Sri Kishan vs Jagannathji And Ors. on 27 September, 1951

Equivalent citations: AIR1953ALL289, AIR 1953 ALLAHABAD 289

JUDGMENT

P.L. Bhargava, J.

1. This appeal arises out of a suit instituted by Sri Jagannathji, installed in a temple situate in Jagannathji ki gali in old Generalganj in the city of Kanpur, and Raghunath Das (the plaintiffs-respondents) against Sri Kishen (the defendant-appellant) to obtain the following reliefs : (1) by enforcement of the right of manage, ment which vesta in Raghunath Das (plaintiff 2), Sri Kishen (defendant) be removed from the management of property specified in the plaint, which has been made "waqf" of, and Raghunath Das be awarded possession over the said property as its "mutwalli" and manager; and (2) an order may be made requiring the defendant to render accounts of the income from the 'waqf' property upto the date of possession by Raghunath Das and a decree for the amount already realised, be passed in favour of Raghunath Das as against the defendant.

2. The temple was admittedly constructed by one Brij Lal, whose relationship with the contending parties will appear from the following genealogical table, which is not disputed :

Brij Lal (Founder of the waqt) (died :1998-1899)
_____|_____ | | Lachchmi Narain (elder) Thakur Das (Died : 1901) (Predeceased Brij Lal) | | Narain Das (Died : 1920) | _____|_____ | | | Janaki Das Raghunath Das | | (Seniormost in the | Ramkumar family now)(Plaintiff 2) | _____|_____ | | | Kedar Nath (eldest) Mangal Das Ram Kishan (Dead) (Died : 1904) (Next Eldest) | (Died :1945) Sri Kishan (Defendant) _____|_____ | | Sri Narain Jagdish Narain

3. Having constructed the temple, Brij Lal installed and consecrated therein the idol of Sri Jagannathji. He himself managed the temple and defrayed the expenses in connection with 'bhog' etc. For the worship and services of the deity he had appointed a 'pujari' (priest). On 15-1-1879, Brij Lal executed a deed of 'waqf, whereby he dedicated to Sri Jagannathji two houses, situate in mohalla Old Generalganj in tho City of Kanpur, transferring all his rights and interests therein. In the deed he stated that he had been and was defraying necessary expenses in connection with the temple, and with a view to perpetuate his name after his death, he had made the 'waqf'. The first condition mentioned in the deed was that the necessary expenses in connection with the temple shall be defrayed out of the rent realised from the two houses, one of which was let out on an annual rental of Rs. 115 and the other fetched an annual rental of Rs. 110, i. e., in all Rs. 225.

The next condition in the deed was that none of the heirs of Brij Lal shall try to appropriate to himself any portion of the said sum of Rs. 225 and the whole amount shall be spent in meeting the expenses connected with the maintenance of the temple, and that the representatives of Brij Lal shall from time to time improve the condition of the 'waqf property so that the funds may never fall short for meeting the necessary expenses. The third condition in the deed is the most important, and its proper interpretation is one of the subject-matters in dispute in this appeal. That condition is to the effect :

> "That my sons, Lachhmi Narain and Thakur Das, shall after my death be the managers ('mohtamim') and 'Karkun' of the temple made 'waqf' of and shall act as my representatives like myself ('misl zat khas mere'). As the property has been set apart and made 'wagf' of, I or my heirs have no personal interest left therein. If ever in future any such situation arises as to cause loss to the property aforesaid, my sons, Lachhmi Narain and Thakur Das, shall jointly or severally act as managers ('muntazim-munsarim') and do 'pairvi' before the officer for the time being and at all times; and similarly in future the senior-most members of my family ('aulad-i-akbar) shall be the manager of the 'waqf property, shall supervise the affairs of the temple made 'waqf of, and shall have all the rights mentioned in this document, except the right to misappropriate. My sons, Lachhmi Narain and Thakur Das, or any of my lawful heirs shall never, under any circumstance, have the right to transfer the two houses mentioned above. In case any of my heirs incurs any liability, the property aforesaid, i. e., the two houses and the amount of rent made 'wagf of, shall not be subject to the charge of any amount due from any of my heirs. In case it so happens, the officer for the time being shall protect the property from litigation. After my death, my two sons, aforesaid, shall have the right to, and remain in possession of, all the existing appurtenances to the temple. During my lifetime I myself shall be responsible."

4. The fourth condition in the deed specifies how the sum of ES. 225, the income from the rental of the two houses, was to be spent. After the details of the expenses, the boundaries of the two houses are given.

5. The plaintiffs alleged in their plaint that-

> (1) according to the conditions set forth in the deed of 'waqf', after the death of Brij Lal his two sons, Lachhmi Narain and Thakur Das, were to be the managers and 'karkuns' of the temple as well as of the 'waqf property, and after the death of the two sons, the seniormost member in the family of Brij Lal was to succeed to the office of the manager and 'karkun' of the temple and of the 'waqf property. This interpretation of the conditions in the deed of 'waqf was not admitted by the defendant ;
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> (2) Brij Lal during his lifetime continued to manage the temple and the 'waqf property, but on account of his old age, the death of his elder son, Lachhmi Narain, and the indifference of his other son, Thakur Das, Brij Lal executed a 'mukhtarnama'

in favour of his grandson, Kedar Nath, who, as the general-agent of Brij Lal, started managing the temple and the 'waqf property.' The defendant admitted that Brij Lal and Kedar Nath managed the temple and the 'waqf property ; but alleged that they did so in their own rights ;

(3) Brij Lal died in Sambat 1956. After his death, Thakur Das did not manage the temple or the 'waqf' property on account of his indifferent health and as he had purchased another property known as Kambagh and dedicated the same to Sri Jagannathji to be managed by a trust appointed by him and had repudiated the 'waqf made by his father, he did not like personally to manage the same; that, with the consent of Thakur Das, Kadar Nath remained the manager and 'karkun' of the temple and the 'waqf property; that on the death of Thakur Das, according, to the terms of the deed of 'waqf and by virtue of his being the seniormost member in the family of Brij Lal, Kedar Nath succeeded to the office of the manager and the 'karkun' of the temple and the 'waqf property. It was admitted by the defendant that after the death of Brij Lal, Thakur Das filed a false suit for cancellation of the deed, of 'waqf and that Kedar Nath became the 'mutwalli' during the lifetime of Thakur Das as he was the next seniormost member in the family of Brij Lal;

(4) after the death of Kedar Nath, in 1904, his, brother, Mangal Das, by virtue of his being the next seniormost member in the family of Brij Lal, in accordance with the terms of the deed of 'waqf, succeeded to the office of the manager of the temple and the 'waqf property. But his younger brother, Ram Kishen, took in his own hands the management of the temple and the 'waqf property on the ground that Mangal Das had become a Sadhu. Mangal Das filed suit no. 14 of 1909 against Ram Kishen, and obtained a decree declaring that, in accordance with the terms of the deed of 'waqf, the seniormost member in the family of Brij Lal was entitled to succeed to the office of the manager of the temple and the 'waqf property. In terms of the decree, Mangal Das remained the manager of the temple and of the 'waqf property upto the date of his death, which event took place on 3-11-1945. The defendant admitted that Kedar Nath died childless in or about the year 1904, but asserted that after his death Mangal Das became 'mutwalli' by virtue of his being the seniormost son in the family of Brij Lal and that he occupied that position upto the year 1945 ;

(5) after the death of Mangal Das, Raghunath Das (plaintiff 2) was now the seniormost member, i. e., the 'aulad-i-akbar' in the family of Brij Lal and, according to the terms of the deed he was entitled to succeed to the office of the manager and 'Karkun' of the temple and the 'waqf property. The defendant is wrongfully asserting himself to be the manager and 'Karkun'. The defendant's reply to this allegation is that after the death of Mangal Das he obtained possession over the 'waqf' property lawfully and by virtue of his being the seniormost descendant in the family of Brij Lal; and (6) the defendant is unlawfully collecting the income from the 'waqf' property to which Sri Jagannathji (plaintiff l) alone is entitled and is, therefore, liable to render accounts of the same. This liability is denied by the defendant.

6. It is not disputed that the temple and the 'waqf' property had been validly dedicated by Brij Lal to Sri Jagannathji (plaintiff l) in the year 1879 ; that the property still belongs to Sri Jagannathji; that Brij Lal and his descendants have been managing the temple and the 'waqf' property ; and that Raghunath Das or the defendant has no personal interest in the property.

7. The additional pleas raised by the defendant 'inter alia' were that he is the lawful heir of Mangal Das, the last 'mutwalli' of the 'waqf' and in spite of the conditions laid down in the deed of 'waqf' relating to the devolution of the office of 'mutwalli' he is, according to law, the lawful 'mutwalli' of the 'waqf' property and no one has any right to dispossess him; that, even in view of the conditions laid down in the deed of 'waqf,' the defendant, as the seniormost descendant in the family of Brij Lal, is lawfully the 'mutwalli' of Sri Jagannathji and the manager and supervisor of the property belonging to deity; that, according to the intentions of the 'waqif' himself, the office of 'mutwalli,' manager and supervisor of the 'waqf' property has always been held by a member of the family in accordance with the rule of lineal primogeniture; that the members of the family of Lachhmi Narain have, for more than 50 years, held possession of the 'waqf' property as 'mutwallis,' and no one in the family of Thakur Das, to which Raghunath Das (plaintiff 2) belongs, has ever been in possession; as such, in view of the adverse possession of the defendant and his ancestors, the claim of Raghunath Das is barred by limitation; that during the lifetime of Brij Lal, Thakur Das and Narain Das had dishonestly filed a suit for cancellation of the deed of 'waqf,' which was dismissed and the decision of the trial Court was upheld on appeal; that the ancestors of Raghunath Das (plaintiff 2) and the members of his family have always been hostile and disloyal to Sri Jagannathji, consequently even if anyone in Thakur Das's branch had any right to the office of 'mutwalli' or manager of the temple and the 'waqf' property he had forfeited that right; and that Raghunath Das (plaintiff 2) has no right to demand rendition of accounts of the 'waqf' property, which is lawfully in possession of the defendant.

8. The Civil and Sessions Judge of Kanpur, who tried the suit, has recorded the following findings :

> (1) After the death of Brij Lal, his elder son, Lachhmi Narain, having predeceased him, the order of seniority of other descendants of Brij Lal was as follows : (l.) Thakur Das, (2) Kedar Nath, (3) Mangal Das, (4) Narain Das, (5) Ram Kishen, and (6) Raghunath Das.
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> (2) The order of succession to the Managership of the temple and the 'waqf' property from the time of Brij Lal, has been that Brij Lal managed it till his death; after his death the management passed on to Kedar Nath (as Lachhmi Narain was dead and Thakur Das for one reason or the other did not take up the management) and then to Mangal Das.
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> (3) The scheme of succession to the office of manager as laid down in the deed of 'waqf' was that (i) the first manager will be Brij Lal himself; (ii) after him his sons, Thakur Das and Lachhmi Narain, jointly or severally will perform the duties of the manager; and (iii) after them, the member seniormost in age among the descendants of Brij Lal will be the manager.

(4) The above scheme of succession to the office of the manager is valid and enforcible and the member of the family, who fulfils the qualification laid down, takes the office as nominee of the founder of the 'waqf.' Kedar Nath and after him Mangal Das held the office in terms of the deed as they were the seniormost members of the family for the time being.

(5) On the date of the suit, Raghunath Das (plaintiff 2) was the person entitled to hold the office of the manager.

(6) The above order of succession has all along been accepted by the ancestors of the parties.

(7) No question of adverse possession arises as the plaintiff's right arose on the death of Mangal Das in the year 1945, and that the plaintiff's claim is well within time.

(8) Lachhmi Narain and his sons did not form joint family with Brij Lal at the time of the latter's death, and that even if the rights of management were to revert to the heirs of the founder, the defendant will not have preference and Raghunath Das will be entitled to the office of the manager jointly with the defendant.

(9) The defendant was liable to render accounts since the date of his entering into wrongful possession, of the 'waqf' property.

9. Accordingly, the learned Civil Judge declared Raghunath Das (plaintiff 2) to be the rightful 'mutwalli' and made an order that he be put in possession of the property as a manager on behalf of Sri Jagannathji (plaintiff l) and that the defendant should render account of the income and expenditure since 4-11-1945, upto the date of the decree.

10. Learned counsel for the defendant-appellant has contended that as soon as the endowment was made by Brij Lal, 'shebaitship' which is the necessary commitment of the creation of an endowment came into existence; that as no one was appointed 'shebait' 'shebaitship' according to Hindu law, vested in the founder, namely, Brij Lal, who became first 'shebait'; and that on the founder's death as he had not prescribed any permissible rule of succession, the 'shebaitship' devolved upon his legal heirs. In support of his contention that on creation of an endowment 'shebaitship' automatically comes into existence, the appellant's learned counsel has relied upon the following passage in Mulla's Hindu Law (10th Edn.) Section 421 at p. 509, and also upon the decisions of. the Privy Council on which the observations in the said passage are based :

"S. 421. Eights of Founder. -- (1) According to the Hindu Law, when the worship of an idol has been founded the 'shebaitship' is held to be vested in the founder and his heirs, unless : (a) he has disposed of it otherwise; or (b) there has been some usage or course of dealing which points to a different mode of devolution."

The Privy Council decisions are reported in Greedharreejee v. Ramanlolljee, 16 Ind. App. 137 (pc); Jagadindra Nath Roy v. Rani Hemanta Kumari, 31 Ind. App. 203 (PC) and Mohan Lalji v. Gordhanlalji, 40 Ind. App. 97 (PC).

11. In the first case, Greedharreejee v. Ramanlolljee, 16 Ind. App. 137, the plaintiff claimed to be the rightful 'shebait' of a consecrated picture of idol, to which peculiar sanctity was attached by the Bullav Acharjee sect or community of Vishnuvites, and as incident thereto he claimed things which had been offered to the idol and the possession of a temple in Calcutta, in which the idol had for some years been located. The plaintiff was the representative by primogeniture of the founder of the Bullav Acharjee community. The contesting defendant was cadet of the same family. All the male members of the family were in their lifetime esteemed by their community as partaking of the divine essence and as entitled to veneration and worship; but the head of the family had the precedence and was styled Tickut.' The plaintiff's grandfather Dowjee was 'Tickut' in his lifetime and had moved from Udaipur--the principal seat of the community--to Calcutta, where he presented to his disciples a consecrated portrait of himself, which has ever since been worshipped.

The plaintiff as 'Tickut' based his claim upon his spiritual character and authority which had all along been acknowledged by the persons concerned with the actual worship and management of the idol and the temple. The plaintiff's family had from time to time intervened in the affairs of the temple. The contesting defendant claimed to be shebait' having been appointed by the donee of the property at the site of which the temple had been constructed. Their Lordships stated the general law relating to shebaitship' in these terms:

> "According to Hindu law, when the worship of a thakoor 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 circumstance to show a different mode of devolution."

And, with reference to the facts of the case before them, their Lordships held that the plaintiff was by general law the 'shebait' of the worship which had been founded by Dowjee and that the donee could not of his own authority alter the 'shebaitship'.

12. In the second case, Jagadindra Nath Boy v. Rani Hemanta Kumari, 31 Ind. App. 203 (P.c.), the principal suit was brought by the plaintiff on the allegation that as 'shebait' of the idol the proprietary rights in certain 'taluqs' vested in him; that 'mouzah' Gabshara included in these taluqs' long ago became diluviated; that reformation took place and the reformed lands were resumed by Government and under the designation 'Khas Mehal Chur Gabshara' were settled with the pre-decessors-in-title of the plaintiff for different periods successively ; that the lands now in dispute became part of 'Chur Gabshara' by reformation and accretion; and that in 1864 the predecessor-in-title of the defendant with others, sued the plaintiff's predecesaor-in-title to establish title to the lands in dispute and failed, whereby the right of the plaintiff's predecessors-in-title became established as against those whom the defendant represents. On the strength of his title the plaintiff claimed to recover the lands in dispute, from which he said he had been dispossessed. The defence 'inter alia' was that the suit was barred by time, as the plaintiff had been out of possession

for more than 12 years.

13. Although the suit was brought as 'shebait' there was no evidence to show as to who had founded the religious endowment or as to the terms and conditions of the foundation. It was, however, admitted that the interest was in the Thakur and the settlements had been made from time to time with the grantees as 'shebaits.' In the circumstances of the case, on the authority of Greedharreejee v. Ramanlolljee, 16 Ind. App. 137 (P. C.), the legal inference was drawn that the title to the property, or to the management and control of the property, followed the line of inheritance from the founder.

14. In that case, it was further held that an idol might be regarded as a juridical person capable as such of holding property though it was only in an ideal sense that the property was so held, especially when the dedication was of the completest character known to the law. Yet the possession and management of the dedicated property with the right to sue belongs to the 'shebait.'

15. Similarly in the third case, Mohan Lalji v. Gordhan Lalji Maharaj, 40 Ind. App. 97 (P.c.), the plaintiff claimed the 'shebaitship' of a temple of which respondent was in possession as a 'shebait.' One of the questions raised in that suit was whether the succession to the office of a 'shebait' was governed by the ordinary rule of Hindu Law or by special usage. Reference was made in this connection to the principle enunciatd in Greedharreejee v. Ramanlolljee, 16 Ind. App. 137 (P.c.), which has been quoted earlier. Their Lordships held that according to the customs and usages of the Ballav Kul the 'shebaitship' of the temple vested in the plaintiff.

16. In all the three cases, the existence of the office of 'shebait' was admitted. In the first case the question was as to who was the 'shebait' for the time being; in the second case, the plaintiff had instituted the suit as a 'shebait'; and in the third case the dispute related to the succession to the office of a 'shebait.' These cases undoubtedly furnish authority for the general proposition of law that when the worship of an idol 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 circumstance to show a different mode of devolution bat they cannot be accepted as authority for the proposition that when the worship of an idol is founded 'shebaitship' with all the legal incidents automatically comes into existence.

17. The construction of a temple is one of the most common forms of a religious endowment. In a temple so constructed, an idol representing some deity is usually installed and consecrated by means of 'pratishtha' the means whereby the Universal Soul is localised and made to dwell in the idol. After the 'pratishtha' and 'pran-pratishtha' the idol acquires the status of a juridical personage, capable of holding the property. The person who erects the temple loses the proprietorship therein, and the same vests in the deity. The deity so consecrated has to be looked after and worshipped daily and the temple has to be repaired and maintained. A human agency is necessary for the daily worship as well as for looking after the repairs and maintenance of the temple.

18. A person having constructed the temple and consecrated the deity therein is naturally anxious to devise means for the perpetuation of the worship and with that end in view, he makes a further endowment of property sufficient for the upkeep of the temple. Thereupon, the appointment of a

human agency to look after and administer the endowed property also becomes necessary.

19. The human agency required for the purposes of looking after the repairs and maintenance of the temple or for the management of the endowed property has been given different names --in some cases he has been designated as a 'shebait' in others as a manager and in some others as 'dharamkarta.' As observed by their Lordships of the Privy Council in Vidya Varuthi v. Balu Sami, 48 Ind. App. 302 (P.c.) :

> "The beads of these foundations bear different designations in respect of the rights and incidents attached to the office: the difference arises from the customs, and usages of each institution."

20. A 'shebait' of a religious institution is equated with the head of a 'muth.' As pointed out in Srinivasa Chariar v. Evalappa Mudaliar, 49 Ind. App. 237 ;

> "Those functionaries ('shebait' of a religious institution and the head of a 'Muth') have a much higher right with, larger power of disposal and administration, and they have a personal interest of a beneficial character,"

Mayne in his Treatise on Hindu Law and Usage thus sums up the position of a Sehebait' :

> "The 'shebait' is one who serves and sustains the deity whose image is installed in the shrine. The duties and privileges of a 'shebait' are primarily those of one who fills a sacred office. 'Shebaitship' in its true conception therefore involves two ideas, the ministrant of the deity and its manager ; it is not a bare office, bub an office together with certain rights attached to it,"

The abovementioned description of a 'shebait' is based upon the observations in Manohar v. Bhupendranath, 60 Cal. 452 (F B) at p. 494. In that case it was further observed :

> "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 .....
>
> 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."

21. What is the true conception of 'shebaitship'? That would appear from the following observations of Mookerjee J. in Kunjamani Dassi v. Nikunja Bihari Das, 20 Cal. w. n. 314, which were quoted with approval in Bhabatarini Debi v. Ashalata Debi, 70 Ind. App. 57 (P. C.), at p. 62:

> "To me it seems that both the elements of office and property, of duties and personal interest, are mixed up and blended together in the conception of 'shebaitship.' One of

the elements cannot be detached from the other. The entire rights remain with the grantor when a deity is founded and it is open to him bo dispose of these rights in any way he likes. If there is no disposition, 'sebaitship' remains like any other heritable property in the line of the founder and each succeeding shebaib succeeds to the rights by virtue of his being an heir to his immediate predecessor and not to the original grantor.

If it is disposed of completely and absolutely in favour of another person, there remains nothing in the grantor except the possibility of a reverter when there is a failure or extinction of the line of 'shebaits' indicated by him. If, on the other hand, the founder has parted with his rights only in a partial manner for the lifetime of the grantee, the residue still remains in him and his heirs, and on the death of the grantee, the heir of the founder living at the time is entitled to the 'shebaitship.' If the grantee in such cases happens to be the sole heir of the founder upon whom the residuary right devolves at the eame time and he becomes the 'shebaib' under law as well, then, whether or not we invoke the technical doctrine of merger or coalescence of the particular estate with bhe residue, his position, in my opinion, is thab of an absolute 'shebait' whose rights devolve upon his heirs and not upon the heirs of the founder at his death.

If there was no grant in his favour, he would have been entitled to an estate of inheritance under law as regards the 'shebaiti', and bhe fact that there is a grant in his favour of a limited right cannot make his position worse, and take away from, him the higher rights which he had irrespective of the grant. It would be opposed to all principles of law to require that in such cases on the deabh of bhe 'shebait' who was himself the heir of the grantor, the successor can come in only, to use the technical phrase, per formam doni."

22. We do not, however, come across a 'shebait' possessed of the rights and interest of the nature indicated above in every case. For instance, see Gnanasambanda Pandara Sannadhi v. Velu Pandaram, 27 ind. App. 69 (PC). In that case there was a gift by the founder of a religious endowment connected with a temple, but there was no 'shebait.' It appears that the superintendence of the endowment was vested in the Govern-. ment and the management was being carried on by persons appointed by Government. The suit related to the right of management of the endowment. Also see Srinivasa Chariar v. Evalappa Mudaliar, 49 Ind App. 237 (PC). In that case the institution was being managed by a 'dharamkarta,' who is, according to the same case, literally no more than the manager of a charity and his rights are never of a higher legal category than that of a mere trustee. In addition to these cases reference may also be made to Ayiswaryanandaji Saheb v. Sivaji Raja Saheb, 49 Mad. 116. In that case also the endowed property was being managed by Government or its nominees.

23. We do not find any mention of a 'shebait' in any of these cases. These cases, no doubt, related to the religious endowments' in southern India, but, as pointed out in Vidya Varuthi Thirtha v. Balusami Ayyar, 48 ind. App. 302 (p.c.) in their general characteristics the institutions in southern

India are almost identical with similar institutions in northern India and in the Bombay Presidency. In that case, it was also pointed out that neither under the Hindu Law nor in the Mohammedan system was any property conveyed to a 'shebait' or a mutwalli' in the case of a dedication. Nor was any property vested in him; whatever property he held for the idol or the institution, he held as manager with certain beneficial interests regulated by custom and usage.

24. The heads of religious endowments, as already pointed out, bear different designations in respect of the rights and incidents attached to the office; the difference arises' from the customs and usages of each institution and also from the nature of the endowment. If the worship of a deity is established, the rights of worship have to be considered in determining the question as to who is to be regarded as a 'shebait'.

25. In Prannath Saraswati's Hindu Law, Endowments, at p. 136, it has been observer! :

> "Great as is the religious merit of personally performing these services for the deity, the endower has not always the inclination or the capacity to perform them. Apart from the question of physical capacity there is that of religious capacity. Thus it is said in the Vrihan-Naradiya Purana, 'Women; those uninvested with the sacred thread, i.e. (the members of the 'dvija' class before the initiation ceremony has been, performed for them); and Sudras are not competent to touch images of Vishnu or Siva."

26. A person in order to be entitled to perform the functions connected with the worship of a deity must possess the religious capacity; he must possess full knowledge of sacred literature; he must also be a devoted worshipper of the deity whose image is to be worshipped; and he must be a religious student of good character. A founder may appoint a person, who possesses such qualifications, to perform the worship of the deity, and he may not himself perform the functions connected with the worship of the deity. But, he may still continue to manage the endowed property and out of the income of the property defray the expenses connected with the temple and the deity.

27. The founder of an endowment may, therefore, make such arrangement as he likes for the administration of the endowed property as also for the worship and service of the deity. Whether on the creation of an endowment the office of a 'shebait' in the legal sense of the term comes into existence or not would depend upon the circumstances in each case; and it cannot be said that in each and every case, on the creation of an endowment 'shebaitship' automatically comes into existence. The law'recognises the founder's right to management of and control over the endowed property because by dedication he 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. This does not mean that he holds the property as a 'shebait' even though he has assigned to himself the position of a bare manager and also appointed another person to look after the service and worship of the deity in whose favour the endowment has been created.

28. Certain religious endowments are managed by persons designated as managers. While dealing with the position of a manager of a temple, their Lordships of the Privy Council in Ramanathan Chetti v. Murugappa Chetti, 33 Ind. App. 139, observed at p. 144 :

> "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 of dignity. ..."

29. The noticeable difference between the position of a 'shebait' and the position of a manager of a temple is that the 'shebait' has, in the endowed property, a personal interest of a beneficial character. This distinction would bo the determining factor when the question arises whether a particular endowment is being managed by a 'shebait' or a bare manager. If the person appointed has any personal interest of a beneficial character in the endowed property, he would be a 'shebait', but if he has got no such interest, he would be treated as a bare manager. There is no bar to the founder of an endowment appointing a bare manager and prescribing a line of succession to the office of the manager.

30. In M. Desikar v. Gopila Chettiyar, I. L. R. (1943) Mad. 858, it was held that the law gives to the author of a public religious trust the privilege of prescribing, if he is so minded, a line of succession to the office of the manager, without conforming to the law .of inheritance. This principle, it was further pointed out, has its foundation in the distinction that exists between heritable property over which the owner has only a restricted power of disposition and a mere office which confers on the holder a bare right of management without any right to a beneficial interest in the property committed to his charge. If we may say so with respect, we entirely agree with these observations.

31. Learned counsel for the appellant sought to distinguish this case on the ground that it related to a particular kind of endowment in southern India. The dispute in that case related to the properties which admittedly belonged to a Shiva temple in Jaffna in Ceylon founded by the ancestors of the parties. With reference to Vidya Varuthi Thirtka v. Balusami Ayyar, 48 Ind. App.

302 (P.c.), it has already been pointed out that in their general characteristics the institutions in southern India are almost identical with similar institutions in northern India and in the Bombay Presidency. The manager of an endowment, who is designated as a 'dharamkarta , is not a 'shebait' or a 'pujari' of a shrine or a head of the 'Math'. He is literally and no more than the manager of a charity, and his rights are never of a higher legal category than that of a mere trustee, vide Srinivasa Chariar v. Evalappa, Mudaliar, 49 Ind. App. 237 (P.C.).

32. In the case before us Brij Lal had constructed a temple and he had therein installed and consecrated the deity, Sri Jagannathji. He had appointed a 'pujari' (priest) for the service and worship of the deity ; and he himself arranged for the funds and defrayed the necessary expenses of the temple and the deity. Consequently, the functions usually performed by a 'shebait' were being performed by Brij Lal himself as well as by the pujari. Subsequently, having regard to his advanced age, he made a 'waqf' of property in favour of the deity to provide for expenses for the worship of the

deity. This was an endowment recognised by Hindu law. Under the endowment, the endowed property vested in the deity who could not enjoy the property except through a human agency. The pujari was to continue to look after the service and the worship of the deity and the work of realization of rent from endowed property and the defraying of expenses was to be done by the founder himself. Neither the 'pujari' nor the founder had any personal interest of a beneficial character in the endowed property. The same state of affairs was to continue oven after the founder's death ; provision was made in the deed of 'waqf' for payment of the salary of the 'pujari' and for the management being carried on by the sons of the founder and after them by the seniormost member of the family of the founder.

33. It is not disputed that the human agency whose existence is necessary for the management of the endowed property and for arranging the worship of the deity must come into being as soon as the endowment is made. As already pointed out above, 'shebaitship' in its true conception involves two ideas, the ministrant of the deity and its manager, it is not a bare office, but an office with certain rights attached to it. The founder in the case before us did not constitute himself a 'shebait' in the literal or legal sense. He did make an arrangement for the due performance of the functions usually performed by a 'shebait' by assigning some of those functions to a 'pujari' (priest) and others to himself, his sons and the seniormost member of his family.

34. In the present case, we are not concerned with the office of the 'pujari' (priest) and have to see what was the position of the founder and of those who have looked after and managed the temple and the 'waqf' property after the founder. In the deed of 'waqf' it was stated that the founder and after his death his two sons shall have the right to, and remain in possession of, all the existing appurtenances to the temple; that the sons of the founder shall be the managers ('mohtamim') and 'karkun' of the temple and the endowment, like the founder ; and that similarly after the sons the seniormost member of the family of the founder would be the manager of the endowed property. The parties have, in their pleadings, also described the manager of the endowed property as manager, 'karkun', or 'mutwalli'.

According to the appellant's case Brij Lal and Kedar Nath managed the temple and 'waqf' property, Kedar Nath and Mangal Das became 'mutwallis' one after the other and he himself became 'mutwalli' after the death of Mangal Das. The term 'mutwalli' also conveys the idea of a superintendent, an administrator or procurator of any religious or charitable foundation. The appellant or anyone else never described the founder or those who held the office after him as 'shebait'. On the other hand, the form of their designation goes to show that they were treated as bare managers. Admittedly, none of them had any personal interest of a beneficial character in the endowed property. Their position was analogous to that of a manager of a temple as explained in Ramanathan Chetti v. Murugappa Chetti, 33 Ind App 139 (P.c.). It must, therefore, be held that there was no 'shebait', in the legal sense of the term, of the endowment created by Brij Lal.

35. Having regard to the nature of the right of a 'shebait' in Hindu Law, it has been held in Manohar v. Bhupendranath, 60 Cal. 452 (F.b.), that 'shebaitship' is property within the meaning of Hindu Law and a hereditary office. The same thing, however, cannot be said of the managership f a temple or an endowment.

36. No authority has been cited before us to show that any order of succession to the office of a manager, which is inconsistent with the rule of succession laid down by the Hindu law, cannot be given effect to.

37. In Juttendro Mohun Tagore v. Ganendra Mohun Tagore, it was held 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 no person can succeed thereunder as heir to estates described in the terms which in English law would designate estates tail. The rule laid down in Tagore v. Tagore is, no doubt, applicable to a hereditary office like that of a 'shebait' but it cannot be made applicable to succession to the office of a bare 'manager'.

38. In this case, it had been admitted that the succession, to the office of a manager of the temple has been in accordance with the terms of the deed of 'waqf'. The appellant has stated that after Mangal Das's death he became 'mutwalli' by virtue of his being the seniormost son or descendant in the family of Brij Lal. This has been the position for over 50 years and it can now be treated ag a usage which should govern the future succession to the office of the manager of the endowment made by Brij Lal.

39. It has been found by the Court below, and the finding has not been disputed before us, that Raghunath Das (plaintiff 2) is the seniormost male member of the family now alive,

40. Whether Raghunath Das is entitled to succeed to the managership of the endowment depends upon the proper interpretation of the phrase "khandan main aulad-i-akbar" which occurs in the deed of 'waqf'. Learned counsel for the appellant has contended that the expression does not necessarily mean "seniormost member of the family" but it means "eldest in the eldest branch". The word "khandan" cannot be confined to the family of the elder son only. When Brij Lal used that word he obviously intended to refer to his own family, so as to include all the branches of his family. Brij Lal clearly laid down in the deed that after his death his two sons should jointly and severally be responsible for the administration and management of the endowment ; but as ill-luck would have it, his elder son predeceased him and the younger son did not feel much interested in the endowment and even instituted a suit to have the 'waqf' set aside. Thereupon, Brijlal himself selected the then eldest among his male descendants, who happened to be of the senior branch to act as manager of the endowment. The same position continued even after the death of the person so selected by Brij Lal.

It is now that a person in the junior branch is the seniormost male descendant in the family of Brij Lal. Consequently, the expression "khandan main aulad-i-akbar" must be interpreted to mean the eldest male descendant in the family of the founder. That is how the expression has all along been understood by the parties as their pleadings go to show. Raghunath Das has, therefore, been rightly found entitled to succeed to the managership of the temple and the endowment.

41. The next argument advanced on behalf of the appellant was that as Thakur Das did not enjoy 'shebaitship', he and his descendants lost their rights to hold that office. As 'shebaitship' never came into existence, this argument has got no force. The administration and management of the temple

and the endowed property has been, carried on by the persons nominated by the founder ; and the learned trial Judge has rightly pointed out that no question of adverse possession arises in the case.

42. Another contention put forward on behalf of the appellant is that the 'shebaitship, having devolved absolutely upon Mangal Das, after his death it must devolve on his heirs and not on the heirs of the founder. This contention would have had force if any office of shebaitship had come into existence when the endowment was created. But as already stated, 'shebaitship' never came into existence and the rule of succession, which governs succession to the office of 'shebait', cannot be made applicable to the office of the manager of an endowment.

43. The learned trial Judge was, therefore, perfectly justified in holding that Raghunath Das (plaintiff 2) was entitled to succeed to the managership of the temple and the endowment. As the defendant is in the possession and has been managing the endowed property, he is undoubtedly liable to render accounts. The decision of the Court below is, therefore, correct and must be upheld.

44. The appeal is accordingly dismissed with costs.