1951 INSC 31

SUPREME COURT OF INDIA

Angurbala Mullick

Vs.

Debabrata Mullick

(Saiyid Fazal Ali,J., B.K.Mukherjea and N.Chandrshekar Aiyar, M. C. Mahajan S. R. Dass, JJ)

03.05.1951

JUDGMENT

B.K.Mukherjea,J.,

1. This appeal is directed against an appellate judgment of the Calcutta High Court, dated the 19th May, 1950, which affirmed the judgment of a single Judge of the Original Side of that Court passed on 9th February, 1949, in Suit No. 2481 of 1947.

2. The plaintiff, who is the appellant before us, is the widow of one Mrityunjoy Mullick, a wealthy Hindu resident of Calcutta, while the defendant, who is still an infant, is the only son of Mrityunjoy born of his first wife Kiranbala, who died during the lifetime of her husband. The controversy between the parties centers round the short point as to whether the plaintiff is entitled, after the death of her husband, to act as shebait of an idol named Sree Sree Nitto Gopal Jew founded by Mrityunjoy and his mother, either solely of jointly with the defendant, her step-son.

3. To appreciate the points that have been canvassed before us in this appeal, it will be necessary to narrate a few antecedent facts about which there is no dispute between the parties. It may be stated here that neither side adduced any evidence before the trial judge during the hearing of the case and the questions raised in the suit were argued as questions of law turning on the construction of the indenture which created the endowment as well as of the provisions of the Hindu Women's Rights to Property Act (Act XVIII of 1937 as amended by Act XI of 1938).

4. It appears that one Dhananjoy Mullick, who was the adoptive father of Mrityunjoy, died on 28th of August, 1907, leaving behind him, his widow Nitto Sundari and the adopted son Mrityunjoy, who was then a minor. On February 11, 1910, Nitto Sundari obtained letters of administration to the estate of the deceased Dhananjoy limited during the minority of the adopted son. On June 13, 1920, the widow purchased a house property in the city of Calcutta - being premises No. 14, Syakrapara Lane - out of the monies belonging to the estate of her husband, and on October 10, 1934, she conveyed the said property to Mrityunjoy who had by that time attained majority.

On the very same day that this property was conveyed to Mrityunjoy, Nitto Sundari and Mrityunjoy together executed an indenture, by which certain properties described in Schedules A and B of the document and including premises No. 14 Syakrapara Lane, were dedicated to deity Nitto Gopal Jew. The indenture recites that Nitto Sundari had, with the consent and concurrence of her son, established and consecrated the said idol and located it in premises No. 14, Syakrapara Lane, and that she had been performing the worship and periodical festivals of the deity according to Hindu rites. The document lays down in detail the various rites, ceremonies and festivals of the idol that are to be performed daily or at specific periods, and the way in which the expenses necessary for these purposes are to be met from the income of the dedicated properties. A remuneration of 25 per cent. of the net income of the debutter property has also been provided for the shebait or shebaits for the time being. After declaring the various trusts, the indenture proceeds to provide for appointment of shebaits and for devolution of shebaitship in the following manner :-

> "That the said Sm. Nitto Sundari Dassi doth hereby constitute and appoint herself the shebait of the said Thakur for the during the term of her natural life and doth hereby declare that after her death her son the said Mrityunjoy Mullick shall become the shebait of the said Thakur and after his death his wife Sm. Kiranbala Dassi and after her death the heirs of the said Mrityunjoy Mullick shall be and act as the shebait or shebaits of the said Thakur and she doth hereby declare him or them such shebait or shebaits accordingly and doth hereby direct and declare that the daily worship and other periodical festivals and ceremonies of the said Thakur should be performed by such shebait or shebaits. Provided however that in case the said Mrityunjoy Mullick shall happen to die without any issue or without giving any authority to his wife him surviving, to adopt, then in such case it shall be competent for the said Mrityunjoy Mullick to appoint by will or otherwise a shebait who would act as such after the death of his said wife as aforesaid but in case the said Mrityunjoy Mullick shall happen to die without any issue the shebaitship of the said Thakur after the death of his wife shall devolve upon his heirs under the Hindu Law."

5. It is not disputed that Nitto Sundari acted as shebait till her death in 1938 and that after her death Mrityunjoy became the shebait. Kiranbala, the first wife of Mrityunjoy, who is referred to in the indenture as stated above, died on 14th January, 1942, leaving her infant son Debabrata, who is the defendant in the suit. Soon after her death, Mrityunjoy married the plaintiff Angurbala as his second wife and within five months after this marriage Mrityunjoy died one died on the 4th of July, 1942. The present suit was filed in the Original Side of the Calcutta High Court on 29th August, 1947, by Angurbala and she prayed for a declaration that she was the sole shebait of the deity under the terms of the indenture or, in the alternative, was entitled to shebaitship jointly with the defendant, she being a co-heir of her stepson under the provisions of the Hindu Women's Rights to Property Act. There was a further prayer claiming a right of residence in premises No. 14, Syakrapara Lane.

6. The written statement that was filed on behalf of the defendant denied the plaintiff's claim of shebaiti right, either exclusively in herself or jointly with the defendant, and asserted that the defendant was the sole shebait under the terms of the deed of endowment as well as

under law. The defendant also contended that the plaintiff was not entitled to any, right of residence in the premises mentioned above.

7. The learned trial Judge by his judgment dated 9th of February, 1949, held that the plaintiff was neither the sole shebait of the deity nor was she entitled to claim shebaiti rights jointly with the defendant and that the Hindu Women's Rights to Property Act was inapplicable to devolution of shebaiti rights at all. It was held further that as the plaintiff was not in law the natural guardian of the defendant, she could not claim to exercise the rights of a shebait on behalf of the defendant as his natural guardian so long as the defendant remained a minor. The learned Judge held, however, that the plaintiff's claim to a right of residence in premises No. 14, Syakrapara Lane, was well-founded and she was held entitled to relief in that respect. The result was that save and except giving the plaintiff a declaration of her right of residence in premises No. 14, Syakrapara Lane, all the other prayers of the plaintiff were dismissed.
Against this decision the plaintiff preferred an appeal which came up for hearing before an appeal Bench of the Calcutta High Court consisting of Sir Trevor Harries C.J. and Sinha J. The learned counsel appearing in support of the appeal did not seriously challenge that part of the decision of the trial Judge which negatived the plaintiff's claim to act as a sole shebait either under the terms of the indenture of endowment or as a guardian of the defendant during the period of his minority. The only question pressed was whether the plaintiff was entitled to be a joint shebait with the defendant. The learned Judges rejected this contention of the appellant primarily on the ground that the identical point was raised and considered by the Federal Court in Umayal Achi v. Lakshmi Achi [[1945] F.C.R. 1] and it was held there that succession to shebaitship was not in any way altered or affected by the provisions of the Hindu Women's Rights to Property Act. The appeal was thus dismissed and the plaintiff having obtained a certificate under article 133(1)(c) of the Constitution has now come up in appeal to this Court.

8. The substantial contention raised by Mr. Tek Chand, who appeared on behalf of the plaintiff-appellant, is that under the clause in the indenture relating to devolution of shebaitship, the shebaitship is to go to Kiranbala after the death of Mrityunjoy and after her death it is to vest in the heirs of Mrityunjoy. As Kiranbala died during the life-time of Mrityunjoy, the grant of the shebaiti right in her favour lapsed and the heirs of Mrityunjoy are, therefore, entitled to come in as the next shebaits after Mrityunjoy's death. Who these heirs are has got to be determined according to the law in force at the time when the succession opened and under the Hindu Women's Rights to Property Act, which came into force in the year 1937, the widow of a propositus, who dies intestate, would rank as an heir along with the son and would be entitled to the same share as a son gets in the property of the deceased. It is said that as shebaitship is property, it would devolve under section 3 of the Hindu Women's Rights to Property Act upon both the plaintiff and the defendant jointly. Assuming, however, for argument's sake, that the expression "property", as used in the Hindu Women's Rights to Property Act, does not include shebaiti right, it is argued by the learned counsel that it is a well-established proposition of law that succession to shebaitship is governed by the ordinary rules of inheritance in respect to secular property under the Hindu law, and as the Hindu Women's Rights to Property Act has amended the general law of inheritance in certain matters, the same alterations must be recognised in regard to succession

to shebaitship as well. A point was also raised by Mr. Tek Chand - though it was not pressed seriously - that the language of the indenture would go to suggest that in the matter of succession to shebaitship the wife of Mrityunjoy would have priority over other heirs. It is true that the document speaks only of Kiranbala, the wife of Mrityunjoy who is to come as shebait after his death; but it is argued that the word "Kiranbala" is merely descriptive of the word "wife" and whoever would happen to be the wife of Mrityunjoy at the date of his death, would be entitled to succeed to his shebaiti rights.

9. Mr. Shankar Banerjee appearing for the respondent stated at the outset that he would not dispute as a proposition of law that shebaitship is property of some kind, the devolution of which is governed, in the absence of any direction to the contrary given by the founder, by the ordinary rule of succession under the Hindu law. He contended however, that the Hindu Women's Rights to Property Act, which is a piece of special legislation enacted for a special purpose, does not use the expression "property" in a wide and unlimited sense; and it would appeal clear from the provisions of the different sections of the Act that it could not have had in contemplation, and does not purport to affect, the rules of succession relating to the special and somewhat anomalous type of property which shebaitship admittedly is. The learned counsel referred in this connection to the provisions of sections 3 and 5 of the Act as well as to the preamble which sets out its object, and considerable stress was laid upon the pronouncement of the Federal Court in Umayal Achi v. Lakshmi Achi [[1945] F.C.R. 1]. The other contention put forward by the learned counsel turns upon the construction of the relevant clause in the indenture referred to above which lay down the mode of devolution of the shebaitship, and his argument was that reading the clauses as a whole, it would be clear that the intention of the executants of the deed was that the "issue" of Mrityunjoy would succeed to him as shebaits in the first instance and that no other heir of Mrityunjoy basing his claim either upon general law or any special enactment would be entitled to become shebait so long as any issue of Mrityunjoy was alive. A further question relating to the construction of the deed, raised by Mr. Banerjee, was that the words "heirs of the said Mrityunjoy" occurring in the deed are to be construed not as words of devolution but of direct gift to the heirs under the deed and consequently the expression "heirs" must mean those who could legally claim as heirs at the time when the grant was made; and any subsequent change in the law could not affect the position.

10. We will first advert to and examine the provisions of the Hindu Women's Rights to Property Act and see whether the Act includes within its scope a property of such character as shebaitship is.

11. The exact legal position of a shebait may not be capable of precise definition but its implications are fairly well established. It is settled by the pronouncement of the Judicial Committee in Vidya Varuti v. Balusami [48 I.A. 302] that the relation of a shebait in regard to debutter property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of cestui que trust. In a Hindu religious endowment on the other hand the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person and the shebait or mahant is a mere manager. But though a shebait is a manager and not a

trustee in the technical sense, it would not he correct to describe the shebaitship as a mere office. The shebait has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of the shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus, in the conception of shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property. This was elaborately discussed by a Full Bench of the Calcutta High Court in Manohar Mukherji v. Bhupendra Nath Mukherji [I.L.R. 60 Cal. 452] and this decision of the Full Bench was approved of by the Judicial Committee in Ganesh Chunder Dhur v. Lal Behary [63 I.A. 448] and again in Bhabatarini v. Ashalata [70 I.A. 57]. The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasize the proprietary element in the shebaiti right, and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu law from an early date. "According to Hindu law," observed Lord Hobhouse in Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee [16 I.A. 137], '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 circumstances to show a different mode of devolution." Unless, therefore, the founder has disposed of the shebaitship in any particular manner - and this right of disposition is inherent in the founder - or except when usage or custom of a different nature is proved to exist, shebaitship like any other species of heritable property follows the line of inheritance from the founder.

12. Turning now to the Hindu Women's Rights to Property Act, it will be seen that the object of the Act, as set out in the preamble, is to give better rights to women in respect of property. Section 2 lays down :-

> "Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate."

13. Section 3(1) then provides :-

> "When a Hindu governed by the Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law....... dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son :

14. Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

15. Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son." Sub-sections (2) and (4) of section 3 are not material for our present purpose. Sub-section (3) lays down :-

> "Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate............"

16. Section 4 lays down that the Act is not to operate retrospectively. The only other section in the Act which has been referred to in the course of arguments is section 5 which runs as follows :-

> "For the purposes of this Act a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

17. It will be seen that section 3(1) abrogates the general rule of Hindu law according to which a widow succeeds to her deceased husband's property only in default of male issue and she is now entitled to the same share as a son along with or in default of male issue. Similar rights have been given by the two provisos attached to section 3(1) to the widow of a predeceased son and also to the widow of a predeceased son of a predeceased son. Section 3(1) speaks of "any property". The expression prima facie includes, unless something to the contrary can be spelt out from the other provisions of the Act, all forms or types of interest answering to the description of "property" in law. Of course, the property must be heritable property in respect to which alone the question of succession may legitimately arise.

18. Reliance has been placed by Mr. Banerjee, first of all, upon the object or purpose for which the statute was passed. The object, as set out in the preamble, is to give better rights to women in respect to property; in other words, the object of the legislation is to confer larger rights upon women in comparison to what they enjoyed under the ordinary Hindu law. In our opinion, the preamble does not throw any light on the question as to whether the Act does or does not include within its ambit rights and interest of a shebait.

19. Mr. Banerjee next invokes in support of his contention the provisions of sub-section (3) of section 3, which lays down that the interest devolving upon a widow under the provisions of the Act will be the limited interest known as the "Hindu woman's estate". It is argued that this distinction between the Hindu woman's estate and the unrestricted rights of a male heir can be predicated only of ordinary secular property, but this distinction is unmeaning when applies to shebaiti right, for the nature of the interest enjoyed by a male or a female shebait is exactly the same. This argument does not appear to us to be at all convincing. Precisely the same thing happens when the shebaiti right devolves upon a female heir under the ordinary law of inheritance. If a shebait dies leaving behind him a widow and no male issue, the

widow would succeed to shebaitship under ordinary law but her rights in respect of the shebaiti would be restricted in the same manner as they would have been if the successor was the son. This is because there are certain limitations and restrictions attached to and inherent in the shebaiti right itself and they exist irrespective of the fact as to whether the shebaitship devolves upon a male or a female heir. But although as regards powers of alienation the disability of the male and the female shebaits may be identical, there is yet a distinction between them as regards the other limitation or characteristic of a Hindu woman's estate. When Hindu female heir succeeds to the property of a male propositus, she cannot transmit the interest which she inherits, to her own heirs upon her death. The property goes after her death not to her heirs but to the heirs of the last male owner. This rule applies even when the right which devolves upon a widow is the right of a shebait. After her death the shebaiti right would not pass to her stridhana heirs but would go to heirs of the last shebait [Anuragi Kuer v. Paramanand, A.I.R. 1939 Pat.]. Sub-section (3) of section 3, therefore, is of no assistance to Mr. Banerjee's client.

20. Mr. Banerjee then contends that section 5 of the Hindu Women's Rights to Property Act affords a clear indication that the Act is intended to be applicable only to property in respect to which a testamentary disposition is possible. This section, it may be noted, was added by the amending Act XI of 1938 and the object apparently was to explain what is meant by "dying intestate". It says that for the purposes of the Act a person shall be deemed to die intestate in respect of all property of which he has not made a festamentary disposition which is capable of taking effect. Mr. Banerjee would read the section as qualifying the meaning of the word "property" as used in section 3(1) or rather as engrafting a limitation upon it. What he says is, that the language of the section would be wholly inappropriate if the Act is applicable to properties in respect to which, as in the case of shebaitship, no testamentary dispossession is possible. This argument, in our opinion, cannot be accepted as sound. Section 2 of the Act which has been referred to above makes the provisions of section 3 applicable only when a Hindu dies intestate. A person is ordinarily regarded as dying intestate when he has left no will disposing of his properties. A doubt might arise as to whether this Act would apply when a will was actually executed by a deceased, but for some reason or other it was incapable of taking effect and it was for the purpose of removing such doubt that this section was added by the amending Act of 1938. The language of section 5 of the Act is exactly the same as that of section 30 of the Indian Succession Act and the object underlying both these provisions appears to be identical. Mere execution of a will is not enough to exclude the operation of the Act. The will must be an operative will and if the will is void or incapable of taking effect, it would be deemed that the testator has died intestate. If the property is "non-testamentable", as Mr. Banerjee puts it, no testamentary disposition of such property is possible or could take effect in law and the testator must in such circumstances be deemed to have died intestate in respect of such property. Thus, there is nothing in any of the provisions of the Act from which an inference could be drawn that the expression "property" as used in section 3(1) has a limited or restricted interpretation and is not applicable to shebaitship, which is recognized as property in Hindu law.

21. Reference may now be made to the decision Federal Court in Umayal Achi v. Lakshmi Achi [[1945] F.C.R. 1], upon which the learned appellate Judges of the High Court

practically based their decision. The facts of that case stripped of unnecessary details are that one Arunachalam Chettiar who was a resident of Madras and owned considerable properties, moveable and immoveable, both within the outside British India, died leaving behind him two widows and the widow of a predeceased son. The deceased had left a will but the legacies given by the same exhausted only a small portion of his estate so that with regard to the rest which was of considerable value he died intestate. The deceased was in possession of several trust properties in regard to which there were certain religious and charitable trusts and the direction in the will was that the management of these trusts should devolve upon his heirs. The son's widow instituted a suit in the court of the Subordinate Judge at Devakottai for administration of the estate and for partition and separate possession of a half share of the same, basing her claim upon the Hindu Women's Rights to Property Act. The suit was resisted by the two widows as well as by the executors appointed under the will of the deceased and it was pleaded, inter alia, that the Hindu Women's Rights to Property Act was ultra vires the legislature and that in any event it was not applicable as the propositus did not die intestate. The trial court held first that the Act was not ultra vires and was operative on all properties with the exception of agricultural lands and this finding was affirmed by the High Court on appeal and also on further appeal to the Federal Court by the majority of the Judges of that Court. The second finding of the trial Judge was that the deceased died intestate with regard to a considerable amount of property and consequently the plaintiff was entitled to a half share thereof. The High Court affirmed this finding with this variation that her claim to moveable situated outside British India was not allowed but the Federal Court reversed the decision of the High Court on this point and restored that of the trial Judge. The other point and restored that of the trial Judge. The other point and that is the point with which we are concerned in the present case, related to the devolution of the trust estates which were held by the testator. Both the courts below concurred in holding that these trusts should go to the heirs of the deceased under the ordinary Hindu law and that the provisions of the Hindu Women's Rights to Property Act were not attracted to the trusts. This decision was upheld by the majority of the Judges in the Federal Court and that point was actually dealt with by Varadachariar J. in his judgment. The view expressed by the learned Judge is that the Hindu Women's Rights Property Act was intended to apply only to properties beneficially owned by the propositus and it was not applicable to rights in the nature of trusteeship. It seems to us that, property construed, this decision does not stand in the way of the appellant. In the first place, we do not know at all what he nature of these trusts was. The learned Judge observed himself in his judgment that there was little or no evidence as to the terms of the foundations in respect of any of the trusts "managed" by the deceased. This observation, taken along with the terms of the documents referred to in the judgment, would go to show that the deceased was a mere manager of the trusts and in respect of some of them at least he was the manager jointly with other persons. In the High Court, Sir Lionel Leach C.J. expressly held that in no sense could the trust properties be regarded as the separate property of the testator and consequently Act XVIII of 1937 could not apply to such a case. Varadachariar J. observed with reference to the documents relied upon by the learned counsel for the appellant that they only provided for "management by his heirs." At any rate, we have no materials to hold that in regard to the trusts that formed the subject-matter of that suit the trustees had any beneficial or personal interest in the trust properties. The indications, on the other hand, are clearly in the opposite direction. In these circumstances, no question arises in the present

case of controverting the proposition of law that Varadachariar J. purported to lay down, namely, that the Hindu Women's Rights to Property Act could not govern succession to property in respect to which the propositus had no beneficial enjoyment. It is not possible, however, to enunciate on the basis of this decision, a broad rule of law that succession to shebaitship, in which an element of beneficial or personal interest is normally involved would not be governed by the provisions of the Act. There are indeed one or two observations of the learned Judge in his judgment, not very definitely expressed, from which it is not impossible to draw an inference in favour of the respondent, but we think that they in favour of the respondent, but we think that they should be construed in the light of the facts and the actual decision in the case. The observation that Hindu law regards trusteeship as property for certain purposes is of a most general character and it has to be noted that not only the word "shebaitship" has not been used by the learned Judge but he does not even confine his remarks even to religious trusts. Moreover, trusteeship is not certainly equivalent to shebaitship. On the other hand, the reference made by the learned Judge to the limited objective of the Act affords an indication that he had in mind a trust of such a character where the trustee had no personal interest in the trust property. The object of the Act, as stated above, is to give better rights to women in respect of property. If a trusteeship, even if it is regarded as property, carries with it no emoluments or any beneficial interest for the trustee and consists of nothing else But a bundle of obligations and duties, it might possibly be said that the giving of share in such rights to a Hindu widow would not in any wan improve her position. But the position would be obviously different if there is a beneficial interest of a substantial kind inseparably connected with the duties of a particular office. They again, the learned Judge possibly used the expression "private property" in a somewhat loose sense as meaning personal property in respect to which the proprietor has a beneficial interest of his own. The reference to section 3(3) of the Hindu Women's Rights to Property Act is, as we have indicated already, not much helpful for the purpose of construing the Act. After all, we must take the decision as it stands and it is not right to call into aid a particular reason assigned by the learned Judge, for the purpose of carrying the decision beyond what it actually purports to lay down. We think that a very proper view of the effect of this decision of the Federal Court has been taken by a Division Bench of the Madras High Court in P. Suryanarayanacharyulu v. P. Seshamma [A.I.R. 1950 Mad. 103]. There the question arose in connection with the rights associated with the office of archakatvam, which is a hereditary religious office and the holder or holders of it for the time being are beneficially entitled to enjoy the income of the endowed property. It was held that the principle laid down by the Federal Court in Umayal Achi v. Lakshmi Achi [[1945] F.C.R. 1] has no application to a case relating to the office of archakatvan. It is pointed out by the Madras High Court that though the observations of the learned Judge in the Federal Court are wide, the decision proceeded only on the main ground that the Act governs succession to property beneficially owned by the propositus. In our opinion, the same reasons apply to the case of the hereditary shebait of a private debutter, particularly where, as in the present case, 25 per cent. of the net income of the endowed properties has been given to the shebait of shebaits for the time being as their remuneration. Our conclusion, therefore, is that there is nothing in any of the provisions of the Hindu Women's Rights Property Act which excludes from the scope of operation of the Act succession to shebaitship is a recognized form of property in Hindu Law.

22. Assuming that the word "property" in Act XXIII of 1937 is to be interpreted to mean property in common and ordinarily accepted sense and is not to be extended to any special or peculiar type of property, even then we think that the other contention of Mr. Tek Chand is perfectly sound. Succession of shebaitship, even though there is an ingredient of in it, follows succession to ordinary or secular property. It is the general law of succession that governs succession to shebaitship as well. While the general law now been changed by reason of Act XVIII of 1937, there does not appear to be any cogent reason why the law as it stands at present should not be made applicable in the case of devolution of shebaitship.
The last contention of Mr. Tek Chand that under the indenture itself the wife of Mrityunjoy and Kiranbala particularly has been given rights of succession to shebaitship prior to any issue of Mrityunjoy manifestly untenable and as the learned counsel was not at all serious in pressing this point, we consider unnecessary to discuss it any further.

23. It remains for us now to advert to and consider the other contentions raised by Mr. Banerjee which depend upon the construction of the relevant clauses in the indenture. It may be stated at the outset that we are not at all impressed by the argument of the learned counsel that the words "heirs of the said Mrityunjoy" occurring in the document are to be construed as words not of inheritance but of grant. Such construction would be against the language and the whole tenor of the document. It is to be noted that Mrityunjoy was the owner of the dedicated properties and the real founder of the endowment. The mother was associated with him in the act of dedication because it was she who consecrated and established the deity and was looking after its worship and service since it was installed. It was in the fitness of things therefore that Mrityunjoy should request his mother to become the first shebait and this is exactly what is recited in the indenture. After the death of Nitto Sundari, Mrityunjoy, the founder, himself, was to be the shebait and save and except the provision made in favour of Kiranbala, his existing wife, the devolution of shebaitship has been directed to be in the line of heirs of the founder. There is no indication of any intention to treat the heirs as the objects of an independent gift. It may be noted that this identical point was raised before the Federal Court in Umayal Achi v. Lakshmi Achi [[1945] F.C.R. 1] with regard to the devolution of trust estates. The direction in the will in that case was that they should go to the heirs. It was held by Varadachariar J. that it was not reasonable to construe such words as words of gift and not of devolution.

24. On the question of construction Mr. Banerjee's main argument is that if the relevant provisions of the indenture dealing with devolution of shebaitship are read as a whole, it will be manifest that the executants of the deed intended that the issue of Mrityunjoy were to have preference over other heirs in the matter of succession to shebaitship; and that an heir who is not an issue could not come in so long as an issue remained alive. The relevant portion of the document has been set out already and it provides in the first place that after the death of Nitto Sundari, her son, the said Mrityunjoy Mullick, shall become the shebait, after him his wife Smt. Kiranbala Dassi, and after her death, the heirs of the said Mrityunjoy Mullick shall be and act as shebaits. Then there is a proviso to the effect that if the said Mrityunjoy shall happen to die without any issue or without giving any authority to his wife, him surviving, to adopt, then in such case it shall be competent for Mrityunjoy to appoint by will or otherwise

a shebait who would act as such after the death of the said wife; but in case the said Mrityunjoy Mullick shall happen to die without any issue, the shebaitship of the said Thakur after the death of his wife shall devolve upon his heirs under Hindu Law. Mr. Banerjee lays stress upon the proviso, particularly the last portion of it and it contains, according to him, a clear direction that it is only on the failure of issue that the heirs of Mrityunjoy can come in as shebaits. In order that the proviso may be reconciled with the clause that precedes it, Mr. Banerjee invites us to hold that the word "heirs" in the previous clause should be taken to mean only the issue of Mrityunjoy.

25. We do not think that the interpretation suggested by the learned counsel is the proper one. A proviso is normally an excepting or a qualifying clause and the effect of it is to except out of the preceding clause upon which it is engrafted something which but for the proviso would be within it. The word "heirs" cannot normally be limited to issue only. It must mean all persons who are entitled to the property of another under the law of inheritance. So far as the main provision is concerned there is nothing in the language or in the context to suggest that the word "heirs" has not been used in its ordinary or natural sense. Mr. Banerjee argues that the proviso in that case would be wholly inexplicable whereas it is a sound canon of construction that all the parts of a document should be read together and no portion is to be omitted. In our opinion, the clause that precedes the proviso lays down the general rule relating to devolution of shebaitship. The expression "heirs" has not been used in any restricted or limited sense and extends to all persons who are entitled to succeed under the law. The proviso engrafts an exception upon the general rule. What it does is to give a power to Mrityunjoy to appoint a shebait, who would come as such after his death in the contingency of his dying without any issue and without giving any authority to his wife to adopt a son. It may be noted that the word "issue" includes both son and daughter and the power of appointment cannot be exercised by Mrityunjoy even if he has a daughter living. The proviso thus qualifies the main provision to this extent that if the particular contingency that is mentioned here is fulfilled, Mrityunjoy would be entitled to appoint a shebait, although no such power can be deduced from the general clause. In case the contingency does happen but the wife is not given any power of adoption and no appointment is also made by Mrityunjoy, the consequence would certainly be that the other heirs of Mrityunjoy would succeed as shebaits and this is what is laid down in the concluding portion of the proviso. The expression "his heirs" at the end of the proviso would certainly mean heirs other than the son and daughter of Mrityunjoy. As Mrityunjoy actually left a son, the contingency contemplated by the proviso did not arise at all and in these circumstances the proviso is to be ignored altogether for purposes of construction and it is not proper to attempt to spell, out of it, by implication, something which is not only not in the main provisions but is contradictory to