CALCUTTA HIGH COURT

Nirmal Chandra Banerjee

Vs

Jyoti Prosad Bandopadhya

(B.K. Mukherjea ,J.)

12.03.1941

JUDGMENT

B.K. Mukherjea, J.

1. These two connected appeals are on behalf of defendants 1 and 2, and both of them arise out of one suit commenced by the plaintiff for a declaration that he was a validly appointed shebait of an idol named Sri Dhar Jew under a niyoga patra executed by a previous shebait. The plaintiff further prayed for the removal of defendants 1 and 2 who were the two existing shebaits of the idol from their office on grounds of misappropriation and neglect of duties, and claimed accounts against them. The facts are rather long, and so far as they are necessary for purposes of the present appeals, may be stated as follows : There is an idol named Sri Dhar Jew which was the ancestral family deity of one Harish Chandra Banerjee, a Hindu inhabitant of Bhadrakali in the district of Hooghly. Harish Chandra died, leaving behind him his three sons, to wit, Bidhu Bhusan, Priyanath and Karunamoy, and a grandson by a predeceased son named Kumud. In the year 1890 there was a deed of partition amongst these sons and grandson of Harish Chandra and by that document a property yielding an annual income of Rs. 26 was set apart for the seva and worship of the deity, and it was further provided that these four persons would carry on the worship by turns Bidhu Bhusan held the post of a Subordinate Judge and was childless. He erected a pucca ghat and a pucca thakurbari at his own expense for the location of the deity, and he himself performed the pujas so long as he was alive. Bidhu Bhusan died in 1909, leaving behind him a will by which he gave a sum of Rs. 10,000 for the worship of the idol and appointed three persons as its shebaits, namely Harimohan (a son of Priyanath and a pro forma defendant in this suit), Nirmal, (defendant 1, who was a son of Karunamoy) and Nihar Ranjan (a son of Kumud, the nephew of the testator, who was the father of Tushar Ranjan, defendant 2 in this suit). The relationship between these persons and the testator would be clear from the pedigree that is set out in the judgment of the trial Court and which is to be found at page 2 of the paper-book.

2. The will of Bidhu Bhusan further provided that each shebait would have the power to nominate a successor in his absence, and if any shebait died without exercising the powers of nomination, the eldest among his heirs would be the shebait. Bidhu Bhusan left the bulk of his properties to Harimohan who took out letters of administration with a copy of the will annexed in November 1909. After taking possession of the assets, Harimohan advanced the sum of Rs. 10,000, which was bequeathed to the deity, as a loan to one Suresh Chandra Mukherjee, a zemindar of Uttarpara, on a promissory note which was taken in the name of Hari Mohan personally, but was later on endorsed by him in favour of all the shebaits. In 1913 a deed of agreement was executed by the three shebaits by which it was agreed by and between them that the worship of the deity would be carried on by rotation and each shebait would have his turn of worship every threeyears. Hari Mohan has been described in the plaint as a man of immoral habits, who was heavily involved in debts and was living a life of shameless profligacy. He sold the house which he got under Bidhu Bhusan's will to the plaintiff's wife, and on 11th August 1925, he executed a niyoga patra or a deed of appointment by which he purported to relinquish his rights as a shebait and appointed the present plaintiff Jyoti Prosad Banerjee as a shebait in his place. The plaintiff, it may be stated here, is not a member of the family of Harish, though his mother happened to be a cousin sister of Nihar's mother. Hari Mohan severed his connexion with the debuttar estate after executing the deed of appointment, and the plaintiff says that he immediately took over possession of the deity and began to perform the pujas and the ceremonies.

3. In 1927 Nihar Ranjan died and defendant 2, Tushar, succeeded to his rights as a shebait under the terms of Bidhu Bhusan's will. It appears that defendants 1 and 2 wore not willing to admit the plaintiff as a shebait of the family deity, and they ignored him altogether in their dealings in connexion with the deity's property. On 2nd April 1928, defendants 1 and 2 instituted a suit in the name of the idol in the Court of the Subordinate Judge at Hooghly against Jaharlal and Pannalal, the sons and heirs of Suresh, for recovery of a sum of Rs. 11,000 odd alleged to be due on the hand note executed by Suresh in favour of Harimohan in 1909. The plaintiff Jyoti Prosad was not made a party to the suit, nor did he make any attempt to be added as a co-plaintiff. The trial Court dismissed the suit, holding that the money did not belong to the deity, and consequently, the suit as framed was not maintainable. There was an appeal taken against this decision by defendants 1 and 2 to this Court. That appeal was allowed, and the case was sent back to the trial Judge to be tried on its merits. Defendants 1 and 2 however did not proceed with the suit any further, and it was dismissed for non-prosecution on 12th August 19 It appears further that on 23rd July 1935 there were two bonds executed by Jaharlal and Pannalal, the two heirs and sons of Suresh, each for a sum of Rs. 6000 in favour of one Nirod Chandra Chatterjee, who is a son-in-law of Nirmal, defendant l. The plaintiff's case is that the two defendants in clear violation of

their duties as shebaits entered into a fraudulent arrangement with the debtors and misappropriated the whole amount, that the latter owed to the deity, by taking these bonds in the name of a benamidar of theirs, and subsequently allowed the suit to be dismissed for default. It was further alleged that defendants 1 and 2 neglected their duties as shebaits and did not pay the expenses of the worship of the idol or repairs of the temple which were being borne by the plaintiff entirely out of his own pockets. Defendant 2 was further alleged to have turned insane and hence incapable of discharging his duties as shebait. On these allegations the plaintiff prayed that defendants 1 and 2 might be removed from their office as shebaits and he might be declared to be the sole shebait of the deity on the strength of the deed of appointment executed by Harimohan. He also claimed accounts against defendants 1 and 2 for their respective periods of shebaitship.

4. The defence of the defendants in substance was that the plaintiff was a trespasser and that the niyoga patra upon which he relied was an invalid document which could not, in law, give him the rights of a shebait. They denied the charges of misappropriation and neglect of duty, and asserted that the money suit was not prosecuted by them, acting under proper legal advice, and that there was nothing dishonest or mala fide in their conduct. It may be stated here that Nirmal, defendant 1, himself brought another suit (being suit No. 1 of 1937) against Jyoti Prosad to which Harimohan was also made a party defendant. He prayed in that suit for a declaration that the niyoga patra was a void and inoperative document and Jyoti Prosad being an outsider had no rights to have the custody of the idol. He further prayed for the removal of Harimohan as a shebait on the ground that by executing the niyoga patra he really sold his religious office to Jyoti Prosad.

5. Both these suits were heard together by the Subordinate Judge, First Court, Hooghly, who by his judgment dated 5th June 1937, dismissed the suit brought by Jyoti Prosad, and decreed the other suit which was filed by Nirmal as plaintiff. The Subordinate Judge took the view that the niyoga patra executed by Harimohan was an illegal and inoperative document which could not confer upon Jyoti Prosad the status of a she-bait. Against these decrees there were two appeals taken by Jyoti Prosad to the Court of the District Judge at Hooghly. The District Judge by his judgment dated 7th January 1938 allowed the appeal preferred against the decree in suit No. 4 of 1937 and dismissed that suit in its entirety, holding that the niyoga patra of Harimohan was a valid document by which Jyoti Prosad was legally appointed a shebait of the deity in place of Harimohan. By the same judgment the other appeal was allowed and the case was sent back to the Subordinate Judge for determination of the question as to whether Nirmal and Tushar had abused the trust imposed on them. After the Subordinate Judge had recorded his findings on that point, the appeal was disposed of by the District Judge by his judgment dated 23rd December

1938. The plaintiff's suit was decreed; he was declared to have been validly appointed a shebait, and both the defendants were removed from their office: defendant 1 on the ground of his having committed a breach of trust and defendant 2 on account of his lunacy. The District Judge further ordered that defendant 1 was liable to account to the plaintiff, his co-trustee, and the case was remanded to the Subordinate Judge for the purpose of taking accounts for such period as was not barred by limitation. It is against this judgment that Second Appeal No. 481 of 1939 is directed.

6. After the case went back for inquiry into accounts, the Subordinate Judge by his order dated 1st December 1939 directed that a commissioner should be appointed to examine the accounts and ascertain the liability of defendant 1 for the period of his shebaitship from 13th February 1909 till 23rd December 1938, and accounts were directed to be taken not merely on the basis of what the defendant received and spent out of the debutter property, but on the basis of the loss which the deity sustained through his negligence or wilful default. An appeal was taken against this order by Nirmal which was disposed of by the District Judge on 4th April 1940. It was held that the period of accounting should be from 15th April 1911, and not from 13th February 1909, as directed by the Subordinate Judge. The District Judge was further of opinion that the trial Court was not right in directing accounts to be taken on the basis of wilful default when no such case was made in the suit. The case was again sent back in order that further evidence might be taken by the trial Court and the basis of accounting properly determined. It is against this order that Second Appeal No. 830 of 1940 has been taken to this Court.

7. The points that have been taken by Mr. Hiralal Chakravarti who appears in support of these appeals are really of a three-fold character. The first point taken is that in the suit as framed no relief by way of removal of the shebaits or for accounts against them consequent on such removal could be granted. The second ground urged is that on the facts found no case of removal of either of the two defendants has been made out, and that the Court of appeal below erred in law in holding that subsequent lunacy of a shebait would cause forfeiture of his rights. The third ground taken relates to the question of accounting, and it is argued that defendant 1 is not accountable in law to the plaintiff; and if accounts are to be taken at all, they should be taken not on the basis of wilful default nor for the entire period of his shebaitship. I will take up these three points one after another. As regards the first point, the contention of Mr. Chakravarti is that a shebait can be removed only at the instance of the deity, but the present suit is neither in form nor in substance one on behalf of the idol. It is said that the plaintiff who is one of the shebaits cannot in law represent the deity, and from the pleadings of the parties it would be clear that the dispute was in the nature of a scramble for power between rival shebaits neither of whom can be said to be a representative of the idol. This contention really involves two questions: (1) whether the plaintiff being one of the three shebaits can, in law represent the deity, and (2) even if he can,

whether the present suit is one by the deity, or by a shebait as such to establish his own rights with regard to the endowment.

8. On the first question, I am of the opinion that Mr. Chakravarti's contention cannot succeed. It is well settled that when the right to sue is vested in several trustees or shebaits all of them form, as it were but one body and they must exercise the powers of their office jointly. Ordinarily, therefore, all the trustees or shebaits should, if possible, join as co-plaintiffs in a suit which is brought on behalf of the deity and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs: vide Bechulal v. Oliullah ('85) 11 Cal 338, Kokilasari Dasi v. Rudra-nand Goswami ('07) 5 CLJ 527; land Norendra Nath v. Atul Chandra ('18) 5 AIR 1918 Cal 810, which was approved by the Privy Council in Baraboni Coal Concern Ltd. v. Gokulananda Mahanta Thakur .

9. This principle cannot obviously be invoked in the present case. Here the suit was to remove two of the shebaits from their office on grounds of misappropriation land breach of trust. It would be absurd to suggest that the two defendants, against whom charges of misfeasance and neglect of duties were made, should be invited to join as plaintiffs in the suit. A case like this would come within the exceptions which are recognized in the decisions mentioned above, and it must be held that in view of the nature of the suit and the allegations made in the plaint, it would not be possible to bring together all the shebaits as plaintiffs in the suit. Moreover, as according to Mr. Chakravarti the right to sue in such a case is vested in the deity and not in the shebait, the deity can certainly sue through any person as next friend who has no in-interest adverse to it, and it is immaterial that the next friend happens to be one of its shebaits: vide Jodhi Rai v. Basdeo Prosad ('11) 33 ALL 735. I hold therefore, that the suit is not defective merely because all the shebaits of the deity did not appear as plaintiffs, and it could not be held to be defective even if it was found later on that the charges brought against one or both of the defendants shebaits were not well founded. The material question, however, is whether the suit has been really brought by the deity through the plaintiff as shebait, or it is a suit by the shebait himself. The description of the parties as given in the heading of the plaint undoubtedly supports the contention of Mr. Chakravarti; for the plaintiff is not the deity Sridhar Jew, suing through one of the she-baits; but it is Jyoti Prosad Banerjee, describing himself as one of the shebaits of the deity, who figures as the plaintiff in the suit, and the defendants also are described as shebaits of the same deity. The form however is not conclusive, and it is necessary that we should look more closely into the. allegations made in the plaint : vide Radha Binod Mandal v. Gopal Jiu Thakur .

10. Paragraph 1 of the plaint gives the early history of the debutter and recites the will of Bidhu Bhushan which appointed three persons as shebaits and empowered them to nominate their successors in their absence. Foundation is thus laid in this paragraph for introducing the story of

the appointment of the plaintiff himself as a shebait by Harimohan. Paragraphs 2 and 3 set out the facts relating to the advance of Rs. 10,000 as a loan by Harimohan to Suresh and the subsequent endorsement of the promissory note in favour of all the shebaits and the payment of interest by Suresh on the same. In paragraph 4 we have an account of the execution of the niyoga patra by Harimohan in favour of the plaintiff which constitutes the foundation of the plaintiff's title. In paragraphs 5 and 6 the plaintiff avers that after he was appointed a shebait the other shebaits did not join with him in worshipping the deity or making repairs of the temple and the plaintiff had to carry on these expenses from his own pockets. In the remaining paragraphs in the plaint are contained the facts relating to the dismissal of the money suit by defendants 1 and 2 against the heirs of Suresh for non-prosecution and the allegation of misappropriation against defendants 1 and 2, who were said to have misappropriated this entire money due to the deity. The other acts of neglect of duty for which the defendants were sought to be removed from their office as shebaits were also set out in these paragraphs. The prayers were, in the first place to establish the plaintiff's rights as a shebait on the basis of the niyoga patra executed by Harimohan and, in the second place, to remove defendants 1 and 2 from the shebaitship on grounds of misappropriation and neglect of duties. The other prayers were consequential in their nature; the plaintiff claimed a declaration that he was the sole shebait of the deity and also demanded accounts against the defendants consequent on their removal. From the allegations and the prayers set out above it is quite apparent that the suit is not really one on behalf of the deity, but it is the plaintiff Jyoti Prosad who is seeking to establish his rights against his co-shebaits and demanding their removal on grounds of misfeasance and abuse of trust. So far as the plaintiff's prayer for a declaration of his title as shebait is concerned, there is no defect whatsoever in the frame of the suit, and the whole question narrows down to this as to whether the prayer for removal of the other shebaits and the demand of accounts against them are maintainable at the instance of a co-shebait when the deity is not a party to the suit.

11. It is settled law that any person interested in the endowment can bring a suit to recover the idol's property for debutter purposes. In the case of a private endowment a co-shebait or one who is entitled to become a shebait after the present incumbent, or a member of the family may sue to set aside an alienation of the office or of the endowed property illegally made : vide G. Sastri's Hindu Law, 8th Edn., p. 696. In Manohar Mukerjee v. Peary Mohan ('20)7 AIR 1920 Cal 210, which was affirmed by the Privy Council in Peary Mohan v. Manohar Mukerjee ('22) 9 AIR 1922 PC 235 one of the heirs of the founder was held entitled to invoke the assistance of the Court for proper administration of the debutter property and for removal of the existing shebait, even though the deity was not made a party to the suit. A shebait is certainly a person interested in the endowment, and if he can institute a suit to bring back to the debutter any property of the idol which was illegally alienated by his co-shebait, there is no good reason, in my opinion, why

he cannot in the same capacity maintain a suit in the interests of the endowment itself for removal of a shebait from his office on the ground of misappropriation of the deity's money and for recovery of the money that might be illegally retained by the latter. It is true-that the plaint has not been very artistically drawn up and the plaintiff in the present ease does not expressly say that he is suing in the capacity of a person interested, and the frame of the suit might suggest, at first sight, that it was a dispute between the shebaits inter se. But as the material allegations are all in the plaint it would be only a question of amendment, and this could have been allowed had the defendants raised this question pointedly at the earliest opportunity. We feel reluctant to throw out the suit on this ground alone if the facts, established by evidence, entitle the plaintiff to any relief against the defendants, in the interests of the endowment itself. The first contention of Mr. Chakravarti is, therefore, overruled. The next point for our determination is whether on the facts admitted and found, the District Judge was justified in making an order of removal against either or both of the defendants. The allegations of the plaintiff upon which he sought to remove both the defendants from their office as shebaits are of a two-fold character. The first accusation against them was that they had neglected their duties as shebaits, and the second charge was that they had actually misappropriated the moneys due on the handnote of Suresh by realizing them from the two sons of the latter and then allowing the money suit which was remanded by this Court to be dismissed for default.

12. On the first point the finding of the District Judge is in favour of both the defendants, and it is held expressly in the judgment that no case of removal was made out on the ground of non-performance of the devseva. On the other point, the finding is that though Nirmal did not actually receive the moneys due on the handnote of Suresh, and consequently could not misappropriate the same, yet it was a grossly improper act on his part to get two bonds executed by the two sons of Suresh in favour of his son-in-law, who was nothing but a benamidar of his, and then to allow the money suit against the debtors to be dismissed for non-prosecution. This was con-duct which fell far below the standard of rectitude and accuracy which is expected from a trustee of charitable funds, and justified the removal of defendant 1 from his position of trust.

13. With regard to Tushar, defendant 2, it was expressly found that no case of misappropriation or abuse of trust was established against him, but it was held that he forfeited the rights of a shebait on account of his having become a lunatic in the year 1933. As regards Nirmal, Mr. Chakravarty argues that even if he took the bonds in the name of his son-in-law, there was no dishonest object behind it and he did it only to spite the plaintiff Jyoti Prasad whose claims he was resisting all along. Mr. Chakravarty says that the intention of Nirmal was not to deprive the deity of the money but only to prevent the money from falling into the hands of Jyoti Prasad whom his clients could not but look upon as an arrant trespasser. It is true that Nirmal did not

recognize the validity of the niyoga patra by which a stranger to the family was appointed a shebait, and there were considerable doubts also, till the matter was decided by this Court, as whether according to the terms of Bidhu's will a shebait could hand over his rights to a nominee during his own lifetime.

14. Jyoti Prasad, it seems, was not at first very sure of his position and for some years at least he avoided raising the question of his shebaitship in any Court of law. He had one advantage over his co-shebaits, viz., that he had got possession of the deity from Harimohan and also the thakurbari which was close to his residence. Jyoti Prasad, as I said above, did not join in the money suit which was instituted by Nirmal and Tushar in 1928, although three years had already elapsed from the date of the execution of the niyoga patra, and if the evidence of Joharlal Mukherjee is to be believed, he assisted the debtors during the progress of the suit in the trial Court. It was in 1935 after the money suit was allowed to be dismissed for default, that Jyoti Prasad came to Court for establishment of his rights as a shebait and for removal of his co-shebaits. But whatever strained feelings there might exist between Nirmal and Jyoti Prasad, it is difficult to see how the taking of the two bonds in the name of his benamidar could at all help Nirmal in resisting the claims of Jyoti Prasad or preventing the money from falling into the hands of the latter. Jyoti Prasad was either a legally appointed shebait or he was not. If he was legally a shebait, Nirmal had no right to prevent him from having the custody of the deity's property along with his co-shebaits, while on the other hand, if he was a trespasser, Nirmal would have been entirely within his rights if he refused to hand over the money to Jyoti Prasad till the rights of the latter wore established in a Court of law. We have no hesitation, therefore, in agreeing with the Court of appeal below that the conduct of Nirmal was grossly improper and amounted to an abuse of his fiduciary position. It is true, as has been pointed out by Mr. Chakravarty, that Nirmal had acted throughout the earlier stages of the litigation in a perfectly honest and conscientious manner and it may be that if he had been dishonestly inclined, he could have entered into some dishonest compromise with the debtors after the trial Court dismissed the suit and an appeal was pending against that decision in this Court. It would be difficult to speculate on his motives, but when on the face of it the transaction was improper, it was for Nirmal to offer an explanation. Far from offering an explanation he denied that the bonds taken in the name of his son-in-law had any connexion with the debutter money and he attempted to justify his non-prosecution of the suit on the ground that he had no funds in his hands to carry on the litigation, and moreover, that he was advised by his lawyers that the suit was bound to be dismissed on the ground of limitation. The fact that there was no actual misappropriation and that the deity has not actually suffered any loss are no doubt pertinent matters for consideration for deter-mining the extent of Nirmal's liability to account, but they cannot, in my opinion, justify the reversal of the order of removal that has been passed by the District Judge. It is pointed out to us by Mr. Chakravarti that

Nirmal has already resigned hence there is no necessity of removing him by any order of the Court. We are not concerned with the question of his resignation in this appeal at all, and whether or not he has resigned, the order of removal must stand.

15. We now come to Tushar, the other she-bait, and an interesting question of law arises as to whether a shebait who was of sound mind when the shebaitship devolved upon him, loses his rights by subsequently becoming insane. The District Judge was of opinion that subsequent lunacy of a shebait would cause a forfeiture of his rights, and in support of his proposition he relied upon a passage in Sir Dinshaw Mulla's well known Treatise on Hindu Law where the learned author stated the law on the point in the following manner:

In the case of temples the ideal person is the idol itself; in the case of maths, the ideal person is the office of the spiritual teacher, Acharjya, which, as it were, incarnate in the person of each successive Swami or head of the math. The difference in the character of the juridical person in the ease of temples and in the case of maths, leads to this result that while the shebait of a temple forfeits his position as such by reason of his lunacy, the head of a math does not.

16. This statement of law is based entirely on the pronouncement of the two learned Judges of the Madras High Court in Vidya Purna Tirtha Swami v. Vidya Nidhi Tirtha Swami ('04) 27 Mad 435. In that case the title of the plaintiff to the headship of a mutt depended on the question as to whether on the date when the plaintiff was said to have been appointed, there was a vacancy in the office by reason of the then head of the mutt (who was defendant 1 in the suit) having become a lunatic. If the lunacy of the mohunt was a ground of forfeiture of his rights, the plaintiff would succeed in the suit, assuming that the person who appointed him had the requisite authority to make the appointment, but if, on the other hand, there was no vacancy on account of the lunacy of mohunt the plaintiff's suit would fail. The trial Court held that there was no vacancy even if the mohunt had become insane and this decision was upheld by the High Court on appeal. The legal position of the head of a mutt was elaborately discussed by the two learned Judges (Sir Subrahmania Ayyar, Ag, C. J. and Bhasyam Ayyangar J.) who heard the appeal and delivered separate but concurring judgments. It was held that the head of a mutt was not a mere trustee but a corporation sole having an estate for life in the permanent endowments of the mutt and an absolute property in the income derived from the offerings, and the lunacy of a mohunt would not occasion a forfeiture of his rights. The question whether the same principle would be applicable to the case of a shebait of a temple was not; a matter for consideration in the case at all. But there are certain observations of the learned Judges in their respective judgments to the effect that in the case of a temple the juridical person being the idol itself, the custodian of the temple, who has no beneficial interest in the endowment but occupies the fiduciary position of a mere manager, might not improperly be looked upon as subject to the strict liabilities of a trustee.

This was said, and that in a very guarded manner with regard to dharmakartas or panchayats and the expression "shebait" itself was not used in the judgments. In my opinion, these observations which certainly cannot rank above an obiter could not be taken to be any pronouncement by the learned Judges on the legal position of a shebait of a religious endowment. The distinction between a dharmakarta and a shebait or mohunt was pointed out by the Judicial Committee in Srinivasa Chariar v. Evalappa Mudaliar ('22) 9 AIR 1922 PC 325, where it was said that the position of a dharmakarta was not the same as that of a shebait of an institution or the mohunt or head of a mutt. "These functionaries," their Lordships observed, "have a much higher right with larger powers of disposal and administration and they have a personal interest of a beneficial character." The decision in Vidya Purna Tirtha Swami v. Vidya Nidhi Tirtha Swami ('04) 27 Mad 435 was cited with approval in the judgment. I think therefore that the decision in the above case cannot be regarded as an authority for the proposition that a shebait of a private religious endowment loses his rights as soon as he becomes insane.

17. In my opinion nothing turns upon the fact that in the case of a property dedicated to an idol the juristic person is the deity himself in whom the property is vested and the shebait is a mere manager or custodian of the idol. In the case of a mutt also the proprietary right vests in the institution and not in the mohunt. As was pointed out by the Judicial Committee in Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar ('22) 9 AIR 1922 PC 123, the idea of a trust in the English sense of the word was unknown to Hindu law. Hindu piety found expression in gifts to images consecrated or installed in temples or to religious institutions by whatever name they might be called. In the case of a temple it is the idol which is the juristic person, while in mutts, the juristic person is the institution itself. Neither the mohunt nor the shebait is a trustee in the English sense and has property conveyed to, or vested in, him, but in almost every case he has some personal interest in the endowment which depends on the usage or terms of the grant. It is the presence of this personal interest in the trust property which makes the rule of English law relating to appointments of new trustee when a trustee becomes a lunatic inapplicable to a mohunt or a shebait in India. This was expressed very clearly by Bhashyam Ayyanagar J. in the following I am however of opinion that the head of a mutt as such is not a trustee in the sense in which that term is generally understood in the law of trust and a decision on the question under consideration cannot therefore properly be governed by the principles regulating the appointment of new trustees or by analogy derived therefrom. I may also say that in the case of hereditary trustees in India, and other trustees having a beneficial interest in the trust properties, the principles of the English law of trust embodied in the Indian Trusts Act as to the appointment of new trustees when a trustee becomes incapable of acting by reason of unsoundness of mind, etc., are inapplicable (vide Vidya Purna Tirtha Swami v. Vidya Nidhi Tirtha Swami ('04) 27 Mad 435 at p. 447).

18. I have no hesitation in holding that the same principle applies to shebaits also. A hereditary shebait has not merely duties to discharge, he has some sort of beneficial interest in the endowment itself. In the words of Lord Buckmaster there is a close intermingling of duties and personal interest which together make up the office of a shebait: vide Peary Mohan v. Manohar Mukerjee ('22) 9 AIR 1922 PC 235. It is not merely an office but it is also a property, and this has been held by a Full Bench of this Court in Monohar Mukherjee v. Bhupendra Nath ('32) 19 AIR 1932 Cal 791. It is a thing which is capable of being disposed of by the founder, and failing such disposition, it follows, like any other species of heritable property, the line of inheritance from the founder. According to the rules of Hindu law relating to devolution of property, lunacy of the heir at the time when the succession takes place may prevent him from succeeding to the estate, [but subsequent lunacy will not effect a divestment of the interest already vested in him. In my opinion, the same rule ought to be applied to the devolution of shebaiti rights as well, and as Tushar was admittedly of sound mind when his father died, his subsequent lunacy could not divest him of the rights which he had already acquired.

19. Mr. Gupta, who appears for the plaintiff-respondent has fairly conceded that in the case of a private debuttar when the shebaitship is confined to the heirs of the founder, the lunacy of one of the shebaits may not justify his removal or the appointment of another shebait in his place. The duties, both secular and spiritual, of such shebait can efficiently be discharged by the other shebaits acting along with the guardian of the lunatic, if necessary. In other words, the same course may be followed as in the case of an infant shebait. In the present ease, however, he says that the circumstances are different. Here the idol was an ancestral deity of Harish Chandra Banerjee and the shebaitship was in all the heirs of the original founder. It is true that the deity had little or no property at the time when it was installed, but Bidhu, who created the endowment, being nothing more than a shebait himself could not alter the original line of shebaitship and the shebaits acting under his will would not be shebaits in the proper sense of the word. They would be mere managers of the property given to the deity by Bidhu; in other words, there would be no mingling of duties and personal interest, as in the case of shebaits proper but they would have only duties to discharge, and no personal or beneficial interest in the endowment. This contention, in my opinion, does not seem to be sound. In making additions to an existing foundation it may not be competent for a shebait by his own act alone to alter the line of succession to the office of the she-bait : but if the new line of shebaits laid down by the grantor is attached as an essential condition to the grant, the deity or its representatives may reject the grant if they like, but if they choose to accept it they must accept it subject to that condition: vide Ashutosh Seal v. Binod Behary Seal . In the present case it must be assumed that the deity accepted the gift of Bidhu subject to the conditions relating to the devolution of shebaitship as laid down in his will. The shebaits appointed under the will of Bidhu must, therefore, be taken to

be the only shebaits of the deity, and they are shebaits in the full sense of the word and not mere managers of the endowed property.

20. It has been further argued by Mr. Gupta that even though lunacy may not occasion the forfeiture of the rights of a shebait, yet if he is incapable of discharging his religious or temporal duties, he should be removed from his office or at least suspended so long as his disability lasts. This point was raised and considered in Vidya Purna Tirtha Swami v. Vidya Nidhi Tirtha Swami ('04) 27 Mad 435, referred to above. Bhayam Ayyangar J. was of opinion that in such a case the proper course for the purpose of securing the due discharge of the spiritual functions of the office and the management, and preservation of the endowment and its income is to provide a suitable agency for the purpose. The learned Judge was further of opinion that when a Court of law had already appointed a manager of the lunatic's estate the manager might take charge of the endowed property on behalf of the lunatic and provide for the conduct of the necessary worship and the religious ceremonies of the mutt by appointing per. sons duly qualified for the purpose. If this is possible in the case of a mohunt who has to exercise a large amount of discretion in the administration of the affairs of the mutt, it should be equally possible in the case of a shebait of a private endowment. I quite agree with Mr. Gupta that there may be exceptional cases where the duties imposed on the shebait are of such a character that they cannot possibly be discharged by a representative; and in such a case it may be proper to make other exceptional arrangements so long as the lunacy subsists. But this case, in my opinion, does not present any such exceptional features. The only income-bearing property which the deity possesses is a sum of Rs. 10,000 which was advanced to Suresh. The shebaits have got to realize the interest due on this money and make arrangements for repairs of the temple whenever necessary. As regards spiritual duties, there are the daily worship and the periodical ceremonies which are all fixed and are performed by a priest. The shebaits have only to determine the amount which they can spend on such ceremonies and exercise a general supervision over them. All these things, in my opinion, can be done by the guardian of the lunatic in the present case, who is no other than the mother of the shebait, and there is no necessity whatsoever for removing him from his office.

21. The decision in Bhuban Mohan v. Narendra Nath , upon which Mr. Gupta relies, is not of much assistance to us in the present case. There, two out of four shebaits instituted a suit for rent against certain tenants who held lands under the debutter. The two remaining shebaits were made parties defendants, and it was alleged in the plaint that they were not looking after the affairs of the temple or worship of the idol. One of the questions raised was whether the suit was maintainable at the instance of two of the shebaits without joining the other two as co-plaintiffs. The Courts below decided the question in favour of the plaintiff's, and this decision was affirmed by this Court in appeal. It will be seen that in this case the claim was for the entire rent of the

holding and all the shebaits were made parties to the suit. It was found as a fact that one of the defendant shebaits had removed from her husband's house and was living at a distant place, while the other shebait had sold her rights to a stranger-who was not in the line of shebaits at all. It was further found that none of them managed the debutter estate or looked after the idol. In these circumstances it was held that they had ceased to be shebaits. This decision has no bearing on the facts of the present case, where Tushar has not certainly done anything which might be construed to be an act of abandonment or renunciation of his rights as shebait. Sir Suhrawardy J. expressed himself in my opinion rather too broadly when he said that a shebait, being a manager, cannot remain as-such when he ceases to manage the property and carry on the worship of the idol. He has no right of property transferable or heritable as such.

22. This is not borne out by the decision of their Lordships of the Judicial Committee in Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar ('22) 9 AIR 1922 PC 123, upon which the learned' Judge purported to rely, and it is definitely opposed to the subsequent pronouncement of a Full Bench of this Court in Monohar Mukherjee v. Bhupendra Nath ('32) 19 AIR 1932 Cal 791. The question as to the validity of the niyoga patra upon which the plaintiff relies for establishing his rights as a shebait has already been decided in his favour in the other suit and that decision has been confirmed by this Court. The plaintiff is, therefore, entitled to a declaration that he-is a shebait of the deity, but he cannot have a declaration that he is the sole shebait. The order for removal of Tushar as passed by the District Judge must be vacated, and we express no opinion also, as to the validity of an appointment that is said to have been made by Nirmal after his alleged resignation during the pendency of this suit. The last point raised by Mr. Chakravarti relates to the question of accounting. There are two points which require consideration under this head: (1) whether defendant 1 is at all liable to render accounts to the plaintiff, and (2) if he is bound to render accounts, on what basis and for what period should the accounts be taken? The District Judge was of opinion that ordinarily one trustee is not bound to account to his co-trustees, but he may be made liable when a clear breach of trust is established. He apparently took the plaintiff's claim for accounts to be one made by a trustee against his co-trustees though he directed accounts for the whole period of Nirmal's shebaitship including the period during which the plaintiff was not a shebait at all. It is true that under certain circumstances, namely when he is not given custody or control of the trust property or there is a breach of trust committed, one trustee may sue another for accounts, and if the latter is guilty of a breach of trust, a claim for restoration of the trust fund might also necessitate taking of accounts: vide the case in Maharaj Bahadur Singh v. Tej Bahadur Singh .

23. Mr. Gupta who appears on behalf of the plaintiff-respondent has stated to us that his client does not demand accounts as a co-trustee, but claims them as a person interested in the

endowment, and accounts are necessary to determine whether the she-bait that is going to be removed has in his hands any money belonging to the deity. He says, therefore, that if Tushar is not removed defendant 1 must account to both the plaintiff and defendant 2. We think that this is the correct position to take up. Accounts have been claimed in the suit as ancillary to the prayer for removal. The dismissed trustee is entitled to a discharge for which accounts are necessary. The question now is on what basis and for what period accounts should be directed. Mr. Gupta on behalf of his client has definitely given up before us a claim for accounts on the basis of wilful default. The non prosecution of the money suit has not resulted in a loss to the deity, and Mr. Gupta does not dispute the deed of agreement which was executed between the shebaits in 1913. Defendant 1 is sought to be made account. able for the moneys which he himself has actually received, in accordance with the deed of agreement, during the period of his shebaitship and no accounts are demanded for any money that might have been received by his co-shebaits.

24. In view of the position taken up by Mr. Gupta and having regard to the plaintiff's own case and the findings arrived at by the District Judge, we think that it would be quite sufficient if we direct defendant 1 to render accounts to the remaining two she-baits, of the moneys actually received by him out of the debutter funds and spent by him for debutter purposes, for the period commencing from 1st January 1926 and ending with 23rd December 1938. Up to the year 1925, the debutter estate was managed by three shebaits, namely, Harimohan, Nirmal and Nihar Ranjan. According to the deed of agreement mentioned above each one of the shebaits had his turn of worship every three years. He was to collect the income of debutter property during that year and make the disbursements necessary for the daily and periodical pujas. It is admitted that both Nirmal and Nihar had to stay away from Bhadrakali on account of their business for the greater part of the year, and Hari Mohan who was a licentious spendthrift sold his own house which he got from Bidhu to the plaintiff's wife and began to occupy the thakurbari with his family. The deity was located in the house of the priest and Nirmal used to send money for the worship of the idol. Nihar is dead and Hari Mohan has renounced his rights as a shebait in favour of the present plaintiff in the year 1925. There is no allegation that Nirmal misappropriated any money during this period and, as I have said already, the charge of neglect of duty brought against him was not substantiated. The only income of the debutter property being the interest on the sum of Rs. 10,000 lent to Suresh, Nirmal could have at the most received his interest for four or five years. He admittedly sent moneys to the priests for daily and periodical pujas but as he has kept no regular vouchers and the priest is dead, it is difficult for him to prove now as to how much was spent on each of these religious festivals. The enquiry must necessarily be of a harassing character and Nirmal would have to fall back upon oral evidence for the purpose of proving the amounts he had actually spent. As no accounts are obtainable from the other two shebaits who acted with Nirmal during this period, and as the presumption must be, unless

something to the contrary is proved, that Nirmal had discharged his duties faithfully during this period, we think that accounts should not be carried back prior to the time when the plaintiff himself was appointed a shebait. Hari Mohan had his turn of worship in the year 1925 in accordance with the deed of agreement mentioned above, and for this year there is no liability to account so far as defendant 1 is concerned. We therefore think it proper that he should account from the beginning of the year 1926, and not only will this meet the ends of justice, but it will afford complete protection to the plaintiff himself.

25. The Court of Chancery in England had always a discretion with regard to the period for which accounts were directed in case of charitable trusts, and the period varied according to the circumstances presented to the consideration of the Court: vide Lewin on Trusts, Edn. 14, p. 513. As a general rule the Court will direct accounts so far there has been misapplication of funds or from the date on which the breach of trust commenced: vide Attorney General v. Mayor Newbury (1834) 3 My & K 647 and Attorney General v. Corporation of Leicester (1844) 7 Beav l76. The Court may also in the exercise of its discretion decline to direct accounts when the prosecution of them would lead to harassing and protracted enquiry which would not at all be beneficial to the charity: vide Attorney General v. Dixie h(1807) 13 Ves 519.

26. The result therefore is that both the appeals are allowed in part. The plaintiff is declared to be a shebait of the idol Sri Dhar Jew and the order for removal of defendant 1 as a shebait as made by the District Judge is confirmed. The order for removal of defendant 2 is set aside. Defendant 1 will render accounts to the plaintiff and defendant 2 of his receipts and expenditure in connexion with the debutter property from 1st January 1926 to 23rd December 1938. The accounts will be taken not on the basis of wilful default, but on the footing of what was actually received by defendant 1 out of the debutter estate and what was spent by him in the interests of the idol. He will certainly be entitled to all the expenses reasonably incurred in connexion with the litigation he brought on behalf of the deity in the year 1928 up to the date when it was dismissed for default. If the accounts disclose that any sum of money is still in the bands of defendant 1, he will be directed to refund the money to the two existing shebaits of the deity. If no money is found due this part of the plaintiff's claim will be dismissed. The parties will bear their own costs in all Courts up to this stage: further costs in connexion with the equiry into accounts will be in the discretion of the trial Judge. The case will be sent back for taking accounts in accordance with the directions given above. As both these appeals arise out of the same suit only one decree need be drawn up. No order is necessary on the application.

Biswas, J.

27. I agree.