by his heirs for their residence:

> "(a). I further direct my said Executors and Trustees out of the said rents and profits of the said premises number 39, Chowringhee Road to pay monthly a sum of Rupees Fifty for the maintenance to each of my daughter-in law Smt. Gopeswari Dassee wife of my eldest son Shyama Chorone Requitte and Nagendra Moni Dassee wife of youngest son Tarine Chorone Requitte during their lives respectively and provided they reside with their respective husbands at my dwelling house in Chandernagore.
>
> (b). The Trustees shall pay monthly a sum not exceed in Rupees Two hundred in addition to the interest of Government securities of the nominal value of Rupees Twenty thousand hereinafter mentioned and directed to be applied for the purpose of household and other monthly expenses of my family, namely wife and sons and sons' wives and other relatives of mine who shall reside in my dwelling house at Chandernagore.
>
> (c). To pay and apply the net interest of Government securities on the nominal value of Rupees Twenty thousand for the house-hold and other monthly expenses of my family, namely, wife and sons and also sons' wives and other and other relatives of mine who shall reside in my dwelling house at Chandernagore and also to pay and

> apply the net interest of Government securities of the nominal value of Rupees six thousand for the costs and expenses of keeping and maintaining my said family dwelling house at Chandernagore in proper repair and in payment of all taxes and assessments in respect thereof."

(Emphasis supplied) Looking to the general tenor of the document, it will not be inappropriate to interpret the words "wife, and sons, and sons' wives, and other relatives of mine" in the above-quoted portions of the Will, as including all the descendants and heirs of the testator.

Thus construed conjointly, the two Wills make it clear that although the entire family house, comprising 84 or 85 rooms, at Chandernagore was formally endowed to the family idol, yet the testator's intention was that his heirs and descendants would also be entitled to use this house as their family dwelling house, apart from the room wherein the idol was enshrined.

It may be further noted that in the Will, dated June 4, 1898, the testator made the following provisions for the Sewa puja of the idol at Chandernagore and for other religious festivals:

> (i) The trustees shall set apart interests of Government securities for the daily expenses of worship of the idol.
>
> (ii) The Trustees shall pay and apply the net interest of Government securities of the nominal value of Rs.

25,000/- for the yearly expenses of the Durga Puja festival at Chandernagore.

(iii) The Trustees shall pay and apply the net interest of Government securities of the nominal value of Rs. 15,000/- for the yearly expenses of the Dolejatra of the family idol, Thakur Sreedhar Jew at Chandernagore.

The aforesaid provisions furiner show that although the trustees were provided with the funds for the Sewa-puja of the family deity and for other festivals out of the estate left by the testator, but they were not expressly constituted as Shebaits of the deity. It will, therefore, be not unreasonable to infer that the intention of the testator was that these funds would be expended for the purposes indicated by him, through the Shebaits.

Another telling circumstance appearing in evidence is that after the death of the widow and the two sons of the testator, their heirs, also, continued to live in this family dwelling house at Chandernagore.

It may be further noted that by the Will, dated June 6, 1898, no legal title in the endowed property was vested in the trustees. The title was expressly vested in the family idol to whom the property was absolutely dedicated. The testator did not create a trust estate in the sense in which it is understood in English Law.

The above-quoted provisions from the Wills further show that no rights to act as ministrant of the idol were conferred upon the Trustees. On the other hand, a mere obligation to hold and use the property for the endowment indicated was imposed upon the persons designated as 'trustees'.

Reading the two Wills together, with particular focus on the provisions extracted in this judgment, it is clear that the testator, Durga Chand Requitte, did leave Shebaitship undisposed of; his presumed intention being that Shebaitship should devolve on his natural heirs who would have a right to use the suit house as their family dwelling house. The rights conferred on the Trustees under the Will may, at the most, amount to a curtailment of the right to manage the endowed property which a Shebait would otherwise have. But, such curtailment by itself would not make the ordinary rules of succession in Hindu Law inapplicable in regard to the devolution of Shebaitship, which is heritable property.

The upshot of the above discussion is that in spite of the interposition of the Trust for management of the endowed property, the Shebaitship remained undisposed of and, as such, the defendant and other descendants of Durga Chand Requitte became co-shebaits of the deity by the operation of the ordinary rules of Hindu Law.

In arriving at the conclusion that in spite of the interposition of the Trust, the founder by his Will left the Shebaitship undisposed of, and as such, the defendant also, under Hindu Law, became one of the Shebaits, we are fortified by the inference arising out of the facts admitted by no less a witness than Plaintiff No. 3, Satish Chandra Dass, himself, who alone deposed for the plaintiffs. Though he claimed that there were no Shebaits of the deities and the trustees were managing the Shebaits. he categorically admitted the following facts:

> (a) "The disputed house is a big house", having 84-85 rooms. "It is the only family dwelling house" of the sons and grandsons of Durga Chorone Requitte, who live in it, while "the deity is installed in room No. 66 in the first floor".
>
> (b) "The inmates of the disputed house, as far as practicable, look after the bath of the deity as also the preparation of Naibedya (tray containing the offerings) and Bhog (food) of the deity".

Thus even according to the plaintiffs-appellants, only the descendants and heirs of the founder, who live in the endowed house, have throughout been acting as ministrants of the family idol, which, as already noticed, is one of the vital characteristics of a Shebait. In other words, the sons and the descendants of Durga Chorone Requitte, alone, have throughout been acting as co-shebaits of the family deity, to the exclusion of the 'trustees' who were not his descendants.

The first two courts were, therefore, right in holding that the Shebaiti rights remained with the heirs of the founder.

Assuming for the sake of argument, that the 'trustees' were also vested with the rights and obligations of a Shebait, then also, the evidence on the record shows that those trustees who were

not descendants of the founder, Durga Choron Requitte, never acted as such. They went out of the picture long ago and must be presumed to have renounced their Shebaiti rights in favour of their co-shebaits who were descendants of the founder. It is in evidence that in 1934, a dispute arose among the descendants of the founder with regard to the accommodation in their residential occupation. Thereupon, the trustees agreed with the descendants of the founder by means of the Agreement (Ex. E) to refer the dispute to the sole arbitration of Shri Shringerwar Shrimani. The arbitrator, inter alia, held that the heirs of late Durga Choron Requitte and his descendants alone had the rights to act as Shebaits. There is documentary evidence on the record to show that this award (Ex. G) given by the arbitrator was accepted by the 'trustees'. The present plaintiffs-appellants, by their letter dated June 18, 1950 (Ex. A/7), asserted their right on the basis of this award and described the defendant- respondent as a shebait of the deity. The letters (Ex. A-8 and A-10) also point to the same conclusion.

Thus, even if it is assumed that originally, the trustees were regarded as having been constituted as Shebaits, then also, those among them who were not family members or descendants of the founder, renounced and relinquished their shebaiti rights, if any, in favour of the descendants of the founder. Such a relinquishment made in favour of the co-shebaits, will be valid.

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

In the view we take, it is not necessary to decide, whether the 'trust' created by the Will of Durga Chorone Requitte was a continuing trust or not, or whether the mode of devolution of the office of Trustees indicated by the founder in his Will was or was not hit by the rule in Tagore v. Tagore (supra).

For the foregoing reasons, we allow the defendant's appeal (Civil Appeal No. 1874 of 1970), set aside the judgment of the High Court, and dismiss the plaintiffs' suit. In the result, Civil Appeal No. 1873 of 1970 filed by the Plaintiffs, ipso facto fails, and is dismissed. In the circumstances of the case, there will be no order as to costs.

C.A. 1873/70 dismissed.

P.B.R. C.A. 1874/70 allowed.