Sri Sri Sridhar Jew Vs. Manindra K. Mitter and ors.

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Court : Kolkata

Decided On : Feb-21-1940

Reported in : AIR1941Cal272

Appellant : Sri Sri Sridhar Jew

Respondent : Manindra K. Mitter and ors.

Judgement :

Ameer Ali, J.

1. I shall consider my judgment: at any rate on one point, but I begin now, note with standing that my own notes are in a fragmentary state. The matter should have been made easier for me by the fact that was argued with much ability on the part of the plaintiff, who was able to have the services of Mr. Roy supported by counsel if less eminent no less efficient whom the remorseful relations, notwithstanding that they are supposed to be indigent, were able to brief. I was especially indebted to Mr. Hazra and Mr. Das for arguments on their behalf. But there is such a thing as embarrassment of abundance. This suit was filed on 6th March 1937. The significance of the date will hereafter appear. The suit is by a deity, who by his symbol Sridhar Jew, figures very largely in my list. The next friend of the deity in this case, whose name will be found at the bottom left-hand corner of the genealogical table included in the admitted brief, is Nirmal Krishna Mitter, whom I have seen once during the course of these lengthy proceedings at the back of the Court, and whose qualifications are confined to an amiable disposition, an athletic frame, and I believe the rank of Corporal in the Territorial Defence Force. Nevertheless, it is a suit by the deity. The relief sought may be classified as follows:

1. In respect of what will hereafter be called the blue portion of the dwelling house, that is, 75 and 76, Phear Lane, the northeast corner of the first and second storeys. To this, the claim by the deity is for possession as owner.

2. The claim to a declaration of charge and enforcement of charge for maintenance in respect of the pink portion of the family dwelling house.

3. Similar relief in respect of the income bearing premises, 11 Harinbari first Lane and 81 Phear Lane, together with its sub-numbers

2. As regards the charge, by prayer (e), this is limited to such sum as, together with Rs. 13,000, would bring in a sufficient income for the maintenance of the plaintiff. The defendants are first of all, the family other than the next friend, all now remorseful and regretting the acts of the late shebaits, and the transferees, by this I mean the purchasers of the two income bearing properties which were sold under an order dated 30th August 1912, and with regard to the dwelling house which was mortgaged in 1921 and sold by the Court in 1928, the purchaser at the sale, as the result of the mortgage decree, or his transferee. The sale by the Registrar took place on 6th March 1925. This explains the date of the filing of the plaint, and shows that the

deity, although in an ideal sense was keeping a careful record of the last moment for filing the plaint.

3. I go back to the essential facts. On 29th April 1853 Hari Mohan Sircar made a disposition of the properties I have already mentioned, together with another property, which is not in suit, for the benefit of the plaintiff deity and also for the benefit of his family. I do not quote the deed, because it has been construed in the ruling to which I am about to refer and because its significance is to be gathered as much from what it omits as now what it includes. The whole therefore has to be read. The questions which arise in connexion with this disposition I will formulate hereafter, but it should be noted that the disposition is in the form of an English trust, that is to say, it purports to vest the properties in two trustees, who are to apply the income, firstly, in the maintenance of the Thakur, and, secondly, for the benefit of his sons and their families. It also provides for a right of residence for the sons and their families in the houses at the discretion of the trustees. It uses certain language, which is relied upon by the plaintiff, and those supporting the plaintiff, to show that it amounts to nothing less than a dedication or endowment in the Hindu sense of the term. The estate was administered by the trustees named and by other trustees appointed in the manner of trustees.

4. On 19th May 1879 a suit was filed (suit No. 342 of 1879) by Nobin Kishore, the widow of one of the founder's two sons. Both these sons had died as at the date of the filing of the suit, or at any rate before the date of the judgment of the Court on appeal. The plaintiff asked for construction of the indenture of trust for partition of the whole in the event of the Court finding as she herself contended that the disposition was illusory. Alternatively, for the framing of a scheme, and other reliefs in the nature of administration.

5. The Court of first instance substantially dismissed her suit. The Court on appeal took a different view. The judgment is to be found at p. 92 of the agreed brief. The final decree drawn up should be read in the light of this judgment. It is, I think, clear that this judgment treated the disposition as having the effect of an English trust. 'Whether this makes much or any difference and what that difference may be I will try and indicate hereafter. In this judgment I shall use the word 'trust' in the limited and specific sense of a disposition for the benefit of 'a' (the deity) in which the legal ownership is vested in trustees 'BB'. I use the word 'endowment' as a disposition for the benefit of the deity by which the property is given to and vested in the deity. The first finding was that the religious trusts were valid, and, to quote the expression used 'a first charge on the income of the property' (p. 95). The balance of the income, according to the view of the Court on appeal, belonged, after the life interest of the sons, to the sons' heirs. Therefore, at the time of the judgment, the plaintiff, as the eldest son's widow, was entitled to half the surplus income after discharging the religious trust, and the three sons of the younger son were each entitled to 1/6th. A scheme was then directed to be framed for the carrying out of the religious trust, and in the course of doing so it was to be determined how much was necessary. The Court on appeal has, I think, treated the dwelling house as distinct from the income-bearing property, and, on my reading of this judgment and decree, held that the plaintiff and the other sons were entitled, in shares already mentioned, to the dwelling house absolutely (see phrasing at p. 97). At the very end of the judgment is the following sentence:

In settling the claim for the worship it will be determined what part of the dwelling house should be set apart for the use of the idol. The residue will be partitioned.

6. The question which arises on this part of the case is whether the effect of this judgment and the decree which was drawn up was to vest the whole of the dwelling house in the heirs, subject either to a right, or to something less than a right, in the Thakur to use or have used for him, the thakurbari, or whether the portion in question (which subsequently came to be known as the blue portion owing to the fact that that portion was allotted on the enquiry for the use of the Thakur) vested absolutely in the Thakur. The preliminary decree drawn up is at p. 30. I will come back to discuss the language of the decree in dealing with the questions which are in dispute. The report on the enquiry directed was made on 26th July 1887. It framed a scheme settling the correct amount required for the maintenance at Rs. 1300 a year. It embodied an arrangement whereby the trustees have to pay the income wholly to Radharani, who was to utilise the money allocated to the maintenance of the Thakur during her pala; was to make over that money to the other paladars and

whereby she was also to receive and divide the residue of the income. Lastly, by Clause (5), the referee 'set apart for the use of the Thakur' the blue portion, the exact situation of which will appear from the plan annexed to the report, which is an exhibit.

7. The final decree embodying the report, or an abstract of it, is in the agreed brief (pp. 43 and 44). It is to be noted that this contains an order upon the trustees to pay the income of the said trust estate from time to time as soon as collected to the plaintiff under the arrangement I have already mentioned. Then as a matter of course, there is a provision for the sale of one of the trust properties for the purpose of paying the costs, and this was done. This sale is not attacked, nor it is sought to claim a charge upon the properties so transferred. The final decree is dated 18th August 1887. It will be seen that the directions for partition of the family dwelling house were not followed out. There was no separate allotment or partition. The final decree of 18th August 1887 had better remain on the record and be marked at my instance because, as it appears to me, the portion at the bottom of the page as it appears in the agreed brief has nothing to do with the final decree. The result is, in my opinion, that with regard to the income-bearing properties other than that sold, these continued to be vested in the trustee. There were again various changes and on 24th September 1888 the official trustee was appointed. The order is Ex. P. The application for the appointment was made in Suit No. 342 of 1879. The form of the order is:

The official trustee of Bengal is appointed the trustee of the indenture of trust executed by Hari Mohan Sircar, etc., and that the outgoing trustees do deliver the trust estate and funds in their hands to the official trustee and that the same do vest in him and be held by him for the purposes mentioned in the decree.

8. It does not set out in any schedule or otherwise other than in the manner I have mentioned, the properties which were vested in him. This appointment which is referred to and recited in para. 19 of the plaint in terms appropriate to a valid and proper appointment, is now for reasons which will become apparent, challenged by the plaintiff. It is said that the Court had no jurisdiction to appoint the official trustee.

9. On 7th July 1908 a suit was filed, suit No. 904 of 1908, by Radharani, the daughter of Nobin Kishore. The plaint is at p. 45 of the brief, The nature of the pleading and the relief are stressed by Mr. Roy on behalf of the Thakur as showing an intention of one to impinge upon the rights of the deity as recognized by the decree of 1885, and he asks me to consider the prayers in that light. A primary object of the suit was, for reasons set out in the plaint and connected with the nature of the property and the structures to obtain the conversion of the immovable property into funds. The second prayer is for an inquiry as to the sum necessary to be invested in the hands of the official trustees for payment of an annual sum of Rs. 1180. This is clearly less than the Rs. 1300 fixed by the decree of the eighties, but for the moment the difference is not very material. What was really wanted, apart from this reduction of Rs. 120 a year, was the separation of the fund for the maintenance of the deity, and the partition and appropriation of the balance by the heirs who were then entitled and to convert, their share in the income into a share in the corpus.

10. In this suit certain terms were sought to be agreed, dated 6th July 1910. These terms which included the provision of a fund of Rs. 12,000 were rejected by Cunningham J. The suit proceeded. On 30th August 1912 was the application of the official trustee for sale of the two properties vested in him, or which the Court had purported to vest in him. The application was headed 'In the matter, of Act 17. of 1864, (the Official Trustees Act of the time) and in the matter of the suit of 1908.' It is a long petition, difficult to read. The original has been tendered. The gist of it (and I may have to revert to it in greater detail) is to the effect that the properties are of such a nature that the income is expended in an ever increasing degree in effecting petty repairs. It establishes in my opinion a case for the necessity of conversion. The official trustee sets out the difficulty he was in by the pressure of the action of the Calcutta Corporation. Certain passages are of interest, whatever their ultimate bearing. Paragraph 21 says that:

The trust estate of Hari Mohan Sircar, etc. , . at present consists of the following properties : 11 Harinbari Lane, 81 Phears Lane, besides the portion of premises 75 and 76 Phears Lane allotted on partition for the use

of the family deity.

11. It was from this passage, I think, that I originally derived the impression or drew the inference that the blue portion also vested in the. trustee, subject to a trust for residence but that is not the case either of the plaintiff or of the defendant. I shall deal with that later. It appears to have been the view of the official trustee or his adviser. The official trustee had obtained a valuation, and in the last paragraph of his petition he stated that the net sale proceeds on investment in 3 1/2 per cent. securities would produce an income ample to provide for the expenses of the trust estate and leave a surplus for division amongst the beneficiaries. 'The beneficiaries' in this connexion means the heirs. 'The trust estate' means the trust in favour of the Thakur of which the official trustee was the trustee, and which was the trust which in his own view he was representing.

12. By using the words 'trust' and 'trustee' at the moment, I do not mean that I have, without further investigation, come to the conclusion that this is a 'trust' in the sense above defined. That is one of the points to be considered. In that light however the matter was dealt with by the official trustee and the Court. No order was made immediately on the application, but a reference was directed-I think the date of the order for reference being 11th December 1912. The report found the sum required to be raised upon mortgage but recommended, in view of the particular nature of the properties (an opinion which would have had my agreement), sale rather than mortgage. Incidently, it referred to an alternative scheme, not the subject-matter of the reference by which the parties proposed to raise a large sum on mortgage for the purpose of building blocks of flats. The order of reference is of date 12th June 1911. The order for sale was of 30th August 1912. It was made both in the application and in the suit, treating the matter as being before the Court for further directions on the report of the official referee. The report was read and the order for sale made. No special directions were included as to the sale proceeds, it being ordered in the last lines of the order that 'the suit be placed in the list for hearing.' Mr. Roy relies upon the fact that this order contains no specific direction that the sale by the official trustee should be free from the charge in favour of the Thakur. I shall deal with the matter when I come to consider the question of charge. One property, Harinbari Lane, was actually conveyed on 6th July 1913 and the other property actually conveyed on 28th August 1915. I should have added that exceptions were taken to the report particularly by Radharani, the matter was contested and the exceptions discharged.

13. On 11th December 1912 the suit came on for hearing and an order was made (Ex. J) directing a reference to ascertain how much of the sale proceeds were required to be set apart for the purpose of the religious trust 'subject to any valid and binding agreement between the parties relating to the discontinuance of observing certain pujas.' The exact effect of the last phrase need not for the moment be considered. In the reference the parties came to certain terms, which are annexed to the final decree of 22nd July 1913. In these terms the fund was fixed at Rs. 13,000. This fund was to be held by the Accountant-General. In pursuance of this allocation, the official trustee was directed to pay into Court the sum of Rs. 13,000 to be invested and held by the Accountant-General to the credit of the suit; the interest to be paid to the paladars. With regard to the dwelling house, (including the blue portion) this was to be sold by a member of the Bar who was appointed Commissioner to sell. The Thakur, thus displaced, was to go to the paladars in turn. This property (the dwelling house) was not in fact sold as directed in the final decree. Radharani bought in the shares of the other heirs and assumed possession of the whole. This she let out in 1915 to a Mr. Mahomed Yacoob, who remained her tenant until 1925.

14. On 5th February 1921, Radharani mortgaged the entire dwelling house to an attorney, Mr. Akhoy Bose. A suit was filed. The final decree for sale was sometime in the beginning of 1925, and the sale actually took place, as already stated, on 6th March 1925. In 1935, the purchaser at the Registrar's sale conveyed the dwelling house to the defendant, Mr. Aziz.

15. Those are the facts taken from the documents, and the only facts, speaking generally, to which reference need be made. The oral evidence on the part of the defendants related principally to the improvements and additions effected by them on the property. The evidence on behalf of the plaintiff was confined to an

attempt, probably unnecessary, having regard to the state of the law, to show that the plaintiff had been in actual possession from 1915 onwards; that is, that the family had continued to occupy the blue portion. The witness was the artist father of the next friend. His evidence had been obviously carefully prepared, and was well executed. Quite clearly, it cannot be accepted.

16. My finding is (whatever the bearing may be) that the family left in 1915. The neighbourhood had become non-Hindu. The family dwelling house was rented as to the pink portion, that is the bulk of the building, to Mahomedan merchants, and it is my finding that the family did not keep their family deity in the blue portion, nor, as dramatically described, did the old lady venture forth by one staircase or another to perform the puja. I find that the deity was actually taken away in 1915.

17. At first sight, on the facts that I have mentioned, it would occur to anybody and occurred to me at the outset of the case, that the main questions involved would be questions of limitation, and so indeed was the matter argued on behalf of the contesting defendants. But on further consideration, I have come to the conclusion that the main questions are not of limitation, and that their answers depend mainly, if not exclusively, upon the construction of the original deed, coupled with the decree of 1885.87, and the view to be taken of their combined effect.

18. Splitting up the questions according to their practical import, there are three : (1) the blue portion of the dwelling house, in which only Mr. S. M. Bose's client is interested. The matter, to my mind, although it is one upon which it may not be easy to form an opinion, is in a sense simple, because as a result of the discussion, and subject to the subsidiary points, it appears to me to depend upon the effect of the original deed and decree. Either the blue portion did, or it did not, vest in the deity. If it did, (subject to the arguments as to adverse possession adduced by Mr. S. M. Bose, answered by Mr. S. C. Roy with Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 then the plaintiff is entitled to recover possession. If it did not, the plaintiff had no rights which he can enforce at law. This being the less difficult part of the case, I will deal with at a later stage. (2) As regards the dwelling house, the pink portion, again this depends upon a construction of the effect of the decree of 1885, because it is upon this decree that Mr. Roy founds his action. By this decree was a charge declared on this pink portion, or was. the charge on the other hand confined to the premises other than the dwelling house. That, again, is a matter of the reading of the decree, and although I have expressed a view during the course of the suite I will reserve it for later consideration. (8). The main and the really difficult question in the case is the question whether there is an existing charge enforcible by the plaintiff on the houses other than the dwelling house, transferred by the official trustee under the order of 1912. This is the question which I propose now to deal with. It involves or includes the question of vesting. In whom was the property vested, and to what extent, on what trusts? 'Was there a charge? if so in favour of whom and what is the effect of such charge? Again, it does not appear to me on consideration, that questions of limitation are of prime importance, the main question being whether on the facts of this case the charge after 1913 operated on against the houses, or was transferred to the sale proceeds, or whether by what took place the transferees took free of the charge.

19. One of the points of law which has been most agitated before me in connexion with this matter is that of 'trust.' Whether it makes a fundamental difference that the deed of 1853 should be a 'trust' or an 'endowment,' I ventured to doubt. On the other hand, even if not primarily important, it certainly becomes material in considering whether the proceedings in 1910-12 were properly constituted, that is to say, as a matter of procedure. It is for this reason that counsel for the plaintiff and for the remorseful relations supporting him were so intent on establishing that notwithstanding the form of ' trust' a disposition in favour of a Hindu deity, partial or total, must have the effect of vesting the property in the Thakur.

20. The point propounded by counsel may be formulated as follows: (a) That here is ownership of property subject to an encumbrance or charge in favour of the deity. At one stage it was put as high as a mortgage; at another stage it was contended that there was 'an estate carved out.' But at the lowest, according to the plaintiff, here is a charge under Section 100, T. P. Act; (b) It is then said that the Court has no power whatever

under any circumstances to remove that charge, or, to allow sale of the property free of the charge, and, lastly (c) That the Court, if it can do it at all, which is denied, can do it only in the presence of the deity represented by persons distinct from the shebaits. The matter of 'trust' may therefore become important because should the view be taken that the Court can order conversion in proper or properly constituted proceedings, the further questions will follow: (d) 1. Were the proceedings properly constituted, (d) 2. If not, what will be the effect if such an order is made in proceedings not properly constituted.

21. When I broke off yesterday I was about to consider the question of law discussed in this case, 'trust' or 'endowment.' It is however more convenient to formulate, at this stage in a simplified form, Mr. Roy's argument. I do so as follows: (1) No 'trust,' but 'endowment.' (2) That in this case the endowment may be partial debutter, but that an estate is carved out for the Thakur. At the least a charge has been created; moreover, a charge created by decree, and this does incidentally, according to Mr. Roy, create an interest in land. (3) The other estate, that is to say the estate minus that created by the charge is, according to Mr. Roy owned by the heirs. In this case he contends that the sale by the official trustee was a sale by him as agent of the heirs. (4) The Court has no power to order conversion of land in the case of an absolute debutter. (5) There is no reason for a different rule in the case of a partial debutter. (6) Alternatively, the Court, if it has such power, has only power in proceedings where there is what he calls 'separate representation of the Thakur.'

22. On the argument of Mr. Roy so formulated, it seems to me convenient to discuss the following questions which I will again enumerate: It should be remembered that some of these questions were not fully dealt with by counsel for the defendants owing to the stage at which they become obvious. I. 'Trust.' II. Effect of a partial debutter. III. The position of the official trustee having regard to the answer to question 1 and to the facts of this case. IV. The Court's power to order conversion on the basis of trust. V. The Court's power to order conversion generally. VI. Mr. Roy's two magna chartas, and the question of 'separata representation.' I refer to Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 and Pramathanath v. Pradhyumna Kumar , to which latter case I think the expression is probably more appropriate, because Mr. Roy is contending for the rule. No conversion without representation, or to be more accurate without ' separate representation,' which has a sound about it of magna charta.

23. I come back to the first question, that is, of trust (E). The contention of Mr. Roy, S.E. Das and those less eminent but equally efficient counsel who supported them was that there is no trust in India, outside the Trusts Act. Mr. Roy's contention logically results in the proposition (by which he was prepared to show) that before 1913 when the Trusts Act was introduced into Bengal, there was no such thing as a religious or secular trust among Hindus. Other counsel supporting Mr. Roy, limit the exclusion to religious trusts. Mr. Roy and counsel supporting the deity base their contention on the following grounds : (1) That the integrity of Hindu law has been expressly preserved by statute, (2) that the statutes relating to trusts such as the Trusts Act, the Trustees Act and so forth, all in some terms or other purport to disclaim relation to Hindu trusts or Hindu religious trusts. (I said I would add to my judgment on the question of trust in Hindu law and what I am about to say may be taken as inserted in my judgment at page 22.) (3) Lastly Mr. Roy relies upon the proposition that Hindu law in its integrity does not recognize trusts. This is what I have referred to as the pure and simple Hindu law theory.

24. As regards the second branch of Mr. Roy's argument, exclusion by statute, firstly it should be noted that there are other statutes which do not make any distinction between religious trusts and secular trusts, Hindu trusts and English trusts, for instance the Specific Relief Act. Secondly I do not follow the logic. True Section 1, Trusts Act, made applicable to Bengal in 1913, does not apply to religious or charitable trusts whether Hindu, Mahomedan or English. It does not follow that such trusts do not now exist independently of the statute or did not exist prior to the statutes; in other words, the question is, are trusts part of the system of Hindu law as administered in India at the present day

25. I now come to the question of Hindu law in its integrity. What the pure Hindu law is and where it is to be

found, I have not been able to discover. Mr. Roy relied upon an alleged dictum quoted, I think, in a text book, if I recollect correctly, Gour's Hindu Code, a phrase to the effect that 'trusts should not be introduced into India.' But enthusiasm has led Mr. Roy slightly to change the wording and to divorce the dictum from its contents. The original of this is a phrase in the ruling of the Judicial Committee in Ganendromohun Tagore v. Juttendromohun Tagore ('72) I A sup Vol 47 at page 71, and the phrase is as follows:

The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts and equitable ownership which is paramount in Courts of equity does not exist in and ought not to be introduced into Hindu law.

26. The context and the next sentence shows that this was stated only to emphasize the point that irrespective of these historical anomalies, trusts were recognized by Hindu law.

It is obvious that property whether moveable or immovable must be vested more or less absolutely in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India.

27. I think that Mr. Roy could more usefully have relied upon the phrase in Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar ('22) 9 AIR 1922 PC 123 to the effect that 'Hindu law pure and simple knows nothing of trusts.' Again I consider the meaning to be that this notional original Hindu law was not concerned with estates such as came to be developed owing to historical reasons in England. There is a significant passage in a case which I shall refer to in connexion with partial debutter (which I have not by me) to this effect, that in comparison with English lawyers, the Hindu jurist, equally acute, was little interested in the theory of estates: Sibchunder Doss v. Sibkissen Bonnerjee (1854) 1 Boul Rep 70. But the complete answer to Mr. Roy's case is that Hindu law, whatever it was in the time of the heroes, is no longer pure and certainly not simple.

28. The matter was discussed at considerable length as long ago as 1808 in Kumar Asima Krishna Deb v. Kumara Krishna Deb ('69) 2 Beng LROC 11. Markby J. impressed with the peculiarity of Origin of trusts in England appeared to take the view that as similar historical conditions did not prevail in India, there could be no such thing as an 'English' trust in India. The matter came to be considered in Krishnaramani Das v. Ananda Krishna Bose ('70) 4 Beng L R O C 231. The passages which are particularly important are 278, 284, 287 and 290. Shortly put (and the judgment of Macpherson J. should be especially referred to) it was then held that whatever the Hindu law might have been, trusts in the English sense, though not with the English historical paraphernalia, had be-come an integral part of the Hindu system as administered by these Courts, and since that date although the matter is often agitated, I know no case in which it has been held otherwise.

29. In this Court we have innumerable in stance and a very simple and therefore, good instance of a Bombay decision is in Rangacharya v. Dasacharya ('13) 37 Bom 231 Where a fund was left in trust for the burning of camphor before a particular idol. In my view therefore the law is-and this is the meaning of the other passage in ' Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar ('22) 9 AIR 1922 PC 123 -that notwithstanding the differences in Origin we have in India the same result. Referring to the opening page of Lewih on 'Trusts' we read that in England the 'parents of the trust were fraud and fear, and a Court of conscience was the nurse.' In India we hope that the trust has a more respectable origin and up-bringing, but the result is identical.

30. As this matter is so often agitated before me I will therefore enumerate the terms which I think it convenient to use in order to keep the various positions clear, and which, so far as possible, I myself retain- (1) Endowment. Gift to idol, but owing to peculiar attributes, reflected fiduciary capacity or position in shebaits. Property vested in idol. (2) Trusts. Property vested in A for the benefit of B notwithstanding extraordinary origin in England exists in India. (3) Combination of trusts and endowment.

31. An example of such a combination (and what I now have to state is applicable to another important point discussed in this case) is, in my opinion, what we call 'partial debutter.' The normal case of partial de-butter is one where the disposer has purported to dispose of property in favour of an idol, but in such a manner as to

show an intention of benefiting his family in perpetuity. The Courts have dealt with the matter as follows : Proceeding on lines of invalid dispositions, they have held that an attempt to provide in perpetuity for heirs by an ostensible gift to an idol, is invalid. On principles therefore of resulting trust, they have held the property to be vested in the heirs, but subject to a trust ('overriding trust',' as it has been called) which is valid in perpetuity for the maintenance of the idol. I know of no contrary case where property has been vested in the idol subject to a trust (which of course, would have to comply with the ordinary law) for the benefit of the family. Logically, there appears to me no objection to such a case; but I know of none, and the term 'partial debutter' is, I think, in our vocabulary confined to case which I have described. Among other cases with regard to 'partial debutter' upon which I have formed my opinion are: Sibchunder Doss v. Sibkissen Bonnerjee (1854) 1 Boul Rep 70, Sonatun Bysack v. Sreemutty Juggutsoondree Dossee (1859) 8 MIA 66, Krishnaramani Das v. Ananda Krislina Bose ('70)4 Beng LR OC 231 at p. 286 and Ram Coomar Paul v. Jogendet Nath ('79) 4 Cal 56. In my view therefore partial debutter is an offspring of the law of trusts, and it has in this Court called for administration and partition.

32. Where I do agree with Mr. Boy is that notwithstanding that in my opinion a Hindu can employ English machinery and therefor create a 'trust' for the benefit of a deity, the fact that he has used words more or less appropriate to an English trust is not conclusive. It must be a matter of inference on the documents and the facts of each particular case; whether the benefactor intended to adopt the one or the other method, 'trust' or 'endowment.' We have to take into account the fact that in the early and middle part of the 18th century English lawyers were employed and therefore the terms naturally used would be English terms. On the other hand, it is equally true that the employment of English lawyers led to the use of English methods. There is no doubt, from the number of cases we have seen in this Court, that during this period, the English system which has certain advantages, was extensively adopted.

33. Now in this case there is the deed itself. Then there is the decree of 1885 which decree, Mr. Roy says, he is not going behind. That decree and that judgment in my view plainly accepted this disposition as a 'trust.' Not only that, but from that date it has been treated as a 'trust' even down to the plaint in the present suit. Nor do I think that any distinction was appreciated until I myself raised the question in connexion with limitation. I do not say that the latter matters are in any way conclusive. It must be remembered that for the most part the distinction is immaterial. Both are endowments in the general sense, both are trusts in the general sense and the general consequence follows in each case. Perhaps it should never make a difference. Perhaps in this case it does not. 'Whether it does, will fall to be further discussed. I hold therefore that this was a 'trust' and to that trust the English law of trusts generally applies. The next question, question 2 is 'effect of partial debutter.' How such a disposition is regarded in what Mr. Roy referred to as 'pure Hindu law,' (that is to say Hindu law before any influence upon it of ideas of English jurisprudence), I have been unable to form any view. In its legal aspect, it seems to me very much a creation of Anglo-Hindu law. It does not appear to me in the light of a mere charge a charge and nothing else. It seems to me as I have already indicated permeated with the idea of trust. The words used by Mulla in Section 408 (a) in his text book on Hindu Law, seem to support this view:

'Partial dedication' 'charge in favour of charity, 'where by the grant a mere charge or trust is created in favour of an idol,' etc. . . . subject always to the trust or charge in favour of the idol.

34. The practical results of this compound disposition are among others, that where the income only is charged the intervention of the Court is required. In nine cases out of ten, either the owners come to Court and want their corpus, or the defendant deity comes and wants a fund set aside to meet his charge. Proceedings to effect these objects have been most common in these Courts, and it has been as common for the Court to put that fund in the hands of an independent trustee. In many cases the deity's fund has been deliberately put into the hands of the official trustee so as to distinguish it from the rest of the property which goes to the heirs who are also normally the shebaits.

35. Now Mr. Roy contends that in the ease of partial debutter we have the Transfer of Property Act and nothing else, that Section 39 applies, that having regard to Section 39 the question of bona fides or want of

notice has no effect; especially having regard to the fact that this charge was created by decree and that in such circumstances the Court's order directing conversion being contrary to the express terms of the statute, it is of no effect. With regard to the two Sections 39 and 100, I follow the view expressed in Mulla's Transfer of Property Act as to their effect: see Notes pages 167 and 550. On this aspect of the matter which is the most troublesome point in the suit, not only should I have reserved judgment, but I should have insisted upon further argument by counsel for the defendants (which in fact I did invite) had my view been otherwise than it is on the question of trust, and upon the question of the official trustee's position, which I shall deal with next. Nevertheless I shall, upon the question as formulated by Mr. Roy, express a tentative opinion in dealing with question 5.

36. I now proceed to question 3, the position of the official trustee on the facts of this ease. The effect of the proceedings of the 1880's I think I have already indicated. I need only repeat that in my opinion the two income-bearing properties were vested in trustees upon trust, first to pay 'x' Rs. 1300 per annum for the maintenance of the deity and the balance of the income in certain shares to the heirs. In the case of the person entitled to the biggest share the heir took as a Hindu widow and possibly for this reason there was no attempt at a division, or what Mr. Roy calls a 'localization' at that time, the trust continuing as a trust to pay maintenance to the Thakur, and income in certain shares to the heirs.

37. In 1888 the official trustee was appointed by the Court. The appointment was, as I think I have mentioned, accepted or treated as a valid appointment in the plaint. The contention, however, at this hearing is that having regard to the terms of the Official Trustees Act, the appointment was without jurisdiction. The order vested or purported to vest the income-bearing pro-parties in the official trustee the income of which he collected from that day until 1912 or 1913 and which he made over to the person who was senior shebait and, so to speak, senior heir under the arrangement embodied in the scheme of 1887. In 1911 or 1912 the official trustee applied for leave to convert, qua trustee of those trusts which the Court in 1885 had declared valid, the trust for the maintenance of the Thakur. He got an order in that capacity not as owner subject to a charge, but as owner of the estate of the deity. That explains why the order does not refer to the sale being free of charge, the two things being inconsistent.

38. Now coming back to the matter of the Official Trustees Act counsel for the Thakuir relied upon the terms of the Act as it then stood, whereby, the official trustee was forbidden to accept any trust for a religious purpose. Rightly or wrongly, this Court seems to have drawn a distinction between a trust for a religious purpose and a trust in the English form where the ultimate beneficiary or one of them is a Thakur. The view has been taken, and acted upon, so as to appoint the official trustee in a number of cases (again that does not prove it to be the right view) where the official trustee is to hold qua trustee (English) and pay money to another person who is to apply it for the benefit of the idol or of the idol, among others. Whether to such a ''trust as I consider, this to be, statutes in the terms of Indian Trustees Act or the Trustees and Mortgagees Powers Act (the leguage used being 'cases to which English law is applicable') would apply is a question which has never been finally decided.

39. As at present advised, I take the view, subject to further consideration, that such language would not exclude the application of these Acts. The language of the Trusts Act is more difficult, whatever be the correct view, the Court in this case in 1888 took the view that this was a trust which the official trustee could accept. Supposing that it was a wrong view the Court did appoint. The Court did vest the property in the official trustee. The trustee did act. Does it follow that any orders passed by the Court, purporting to be made under that Act, are of no effect? Would the trustee still, if he acted under such orders, act in breach of the trust? Would the transferee be a transferee from a trustee committing breach of the trust? I think not, and I express that opinion generally although for the purpose of my judgment it may be con-fined to the facts of this case.

40. Upon that view, I now proceed to question 4. 'The Court's power to convert,' regarded from the point of view of 'trust.' In; my view where immovable property is vested in trust, (and this does not exclude the cage of a trustee de facto) for the purpose; first of maintaining the properties, secondly, to pay out 'x' a year to the

Thakur, and thirdly, the balance to the heirs, it is open either to the Thakur or to the heirs to seek an order either separating the properties by metes and bounds or by sale and division, and that in a proper case the Court if satisfied can make an order for conversion. In this case, upon conversion, as pointed out by the official trustee in asking for the order, there would be a corpus of Rs. 1,50,000 which would be, roughly, four times the amount necessary to bring in Rs. 1300 a year. I think therefore that irrespective of any suit or proceedings in the nature of administration, the Court has power to order conversion.

41. In my view, the Court having such power even if there be some technical defect i.e., if the Court has made the order purporting to do so under the provisions of an Act which should not apply, or if for instance as in this case the official trustee should not have accepted the trust, the order having been made, it is not, as the plaintiff contends, of no effect. Further, I consider that in proceedings of the nature of administration proceedings, the Court has the same, if not wider powers. The Court could have ordered the conversion in 1885-87. It did not. It was open to the Court at any time, in that suit or in another of this nature to complete what is in the nature of administration.

42. Further, I consider that pending any suit of this nature, the Court has jurisdiction to order the trustee to do what is right and proper with the corpus. I said that I would incidentally indicate a tentative opinion in the event of my view on trust being unsound, I have therefore included (question 5) the Court's powers to convert, etc., irrespective of 'trust.' According to Mr. Roy's view a partial debutter is nothing more or less than ownership in heirs and a charge upon their property in favour of the Thakur, My view is that the same practical necessities and implications arise as if the matter be regarded in the light of a trust in favour of both. Either heirs or Thakur can, or should be able to, come to the Court and ask the Court to allot, to administer, to localise, or whatever you may call it. That it is done most frequently in these Courts has not been denied. Again, I repeat, it does not follow that it is lawful. I consider however that even if the matter is regarded in the light of security and no more, that there is jurisdiction to administer and divide the only question being whether the proceedings are or are not defective, and secondly, what is the effect if the proceedings are defective.

43. Here enters in the vexed question of 'separate representation.' I propose to deal with it to the best of my ability in dealing with the next question, 'no administration without separate representation.' Question 6. Separate representation. The two cases upon which Mr. Roy has relied are Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 confirmed on appeal to the Judicial Committee, and Pramathanath v. Pradhyumna Kumar . Before I attempt, as in justice to Mr. Roy I must, to analyse these two cases I propose to make certain criticisms just or unjust on the general contentions of Mr. Roy and Mr. S. R. Das on this point.

44. First of all as to the phrase 'separate representation.' It is in itself either redundant or equivocal. What is the meaning of 'separate representation' of an idol? Are they separately represented by the shebaits or does separate representation mean representation by somebody other than the shebaits. Is it correct or is it not misleading to use the phrase 'separate representation' at all. Secondly, Mr. Roy and Mr. Das as champions of 'the pure Hindu law' reject like poison all ideas and principles of English equity. On the other hand and these, I think, are Mr. Das's actual phrases, he was most eloquent about 'common fairness' and orders 'being made behind my back.' Then it is contended by Mr. Roy and Mr. Das these cases have restored the Hindu system to its ancient purity and mark the return of the golden age of Hindu law. My enquiries as to separate representation in that golden age were not profitable and I am bound to confess a suspicion that this idea of separate representation, however much the parentage may be disputed, should be affiliated to the Lord Chancellor.

45. In this connexion, I take the liberty of referring to what has happened in our Courts over a period of years. During the ninteenth century, generally speaking, the shebaits 'stood for' the Thakur. I use intentionally common language. The shebaits, however, partly by reason of economic pressure, partly by reason of the loop-holes afforded by our system and also by reason of the uncertainty of retribution, divine or human, were not always honest. This view of representation in religious and charitable trusts had its effect on our chancery

practice in general. Counsel will remember that in this Court it is only in recent years that even in cases of 'trust' any attempt has been made to ensure that beneficiaries are separately represented or their interests considered in cases when the Interests of the trustee are wholly adverse to the interests of the beneficiary. For instance it was generally considered that trustees without any investigation or consideration of the rights of beneficiaries are entitled automatically to be indemnified out of the trust property and that strangers dealing with the trustee are entitled automatically to decree against the trust property. This, I think, was probably the result of introducing the idea of 'necessity' and upon analogy with the Hindu system. The personal liability of the trustee and its consequences did not come to be recognized until a recent date. At a still later stage, upon the analogy of what takes place when a claim to an indemnity is made by a trustee against the estate this Court began to consider the necessity of representation of the deity distinct from representation by shebaits.

46. It seems to me therefore that by a swing of the pendulum or a retributive process we have now introduced into Hindu law from English chancery practice the idea of 'separate representation' based upon the equitable principle that a beneficiary is to be separately represented when the interest of the person in fiduciary station is adverse to that of the trust estate. Gobinda Ramanuj Das v. Ramcharan Ramanuj Das (35) 63 Cal 326 is one of the cases in which this matter was dealt with. At this stage, i.e., in 1925 came the ruling of the Judicial Committee in Pramathanath v. Pradhyumna Kumar . This judgment must be most carefully related to the argument which followed a very peculiar course. One misconception which on a superficial reading of the case is but natural, is that the party claiming to remove the Thakur was the party who advanced the argument that the deity 'could be thrown into the river.' On the peculiar facts of the ease it is precisely the opposite. The party seeking to remove the deity was challenging the capacity of previous shebaits to direct in a deed of disposition that the deity should not be removed and should reside in the thakurbari. In order to support the proposition that he had a right to impose that limitation, Mr. B. L. Mitter used the phrase above quoted. The Court on appeal in Calcutta and the members of the Judicial Committee were suitably shocked. The argument based on property in and the right to do what one liked with the idol has therefore a very confusing effect on the case. It was however no doubt one of the reasons why the Judicial Committee made the direction which they did.

47. The case generally has been relied upon in these Courts during recent years and is relied upon in this case by Mr. Roy for the proposition 'that in any case where the interests of the deity may be affected, he should be separately represented' and this is said to be in accordance with pure Hindu law. It is quite true, that since then for greater safety in the majority of suits where a Hindu deity is concerned the deity has bee impleaded through a next friend or a guardian-ad-litem. Mr. Roy relies upon a later decision in Kanhaiya Lal v. Hamid Ali to show that in fact the Judicial Committee has itself read the ruling as involving the proposition contended for. In my opinion it is otherwise. The phrase there used in the very short judgment is that:

Their Lordships are not able to deal with the appeal in the absence of Sree Thakurjee Maharaj whose interest arises under the wakf or his representative. In these circumstances following the precedent in Pramathanath v. Pradhyumna Kumar , etc...

48. Now for reasons which I will explain in a moment 'following the precedent' to my mind means merely that their Lordships are going to take the same course and direct the addition of parties and nothing more. It has no relation to the necessity for 'separate representation.' The point there was that the Thakur was not represented by anybody. The owner, respondent, had claimed possession of property in which the appellants had occupancy rights. The holders of the occupancy rights had established a thakurbari and debutter. After suit, the holder of the occupancy rights had executed a deed dedicating the land in which he had occupancy rights to the deity and appointed a trustee. The respondent, that is the plaintiff owner, amended this plaint by impleading the idol and trustee and based upon the execution of that deed a special plea that it extinguished the occupancy rights.

49. In the Court of first instance the amendment was allowed, and a plea thus introduced which if successful

would of course deprive the deity of its property and its thakurbari, but without making the deity or the trustee a party. It was obvious that that could not be done. It has in my opinion, no bearing on the question whether there should be 'separate representation' of the deity in the sense that phrase has been used. Coming back to Pramathanath v. Pradhyumna Kumar itself, it seems to me, that on analysis the direction to add the deity the terms of which are in themselves to be noted (see p. 261) 'in the interests of all concerned the idol should appear by a disinterested next friend' may be based upon one of three principles or a combination of them. First of all, on the basis of proprietary rights, the view apparently taken was that here was a trust and if it had to be analysed, I think, trust in the English form, for residence. A 'right of location' that the thakurbari was vested in the trustees on a trust for residence in the thakurbari (see bottom of p. 258), that some of these trustees who were bound to so hold the thakurbari for the residence of the Thakur were seeking in derogation of their trust to remove him.

50. Upon that principle a Court of equity might well have directed a 'separate representation' of the beneficiary. The other principle upon which it seems to me the Judicial Committee might have given this direction is wholly non-proprietary but anthropomorphic, i. e., by animating the deity with feelings of dignity and comfort. This, I think, is a reaction to the ducking theory of Mr. B. L. Mitter. It seems to have been considered that there should be some opportunity of voicing these feelings where they were likely to be disregarded, thirdly consideration of completeness and convenience. It must be remembered that the ladies were not forgotten, which fact coupled with peculiar language which is not appropriate to an insistence upon separate representation to safeguard legal rights, leads to the conclusion that having regard to all the circumstances, the Judicial Committee thought it the best thing to do

51. Now, on each of those grounds or combination of all, I think the introduction of a next friend is explicable. Until therefore this rule has been otherwise construed by the Judicial Committee, I continue to be of the opinion that the shebaits do formally stand for and represent the deity; but that there are exceptions. At the present day, owing to the extent to which shebaits have in recent years entry into debutter property, the exceptions have almost become the rule.

52. With regard to Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 , Mr. Roy has been good enough at this stage to remind me his argument that Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 is also by implication a decision as to the effect in Pramathanath v. Pradhyumna Kumar . I do not consider it in that light. It is however obviously an illustration of the principle upon which separate representation is based, the essential point being that the shebaits by consensus among themselves could not put an end to the debutter. Nothing could be more 'adverse' than a shebait putting an end to a debutter. Dealing generally with Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 , Mr. Roy suggested that this has caused a juridical revolution. I think otherwise. It certainly led to great activity among Hindu deities. Their claims rose many points in value in the litigation market. But that in my opinion was due rather to certain accidental, but striking features of the case than any juridical ruling. It was an extreme case, both as to demerits and lapse of time, and yet it succeeded.

53. As regards rulings of law, it is true that the notion before then vaguely accepted in some form or another, that the debutter could be determined by consensus was dispelled. But with regard to adverse possession and the enforcement of the charge, it does not seem to me that more was done than to apply accepted principles to very extraordinary circumstances. There always remains the fact relied upon by Mr. Roy, namely, that without the deity being heard or his position being considered, the shebaits cannot do what they please. But that again apart from the question of consensus was never the fully accepted view, whatever may have from time to time been actually done.

54. Mr. Roy, relies upon the case negatively in order to show that administration in the sense that I have discussed it, is excluded, but marked the difference between that case and this. In that case the shebaits purported to wholly abolish the trust and to deal with the property as their own. In this case so far as the sale or conversion is concerned, no question of determining the trusts or abolishing the debutter arises. Indeed,

the trustee himself, the representative of the trust was himself, asking for conversion and intending to hold the property subject to the trusts. I am inclined to agree with Mr. Roy that the consent decree in this case reducing the notional fund from Rs. 42,000, or whatever it may be to Rs. 13,000, without a 'separate representation' of the deity, according to the present day conception in this Court, would not be binding on the deity. That it has been done throughout the century, if the Court did not consider it to be a fraud upon the deity, there is no question, but according to ideas which, as I think have been now imported, this reduction would, in all probability, be regarded as improper.

55. I am not forgetting that it is Mr. N. C. Chatterjee's contention that the deity was in fact represented, his shebaits being parties to the suit. That in my opinion, begs the question in its modern form. But assume that the reduction does not affect the deity, does the fact that that reduction was made vitiate the order for conversion? Mr. Roy contends that the intention of the plaintiff throughout was to reduce the allowance to the deity and that therefore this reduction taints the whole of the proceedings. No fraud has been imputed to the official trustee or his transferee. It seems to me that the matter of principle must be decided similarly whether subsequently the trust property now in the form of moveables and not immovables was not properly divided or localized. On that basis my opinion remains, that the Court had jurisdiction to order the conversion that the order was proper, and that notwithstanding the contentions with regard to the Official Trustees Act it was an order which could be made both upon the application and in proceedings analogous to the administration proceedings, and that they are not vitiated by reason of want of 'separate representation of the deity.'

56. Before I deal, as I shall do much more shortly, with the dwelling house, let me enumerate two points, which have not been fully discussed. One is whether even on the basis of charge and nothing else, by reason of the Court's order the transferees would be in the position of bona fide transferees-without notice, or be protected upon an analogous principle. The second is what on the facts of this case is the effect of the deity not only having received since 1913 the income of the fund set apart but now claiming to retain the fund set apart upon con-version. My judgment is not based upon any special opinion on these points. Nor have I considered it necessary to discuss the question of limitation and to consider whether there is any ground for applying any article other than Article 132. Whether, for instance, it should be treated as a recurring right denied in 1913, or whether on the facts of this case it is necessary for the plaintiff to challenge any transfer. As regards the latter it appears to me that the transfer is not challenged, and the only question is whether it was or was not subject to the charge.

57. With regard to the dwelling house, the first question relates to the claim to a charge over the pink portion. The view expressed by me during the course of the argument is the one which still seems right. As that view is based upon my reading of the judgment and decree, the reasons are also appropriate to the consideration of the question of title-to the blue portion. As I read the judgment and decree, the dwelling house was distinguished from the income-bearing properties. The latter remained trust properties for maintenance, the former was dealt with toy way of an absolute vesting and allocation. How that was done I shall have to consider in a moment, but in my opinion the effect of it was to subtract the dwelling house from the operation of the charge or trust. That is my reading of the judgment and decree.

58. The question relating to the title to the blue portion is more difficult. This was the only matter in which the client of Mr. S. M. Bose was concerned, and as far as I remember (without referring to my notes) the matter was dealt with by him on lines of adverse possession and dispossession or quitting by the deity in 1915, which quitting or relinquishment or dispossession must be treated as being the act of the deity since all the shebaits were agreed, that on the facts of this case the shebaits were properly agreed and that therefore it must be deem-ed to have been the desire of the Thakur to vacate. Because my decision is ultimately based again upon my reading of the deed, judgment and decree. I shall say no more about the facts than this, namely, that in the circumstances and under the conditions which the evidence of the plaintiff's witness brings out so clearly the position of the deity in the blue portion after the family had vacated the rest, was extremely uncomfortable. He would have been tucked away in a corner of a house occupied by persons professing other

faiths. I do not think on the evidence that the family could conveniently, or would, have come to worship him. It is no good being a Corporation sole according to juristic conceptions and being left alone at the other end of the town among strangers. Those are considerations which would have weighed with me had the matter depended upon facts.

59. Nor do I think does the matter depend upon the argument preferred by Mr. S. M. Bose to the effect that there are different kinds of possession or different rights which may be possessed or enjoyed and that in this case the right of the deity, if any, was of such a quality, that imputed possession is excluded, i. e., that in this case, the right of the deity being to reside merely, the principle long ago laid down and followed in Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 does not apply. I say this because the plaintiff does not contend that there is any middle or half-way stage between full ownership and no rights. Either, according to Mr. Roy it is dedicated property or it is the property of the family which the family are setting aside or using for the deity. I myself do think that a middle course is possible and was once under the impression, from something contained in the official trustee's petition for leave to sell, that the thakurbari was vested in the trustee on a trust for residence. That view, I think, is wrong on the reading of the decree, but I must not be taken as ruling that there can be no such trust. For the purpose of deciding this case, that is immaterial. In my view, if the blue portion was vested in the deity, adverse possession as such is excluded.

60. Whether other questions of limitation might arise, I do not propose to consider; for instance, whether it is or is not necessary to set aside any transfer. It will be noted that this question was left open by Rankin J. in Surendrakrishna Roy v. Ishwar Bhubaneshwari : AIR1933Cal295 . On the other hand, if no vesting in the deity, no claim. Now I confess that I was originally under the impression that in 1885/87 there had been an allocation of the corpus between the family and the deity, and that therefore there was an allotment on partition as it were, of the blue portion, to the deity; but on consideration I think that that view is wrong. I do not mean to express the view that any special words are necessary to create an endowment; nor do I mean to rule that words such as 'set aside for the use of,' may, when used by a certain person in certain conditions, create a debutter; but I think that the true effect of this judgment and decree was to declare the whole dwelling house vested in the heirs.

61. The fact that only the residue of the dwelling house, that is the pink portion, was to be partitioned by metes and bounds, is a natural consequence of the thakurbari being set aside in the limited sense. The thakurbari was to remain joint. Thakurbari or Thakur dalan do not by any means necessarily denote endorsement. The manner in which the direction is expressed in the last clause of the judgment 'in settling a scheme for the worship, it will be determined what part of the dwelling house should be set aside for the use of the idol' indicates that this was done for convenience and was necessary to be done, when the parties remained joint in worship and when the property was being substantially partitioned. In my opinion 'for the use of the idol' in these circumstances means no more than 'use by the parties in the service of the idol.' I think that my view is confirmed by the manner in which this 'setting aside' was made part of the scheme for the worship of the idol. I should most certainly have said something about the original deed because although Mr. Roy bases his claim on, and does not seek to go behind the decree, the two in ray opinion have to be read together.

62. Mr. Hazra contended that this deed should be read as containing in itself an implied dedication for the purpose of residence to the deity. I do not take that view. The curious thing about this deed is that the residence of the deity, as apart from the residence of the sons and their families, is not mentioned at all, and had the Court in 1885 provided or made an endowment of the blue portion, it would, in my opinion, have been going beyond the deed. What I think therefore was done by the Court was, as I have said, not a recognition of rights of the deity in property other than the right to maintenance under the trust, but the necessity of providing for the proper worship of the deity both as to location and ceremonies. The other matter upon which I have to add to this judgment is the question of costs, and it is an important question. I informed counsel that I proposed to dismiss the suit with costs, and I then called, counsel's attention to a matter which has been long present in my mind, as presenting difficulties, namely the correct implications of

a decree in that form. Neither counsel had, I think, applied their minds to the matter, and counsel for the defendants at any rate were under the erroneous impression that such a decree would, as the phrase goes, bind the debutter estate.

63. Mr. S.R. Das who is supporting the next friend, did at a later stage request me so to frame a decree as not to make the next friend liable for costs. This came as somewhat of a surprise to myself, my experience being that the next friends are almost too anxious to accept personal liability in these matters and not to claim indemnity from the estate : see for instance Mackintosh Burn Ltd. v. Shiva Kalikumar (33) 20 AIR 1933 Cal 668. I have not yet received from counsel for the defendants their representations in the matter, and I must make my order. I propose in the circumstances to follow the course originally intended, and to dismiss the suit with costs, but I will postpone consideration of the question of the liability of the estate. I will now state what I consider to be the law and practice with regard to this matter however much it may have been disregarded. I do find that under the old Code of 1882, Section 440 (which contained a special provision that the next friend 'may be ordered to pay any costs in the suit as if he were the plaintiff'), certain cases whereby it was held that unless the decree contains a direction that the next friend was personally liable, he was not so liable: Brijessuree Dossia v. Kishore Das ('76) 25 W R 316. The particular provision in the Code of 1882 is omitted in the Code of 1908, and so far as I am concerned I take the law and practice of this Court to be similar to that in England namely, (I quote from the Chancery Practice, p. 101):

The next friend is liable to the defendants for the costs of the action etc., and if he had been ordered to pay any costs in the action he will not in the absence of any reservation in the order directing the payment be allowed such costs out of the estate: Caley v. Caley (1877) 25 W R (Eng) 528.

64. I find that the practice on the appellate side of this Court is embodied in a rule which reads as follows:

In drawing up decrees of this Court dismissing with costs appeals by minor or dismissing with costs suits by minor, the Bench clerk should be careful to make the next friend's minor liable for such costs unless the Court otherwise orders.

65. Although we have no rule on the original side the practice for the last few years since a certain matter which was discussed before me in the motion Court, has been the same. I consider therefore that the next) friend will be personally liable and not the estate, unless I accede to his own request; and upon a consideration of the circumstances come to a conclusion that the suit was of such a nature that he should be entitled to come upon the estate for the costs for which he is in the first instance liable to the defendants.

66. I omitted to mention that in a suit, Geereeballa Dabee v. Chunder Kant Mukherjee ('85) 11 Cal 213 at p. 219 although under the old Code the suit was dismissed with costs against the next friend personally, the next friend having had an opportunity of calling evidence and satisfying the Court that the suit was one really for the benefit of the infants, and having chosen to adduce no evidence, which seems substantially in conformity with the view I have expressed although there no doubt the actual decree specified that the costs should be paid personally by the next friend.