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MANU/BH/0050/1966

Equivalent Citation: AIR1966Pat235

IN THE HIGH COURT OF PATNA

Letters Patent Appeal No. 51 of 1961

Decided On: 29.07.1965

Appellants: **Ram Ratan Lal**
Vs.
Respondent: **Kashinath Tewari and Ors.**

Hon'ble Judges/Coram:
R.L. Narasimham, C.J., S.N.P. Singh and S.P. Singh, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: R.S. Chatterji, Kanhaiyaji and Rameshwar Prasad, Advs.

For Respondents/Defendant: Adv. General and Rajendra Prasad Sinha, Adv. for D.R. Guardian, Adv. and Pardyuman Narain Singh, Adv.

JUDGMENT

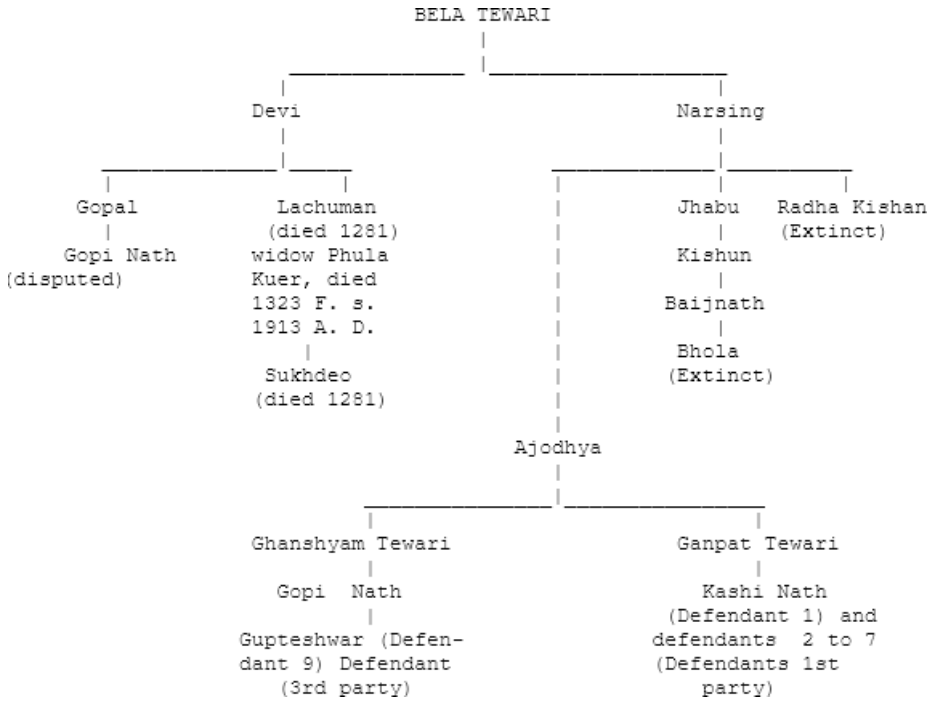
R.L. Narasimham, C.J.

1. This is a plaintiff's appeal from the judgment of Raj Kishore Prasad, J. affirming the judgment of the Additional Subordinate Judge of Arrah, dismissing the plaintiff's suit under the following circumstances.

2. The plaintiff claimed to have taken on rehan a double-storied building in Arrah town for a sum of Rs. 15,000 from the defendants 1st party sometime in 1947. Subsequently he allowed the defendants 1st party to occupy the house on payment of monthly rental to him, and when the rent was not paid according to the terms of the kerayanama the plaintiff obtained an order from the House Rent Controller for the eviction of the defendants 1st party. But when he attempted to execute that order of eviction in Execution Case No. 63 of 1955, an objection was raised by a deity said to have been located in the house of the defendants 1st party on the ground that the property was debottar and hence could not be alienated.

In Miscellaneous Case No. 77 of 1955 (Ext. B(3)) the Munsif, 1st Court, Arrah, upheld the claim of the objector deity under Order 21, Rule 58, Code of Civil Procedure, and the plaintiff as the unsuccessful party brought the suit under appeal under Order 21, Rule 63, Code of Civil Procedure. Defendants 1 to 7 were impleaded as defendants 1st party; defendant No. 8, the deity, was impleaded as defendant 2nd party purporting to act through one of the minor sons of defendant No. 1, Kashi Nath Tewari under the guardianship of his mother; the defendant 3rd party is a co-sharer of defendant No. 1 and the defendant 4th party is another aliened of a portion of the building from defendant No. 1.

3 . The following genealogical tree shows the relationship of the contesting defendants:



Admittedly the house originally belonged to Lachuman, after whose death (his sole son Sukhdeo predeceasing him) it devolved on his widow Phula Kuer. That lady, on the 25th February, 1912, executed a waqf deed (Ext D(1)), in fulfilment of the directions given by her deceased husband, dedicating the house in favour of an idol (Thakurji) which was said to have been installed in a room in the house. The entire property was dedicated to the idol with a direction that the expenses over the ragbhog, puja arena of the deity and the repairs of the Thakurbari should be met from the income of the house and the land attached to the same. On the same day she executed a deed of trusteeship (Ext. E), appointing herself as the first Mutwalli of the waqf property with a direction that after her death her husband's agnate, Kishun Tewari, and a stranger to the family, Lalji Upadhya, should be the trustees (Shebaits) of the said endowment.

The lady died soon afterwards and then another waqf deed was executed on the 2nd December, 1913 (Ext. D), by Ghanshyam Tewari, Kashinath Tewari and Kishun Tewari. In this document the previous waqf deed of Musammat Phula Kuer was mentioned but it was slated that as a Hindu widow she was not competent to create a deed of waqf and that further the said waqf deed was not acted upon. These three executants, therefore, made, as it were, a fresh dedication of the same property 1o the said deity, constituting themselves as the Shebaits (Mutwallis), Kishun having 8 annas share and Ghanshyam and Kashinath the remaining 8 annas share equally. The plaintiff alleged that the so-called deed of endowment was never acted upon, that Ghanshyam, Kashinath and Kishun treated the property as their own personal property, partitioned the same, sublet certain rooms to tenants and also made alienations. The rehan in favour of the plaintiff was however made by Kashinath Tewari and his sons. The plaintiff, therefore, claimed that the decision of the learned Munsif, who decided the claim case against him, was wrong, that the property was never debottar and that he was entitled to execute the decree obtained by him against the defendants 1st party for eviction in the House Rent Control case.

4. Thus the sole question for decision in this appeal is whether the disputed property was debottar property of the deity, namely, the defendant 2nd party, or else the

secular property of the defendants 1st party and defendant 3rd party. Both the courts held that it was a complete debottar and that consequently the defendants 1st party had no right to make an alienation in favour of the plaintiff as there was no legal necessity for such alienation.

The main points urged by Mr. Chatterji on behalf of the appellant are as follows:

(1) The so-called religious endowment was illusory, never intended to be acted upon.

(2) As the name of the deity was not mentioned in the deeds of endowment, the endowment is void for uncertainty.

(3) As no evidence of sankalp or samarpan was given, the dedication was not complete.

(4) On a fair construction of the deeds of trust it must be held that even if there was dedication there was only partial dedication creating a charge in favour of the deity and not complete dedication.

(5) The learned Single Judge committed an error of law in attaching importance to the previous judgments where the property was held to be the debottar property.

(6) In any case, defendant No. 8 was not properly represented in this litigation inasmuch as the Shebaits, as mentioned in the deed of dedication, alone had a right to sue or be sued on behalf of the deity, and the mother guardian of a minor son of defendant No. 1 could not validly defend the deity.

5 . Mr. Chatterji relied mainly on Siri Thakur Parmod Banabihari v. C.G. Atkins MANU/BH/0088/1919 : AIR 1919 Pat 442):(1919) 4 Pat LJ 533, where it was held that a dedication would be nominal when there is no proof of the application of the income of the property for the purposes of the endowment and when the whole conduct of the parties is inconsistent with the hypothesis of a valid trust. Here, however, the subsequent conduct of the executants of the trust deed does not show that the deed was never intended to be acted upon. It is true that in the records of Arrah Municipality the property was not recorded as debottar but as the private property of Kishun Tewari and Ghanshyam Tewari and later on of Kashinath Tewari. But the order-sheet of the mutation case (Ext. F), dated the 30th October, 1918, shows that this device was adopted because if the name of the Thakurji was entered in the Municipal records there could be no assessment on this house. It is thus clear that the non-mention of the Thakurji in the Municipal records was done solely with a view to enable the Municipality to assess the building to tax.

It is true that in the Survey Khatian of the Arrah Municipality as finally published in 1925 (Ext. 9) also the property was shown as the secular property of the Tewari family. But no importance can be attached to the Survey entry in view of certain judicial decisions which had preceded the same.

Exhibit B is a judgment of the Patna High Court in Second Appeal No. 1752 of 1921, disposed of on 8-7-1924, (Pat) where the learned Judges while dismissing the appeal held that the dispute about the house between the various Tewaris could not be finally settled unless the Thakurji was brought on record. The judgment shows that

as early as 1924 the claim on behalf of the Thakurji that it was debottar property had already been canvassed in Civil Courts and it was held that no suit relying to the property could be properly disposed of without making the deity a party.

There was another title suit, No. 2 of 1923 decided on the 27th August, 1924, (Ext. B (2)). This suit was instituted by Baijnath Tewari, son of Kishun, and defendant No. 1 was the deity and defendants Nos. 2 and 3 were Gopinath Tewari and Kashinath Tewari. In that suit also Baijnath claimed that the property was secular property and not debottar, but that was decided against him and it was held that he, Kashinath and Gopinath were merely Mutwallis (Shebaits) of the debottar property. This judgment was delivered after the judgment of the High Court in Second Appeal No. 1752 of 1921 (Pat). There is also another judgment (Ext. B(1)) in Title Suit No. 13 of 1925, disposed of on the 7th November, 1925, in which also it was held that the Tewaris could not claim any personal right in the disputed house as they were entitled only to the right of a Shebait (Mutwalli) of the idol.

In addition there is the deposition of one Khublal Sahu (a tenant of a part of the house) made as early as 1920 (Ext. G) in Case No. 261 of 1919. There the witness expressly stated that the deity was located in the house and that the rent collected from the various shops in the house was utilised for the various festivals connected with the deity and also for repairing the Thakurbari,

It is true that the Tewaris in some of their transactions were treating the property as their private property. They also effected a partition between themselves (Ext. 16) on the 18th March, 1934, dividing the property and scrupulously omitting to mention that it was debottar. Mortgage bonds were also executed by them (Exts. 3 series and 4 series). But this subsequent conduct of the Tewaris in dealing with the property as their private property will not suffice to show that the property was not debottar, especially when in several judicial decisions to which the Tewaris themselves were parties it was decided that they were merely Mutwallis (Shebaits) of the idol who was the real owner of the property.

The learned Single Judge rightly relied on the observations of their Lordships of the Supreme Court in Sree Sree Ishwar Sridhar Jew v. Mt. Sushila Bala Dasi MANU/SC/0093/1953 : AIR 1954 SC 69 to the effect that merely because a Shebait acted contrary to the terms of his appointment or in breach of his duties as Shebait he could not claim adverse possession against the idol. Such conduct on the part of the Tewaris would amount to breach of their duties as Shebaits of the deity.

It was then urged that on the construction of the deed of trust (Ext. D) it must be held that there was no valid transfer of interest by the donors to the deity so as to amount to complete dedication. This document (Ext. D) is written in Urdu and that is why expressions like "waqf" and "Mutwallis" have been used, though one would expect in the case of a Hindu endowment the corresponding expressions such as 'debottar" "Shebaits" etc. The official translation shows that the donors while referring to the previous deeds executed by Musammat Phula Kuer (Ext. E) and pointing out the invalidity of that document practically reaffirmed the same by the following words:

> "We make a waqf of the properties specified below, which are ancestral properties of us the executants, and in respect of which, we the executants have full rights, to the Thakurbari installed in the house situate at Mohalla Mahajantoli II, one of the quarters of Arrah town, by Musammat Phula Kuer,

by cancelling the waqf deed dated 25th February 1912 and we the executants shall remain Mutwalli of the waqf property, we shall all along keep watch and perform puja path ragbhog of Shree Thakurji."

In my opinion, on a fair reading of this document there is an unambiguous dedication of the property by the then owners of the deity.

6. It is true that after the death of Phula Kuer the next heir to the property would be Ghanshyam and Kishun. Kashinath being one degree removed could not be an immediate heir and hence the association of his name in Exhibit D was unnecessary. But as Ghanshyam and Kishun had joined in the execution of the deed, the deed will not become invalid merely because a person who had then no title to the property also joined in its execution. Moreover, Kashinath was not a stranger but one of the prospective heirs, and the other two executants who were undoubtedly heirs, namely, Ghanshyam and Kishun, wanted that Kashinath should also join in the dedication so that he may not raise objections later on. Such an arrangement was made by way of abundant caution and the legal possession of the property remained with Ghanshyam and Kishun. After the death of Phula Kuer and after the dedication was made it became the property of the deity to be administered by the Shebaits. Hence, though Mr. Chatterji urged with great persistence that the association of Kashinath in the deed, though he had no title to the property, and the further statement in the deed that Kashinath also became a co-sharer Shebait to the extent of 4 annas would invalidate the deed I am not inclined to accept such an extreme contention.

7. It is true that in the deed (Ext. D) the actual name of the deity is not given and it is referred to as "Thakurji" installed in the house of Musammat Phul Kuer after constructing the Thakurbari. Mr. Chatterji urged that unless the name of the deity was actually given the dedication must be void for uncertainty because the expression "Thakurji" would merely mean "God". He relied on Upendra Lal Boral v. Hem Chundra Boral ILR (1895) Cal 405, Phundan Lal v. Arya Prithi Nidhi Sabha (1911) ILR All 793 and Chandi Charan Mitra v. Haribola Das MANU/WB/0024/1919. But those three cases are clearly distinguishable. In none of them was there reference to a deity actually installed in a particular place. But here, on the contrary, there is reference to a particular idol installed in the house. As pointed out in Mulla's Hindu Law, 12th Edition, at page 579, Article 410, a gift to an idol is valid even though the image is to be established and consecrated after the testator's-death. This is not a case of an endowment in favour of "God" in an abstract or impersonal sense, but the idol has been clearly particularised and, moreover, was in actual existence inside the building when the Exhibit D was executed. In my opinion, therefore, the deed is not void for uncertainty.

8. It is true that no evidence of actual sankalp or samarpan having been done at the time of dedication was given by the contesting defendants. But the plaintiff also in his plaint did not expressly assert that such ceremonies were not performed. Moreover, it has been pointed out in Prem Nath v. Har Ram AIR 1934 Lah 771, after a review of the judicial decisions, that religious ceremony of sankalp or samarpan is not essential for a valid dedication, though sometimes such ceremonies are performed. In that decision the previous Patna view on the subject, reported in Deosaran Bharthi v. Deoki Bharthi MANU/BH/0053/1924 : AIR 1924 Pat 657 and Bhekdhari Singh v. Sri Ramchanderji MANU/BH/0147/1930 : AIR 1931 Pat 275, was noticed and explained. There is also a subsequent Rajasthan decision in Deeplal v. Parshwanath Digamber Jain Vidyalaya MANU/RH/0054/1956 : AIR 1956 Raj 171 to the effect that no religious ceremony such as sankalp or samarpan is necessary for

valid dedication.

In this case, however, the dedication took place in 1912-13, more than 50 years ago. There is no evidence on the side of the plaintiff to show that any of the witnesses to the deed of dedication are still alive. In the absence of such evidence and in the absence of any specific allegation in the plaint about the non-performance of sankalp or samarpan, I would not attach much importance to the absence of evidence on the defendants' side about the actual performance of such religious ceremonies, especially as such ceremonies are not essential to validate the dedication.

9. The question whether the dedication is partial or complete must be decided, as pointed out in Har Narayan v. Sarja Kunwari MANU/PR/0014/1921 : AIR 1921 PC 20, by a conspectus of the entire provisions of the document. Their Lordships pointed out that if the document provides that the balance of the proceeds of the estate after defraying the expenses of the idol may be enjoyed by the testator's heirs and the fact that the actual expenses of the idol are only a small proportion of the total income, there may be an inference that there was only a partial dedication of creating a charge.

This decision was reaffirmed in MANU/SC/0093/1953 : AIR 1954 SC 69. Here, however, there is absolutely no evidence to show that the Tewaris anticipated any substantial surplus out of the total income of the property and stipulated in the deed (Ext. D) that that income may be appropriated by the donors. It is true that in the deed of Musammat Phula Kuer (Ext. E) she had stated that 4 annas share of the total income may be appropriated by the Shebaits as remuneration for management and the remaining 12 annas may be utilised for the worship of the deity and repair of the temple. This stipulation was not expressly reaffirmed in Exhibit D. Moreover, as pointed out in Iswar Lakshmi Janardan Jiu v. Khitish Chandra Singha MANU/WB/0130/1931 : AIR 1932 Cal 419, the mere fact that some remuneration was provided to the Shebait will not be indicative of the partial nature of the debottar, provided the remuneration is reasonable having regard to the income of the property. There is absolutely no evidence on the side of the plaintiff to show what was the total income of the property, how much was appropriated for the puja of the deity and maintenance of the temple and how much was taken away by the Shebaits. Though several witnesses were examined on the side of the defendants to prove the existence of the deity and the performance of puja, bhog, etc. to the same, nothing was brought out in their cross-examination to show that a substantial portion of the income from the property was utilised by the Shebaits for their personal expenses.

10. It was then urged that it was the duty of the defendants to produce the accounts to show the total income of the properties and as to how the income was appropriated, especially when in the deed of Musammat Phula Kuer (Ext. E) there is a special direction to the Shebaits to keep an account of the income find expenditure year by year. But the plaintiff did not call for the account from the defendants and no adverse inference can be drawn from their non-production.

Moreover, it must be remembered that the defendants 1st party and 3rd party tried on several occasions to treat the property as their own private property and also made alienations. Hence any negligence on their part to keep the accounts cannot lead to an adverse inference against the deity. In MANU/WB/0130/1931 : AIR 1932 Cal 419, as well as in MANU/SC/0093/1953 : AIR 1954 SC 69, the question whether dedication was partial or complete was decided on the construction of the document itself. There is no indication in Exhibit D to show that any beneficial interest was

reserved for the Shebaits. I would, therefore, reject Mr. Chatterji's contention that the dedication was only partial.

11. The judgment of the High Court in Second Appeal No. 1752 of 1921 (Pat) (Ext. B) and the judgment of the Munsif, 1st Court, Arrah, (Ext. B (1)) in Title Suit No. 13 of 1925, may not operate as res judicata as all the parties were not there, but they are clearly admissible under Section 13 of the Evidence Act to show that whenever an attempt was made by the Tewaris to claim the property as their private property the courts refused to accept that contention and referred to the fact that the Thakurji was a necessary party in view of the deed of trust (Ext. D). In Exhibit B(1), the decree was to the effect that the Tewaris' interest in the property was only that of Mutwallis of an idol. Defendant No. 1 and the descendants of Kishun as well as the father of defendant No. 9 were parties to that litigation and they cannot say that they were not bound by the same.

12. Exhibit B(2), however, must be treated on a different footing. It is the judgment of the Munsif in Title Suit No. 2 of 1923, where Baijnath, son of Kishun, was the plaintiff, and defendant No. 1 and defendant No. 9 and the deity were all parties. The most important issue in that case was issue No. 8 which dealt with the question as to whether Kashinath, (defendant No. 1 here), had any personal interest in the property. The decision of the Munsif was that it was debottar and that he had no personal interest in the property. The plaintiff derives his title from Kashinath, defendant No. 1, and he will be bound by this judgment. It would clearly operate as res judicata in this litigation. Mr. Chatterji, however urged that the plea of res judicata was not expressly taken in the written statement nor was an issue raised in respect of the same. He further relied on the concession made by the defendants' advocate, Mr. G.P. Das, before the learned Single Judge to the effect that this judgment would not operate as res judicata. It is, however, well settled that the concession on a point of law made by an Advocate will not bind a party. The plea of res judicata being a pure question of law can be raised at any stage provided that the necessary evidence is on record. Here the judgment of the Munsif (Ext. B(2)) and the decree (Ext. C(1)) show clearly that all the parties in the present litigation and their predecessors in title were parties in that litigation and the issue that was directly involved there was whether the property was debottar of the deity or personal property of the Tewaris. The judgment would clearly operate as res judicata:

13. Mr. Chatterji then urged that the suit under appeal having been valued at Rs. 9,000 was beyond the pecuniary jurisdiction of the Munsif of Arrah and that consequently that court was not a court "competent to try this issue" for the purpose of Section 11 of the Civil Procedure Code. But I notice that in the decree (Ext. C(1)) the valuation of the house was estimated at Ks. 2,500 in 1924, and the Munsif's jurisdiction to decide that suit was not challenged in that litigation. The increase in valuation is, therefore, due to the phenomenal rise in the value of property from 1924 to 1956. It has been held by the Supreme Court in Jeevantha v. Hanumantha, MANU/SC/0055/1950 : AIR 1954 SC 9 that "in order to determine whether a court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of the court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a court would have been competent to try the subsequent suit, had it been then brought, the decision of such court would operate as res judicata although subsequently by a rise in the value of the property that court had ceased to he a proper court, so far as regards its pecuniary jurisdiction to take cognizance of a suit relating to that very property." In Kamkaran Singh v. Smt. Parbati Kuer MANU/BH/0152/1954 : AIR 1954 Pat 443 also

the same view was reiterated.

14. Mr. Chatterji then urged that the identity of the property involved in this litigation and the property which was the subject-matter of Title Suit No. 2 of 1923 is not the same. But I think there can be no doubt about the identity of the property. A perusal of the judgment (Ext. B(2)) shows clearly that the house property in Arrah town which had been dedicated by Exhibit D was the subject-matter of that litigation and it is also the subject-matter of the present litigation. I would, therefore, hold that this judgment would operate as res judicata and prevent the plaintiff from now reagitating the question as to whether the property is debottar or not.

15. Even if it be assumed for argument's sake that it would not operate as res judicata, it will be a very valuable piece of evidence under Section 13 of the Evidence Act. Mr. Chatterji relied on some observations made by the Privy Council in Maharaja Sir Kesho Prasad Singh Bahadur v. Mt. Bhagjogna Kuer MANU/PR/0029/1937 : AIR 1937 PC 69, but in that very judgment at p. 75 it was observed as follows: "There are undoubtedly cases in which a judgment is evidence of weight even against third parties". The present case will clearly come under that principle.

16. Mr. Chatterji urged that the Shebaits alone had a right to sue or be sued on behalf of the idol and that no other person can represent the deity unless specially appointed by the Court. In Panchkari Roy v. Amode Lal Barman MANU/WB/0106/1937 : AIR 1937 Cal 559 it was, however, observed that if the Shebait was negligent or alienated debottar property in breach of the trust, not only a prospective Shebait under the terms of the grant but any member of the family, in case of a family endowment, may maintain a suit on behalf of the deity in order to recover the property. But Mr. Chatterji relied on a subsequent observation at p. 561 to the effect that none but a member of the family can have a right to worship the deity in case of a family endowment and no such person can sue on behalf of the deity for recovery of the property belonging to it unless the founder has expressly given such power. It is true that here in exhibit D, no express power was given to the prospective Shebait to maintain a suit on behalf of the idol, but here all the other Shebaits have been made parties and the litigation deals with the unlawful alienation made by one of the Shebaits, namely, Kashinath. Moreover, here it is not a case of the idol suing as a plaintiff, but the idol is merely defending the property against the claim of the plaintiff, and as the Shebaits were not supporting the idol's claim it was represented by a minor son of Kashinath who is a prospective Shebait acting under the guardianship of his mother, his natural guardian.

17. Moreover, the decisions even in Calcutta are not uniform as to whether any other person interested in the endowment, including a prospective Shebait, can represent an idol in litigation without being appointed by the court. In Sree Sree Sreedhar Jew v. Kanta Mohan Mullick MANU/WB/0064/1945 : AIR 1947 Cal 213 such a view was taken disagreeing with a contrary view taken in an earlier Calcutta case. In Smt. Suhama Roy v. Atul Krishna Roy MANU/WB/0198/1955 : AIR 1955 Cal 624 also the same view was taken disagreeing with an earlier decision in Gopal Jew v. Baldeo Narain Singh MANU/WB/0202/1946 : 51 CWN 383. On the other hand, the Bombay High Court in Shree Mahadoba Devasthan v. Mahadba Romaji MANU/MH/0056/1953 : AIR 1953 Bom 38 has taken a contrary view. There are also some observations in Jangi Lal v. Panna Lal MANU/UP/0200/1957 : AIR 1957 All 743 in support of the view that a prospective Shebait as a person interested has a right to sue on behalf of the idol.

18. In this state of the case law I am not inclined to accept Mr. Chatterji's argument that the idol (defendant No. 8) was not properly represented by the minor prospective Shebait acting through his natural guardian, namely, the mother. All the Shebaits have been made parties and the idol is merely defending its rights against the claim of a person who is in the position of an unauthorised alienee.]n my opinion the learned Single Judge was right in holding against the plaintiff's contention in this respect.

19. Lastly, it was urged that when Musammat Phula Kuer died in 1913, Gopal's son Gopinath was alive, that he was the nearest reversioner and that consequently . neither Ghanshyam nor Kishun had any interest in the property which they could dedicate in favour of the idol by Exhibit D. No specific issue, however, was raised as regards the existence of Gopinath, son of Gopal, in 1913. There is practically no evidence on this question except some observations in the Judgment of the High Court (Ext. B) in Second Appeal No. 1752 of 1921. The question as to who was the nearest reversioner of Musammat Phula Kuer was a very important question and the plaintiff ought to have made a clear assertion to that effect in the plaint, raised an issue and asked for a decision of the trial Court. He cannot obviously ask either the learned Single Judge or this Court in Letters Patent Appeal to hold that there was a son of Gopal named Gopinath, merely because of some observations in Exhibit B. The learned Single Judge rightly rejected this contention.

20. For these reasons the appeal is dismissed with costs.

S.N.P. Singh, J.

21. I agree.

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