
(1959) 11 AHC CK 0008
In the Allahabad High Court
Case No : First Appeal No. 342 of 1948

Biram Prakash Chela M. Puran Das and Others	APPELLANT
Vs	
Narendra Das and Others	RESPONDENT

Date of Decision : 13-11-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1961 All 266

Hon'ble Judges : S.N. Dwivedi, J; R.N. Gurtu, J

Bench : Division Bench

Advocate : N.P. Asthana, K.C. Agrawal, G.S. Pathak, H.P. Gupta, A. Banerji and Jagdish Swaroop, for the Appellant; K.N. Srivastava, N.A. Kazimi and Govind Das, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a first appeal by the plaintiffs. The plaintiffs belong to the Udasi sect and as such allege that they worship in the Dharamshala (also referred to sometimes as the Haveli), a part of which has now been alienated by Narendra Das, the mahant of Gaddi Shanter Shah defendant No. 1 and one Kesho Chandra defendant No. 2. The plaintiffs alleged that the said Dharamshala contains the samadhi of Baba Pakhatmal, the founder of Gaddi Shanter Shah, which Samadhi is the object of worship by the members of the Udasi sect.

The said Dharamshala is, according to the plaint, managed by the Mahant of Gaddi Shanter Shah to whom it is entrusted but it is not a part of the said Gaddi bat is a separate endowment. The plaintiffs alleged that the sale deed dated the 14th Juno 1945 executed by defendants Nos. 1 and 2 (the second defendant is alleged also to be a trustee appointed by a Certain committee to look after the affairs of Gaddi Shanter Shaha) of a part of the Dharamshala aforesaid in favour of defendants Nos. 3 and 4 in lieu of Rs. 1,50,300/- is invalid and not legally enforceable because (1) the Dharamshala aforesaid does not appertain to Gaddi Shanter

Shah and is not a, part of the Gaddi, (2) is inalienable, (3) the defendants Nos. 1 and 2 were not! competent to alienate any part of the Dharamshala, (4) there was no legal necessity for selling the aforesaid Dharamshala to defendants Nos. 3 and 4 and (5) the portion sold was very valuable and was sold for inadequate consideration.

The plaint sets out that the aforesaid sale deed was executed to pay off a mortgage decree in suit No. 66/1935 obtained by Panchayati Akhara Kalan Kankhal against Mahant Saheb Das, a predecessor of defendant No. 1. It is alleged in the plaint that Saheb Das was not entitled to execute the aforesaid mortgage deed dated the 1st June 1933 on the basis of which the decree was passed in suit No. 66 of 1935 (Ex. A-16) on December 21, 1935. The plaintiffs denied the consideration, as also the validity of the said mortgage deed and alleged that it was not for legal necessity.

The plaint sets out that defendant No. 1, along with two other persons, filed a suit under O. 1, Rule 8 C. P. C. being suit No. 3 of 1943 against the Panchayati Akhara Kalan Udasiyan on February 3, 1943 (plaint Ex. 17) in which suit the said mortgage deed was challenged on the very grounds which have been taken against the said deed in the present suit and that the suit was dismissed but that the decree of dismissal dated the 7th December 1944 is of no effect because it proceeded on a compromise which was without the sanction of the court and the compromise itself was as a result of collusion.

2. Shortly put, therefore, the plaint, in the first instance attacks the very foundation of the impugned transaction. The relief sought by the plaintiffs was for a declaration that the Dharamshala is a waqf property and is not transferable and that the sale deed dated the 14th of June, 1945 aforesaid is inoperative and defendants Nos. 3 and 4 have derived no title or interest under the said deed.

3. A common written statement was filed by defendants Nos. 1 to 4. It was pleaded that the Dharamshala was a part of Gaddi. Shanter Shah, that the mortgage deed was not invalidated on any of the grounds set out in the plaint and that the said mortgage deed dated the 1st of June, 1933 was for consideration and Saheb Das, the then Mahant who executed it, was fully competent to execute it and the deed was, in every way, binding on the said Gaddi.

It was also pleaded that the decree passed in suit No. 66 of 1935 created a binding debt against the Gaddi and that the impugned sale deed was executed in order to save a substantial part of the Dharamshala from passing out under an auction-sale held in execution of the said decree No. 66 of 1935 and that the impugned alienation was of a protective character and was for the benefit of the estate and that, therefore, the impugned alienation was fully for legal necessity.

The decree passed in suit No. 3 of 1943 was also pleaded as being *res judicata* and as having disposed of the question of the validity of the mortgage deed, dated the 1st of June, 1933 in favour of the Gaddi, the impugned sale deed was

executed to pay off the decree in suit No. 3/1943 obtained on the basis of the aforesaid mortgage deed. The decree in that suit No. 3 of 1943, it was pleaded, disposed of also the question of the validity of the impugned transfer of the 14th of June, 1945. The decree in suit No. 3 of 1943 was, therefore, pleaded as *res judicata*, in the present suit.

4. Evidence -- oral and documentary -- was led in the court below and by its judgment under appeal, the court below held that the Dharamshala, a part whereof stands transferred by the impugned sale deed, was not a separate endowment and was part and parcel of the "Gaddi Shanter Shah". The court below also held that the impugned sale deed was valid as it was executed to discharge the decretal obligation created by the decree in suit No. 66 of 1935 and that the sale effected was of a defensive character and was clearly of benefit to the estate of the "Gaddi Shanter Shah". The impugned sale deed dated the 14th of June, 1945 was, therefore, executed for legal necessity and for adequate consideration. It was also held that the suit was barred by Section 11 C. P. C. because of the decree in suit No. 3/1943, the plea of the defendants having been accepted in this regard.

5. The contention that suit No. 3 of 1943 was not a suit under Order 1, Rule 8, C. p. C. was repelled on the ground that it had never been disputed in the pleading that it was such a suit. It was also held that there was no collusion in that suit and that permission of the court to the compromise was not necessary to validate the decree passed in that suit, which was one of dismissal. There was no finding in regard to the validity or otherwise of the mortgage dated the 1st of June, 1933. The issue in regard to the plaintiffs' right to sue was decided in favour of the plaintiffs. The issue on the question whether Section 41 of the Transfer of Property Act barred the suit was decided against the defendants.

6. Upon, the above findings, the plaintiffs' suit was dismissed by the court below.

7. In this First Appeal, the judgment of the court below is attacked on several grounds with which we will deal *seriatim*.

8. It was urged firstly by Sri Jagdish Swarup learned counsel for the appellants that the Dharamshala, a part whereof stands alienated by the impugned sale deed of the 14th of June, 1945 was not a part of the "Gaddi Shanter Shah" but was a separate endowment. For this contention, Sri Jag-dish Swarup principally relied upon the Rubkar of the 6th January, 1851, Exhibit 14. We will deal with this Rubkar shortly.

9. The learned Civil Judge has, in his judgment, clearly dealt with this question as to whether the Dharamshala in question is something independent of the endowment of "Gaddi Shanter Shah" or is a part from it. He has referred to the document on which Sri Jagdish Swarup relies and which we have perused. It appears from that document that the property of "Gaddi Shanter Shah" was dedicated to two pre-existing Dharamshalas, one of which is the Dharamshala in question.

These two Dharamshalas were founded by Baba Bakhat Mal and it appears that in order to meet the funds necessary for running them, Zamindari property was granted by the then King, But that document does not establish that these two Dharamshalas were treated as separate endowments from the main endowment of "Gaddi Shanter Shah".

10. This much is clearly admitted in the plaint itself that the management of this Dharamshala was entrusted to the Mahant of Gaddi Shanter Shah,

11. The oral evidence, on behalf of the plaintiffs, in this case which has been placed before us, itself clearly suggests that the Dharamshala has all along been considered and treated as a part and parcel of "Gaddi Shanter Shah and, indeed, that is the evidence on behalf of the defendants also. There is no clear evidence at all to show that this Dharamshala is an independent entity. It is not suggested that any separate "accounts for this Dharamshala had been maintained by the Mahants of "Gaddi Shanter Shah",

In the previous litigation relating to the Mahantship of Gaddi Shanter Shah, namely, civil suit No. 135 of 1915, which was a suit for recovery of possession of the property appertaining to the Gaddi Shanter Shah instituted by Sital Das as Mahant against Saheb Das, the whole of this Dharamshala was claimed and decreed as part of the "Gaddi Shanter Shah" and there was an express finding to that effect. Likewise, in the litigation between the alleged Mahant An and Prakash and Saheb Das, being suit No. 70 of 1925, this Dharamshala was again claimed as part of "Gaddi Shanter Shah". Under the mortgage deed of the 1st of June, 1933, this Dharamshala was alienated as belonging to the Gaddi of Shanter Shah and it was sold as such under the decree passed on the foot of the mortgage in suit No. 66 of 1935. In none of these litigation or transaction was any doubt thrown as to the Dharamshala being a part of the "Gaddi Shanter Shah".

In view of the fact that it has been clearly admitted that the management of the Dharamshala was entrusted to the Mahant of Gaddi Shanter Shall we think that on the evidence of user and management of thus Dharamshala as also the circumstances that at no time previously had a claim been made that this Dharamshala was not a part of "Gaddi Shanter Shah" we would be justified in affirming the finding of the trial court and rejecting the contention advanced before us that the Dharamshala does not appertain to Gaddi Shanter Shah.

The Dharamshala has clearly been in the nature of an appendage to the Gaddi and the said Gaddi and the Dharamshala are not shown, by any evidence, to have been, at any time, considered as separate endowments. We, therefore, reject the contention advanced by Sri Jagdish Swarup as not being established on the evidence in the case.

12. Sri Jagdish Swarup next argued that the validity of the mortgage deed dated the 1st of June, 1933 had to be fully established in this case and that it was not sufficient that the defendants should fall back upon the decree passed in suit No. 66 of 1935 granted on the basis of that mortgage and to say that the impugned

alienation is justified as being of a protective character because the aforesaid decree was a liability which had to be discharged.

13. The mortgage deed D/- 1-6-1933 in question shows that it was executed partly to pay off the amount due under a previous mortgage without; possession executed by Mahant Sital Das in favour of Akhara Kalan Panchayati Udasiyan situate in Kankhal and partly to pay off the pre-existing liabilities created by the successor Mahant Saheb Das.

14. The deed sets out the situation which led to its execution. It refers to expenses incurred in connection with the two previously referred to litigations, namely, one between Sital Das and Saheb Das, being suit No. 135 of 1915 which was by Sital Das for establishment of his right and for possession over the property of Gaddi Shanter Shah; the other was suit No. 70 of 1925 instituted by the minor, Anand Prakash, who claimed a right to be the Mahant and to recover possession of the property of Gaddi Shanter Shah.

15. Rs. 30S25/- were allowed credit for in respect of Sital Das's mortgage. Three credits were allowed in respect of the sums due on three promissory notes executed by Sahib Das dated the 24th of August, 1929, 28th of July, 1931 and the 15th of July, 1932. Credit was also allowed for a mortgage deed dated the 14th of May, 1926 executed by Saheb Das in. favour of the aforesaid Akhara. There was left in deposit with the mortgagees an amount for payment under a decree of Messrs. Bhagwan Das & Co. Likewise, a sum was left with the mortgagees for payment of an amount due under a promissory note to one Radhey Lal. Then there was also left an amount for payment to the mortgagor's other unspecified creditors. In this way, the entire sale consideration is Rs. 61,000/-. The amounts appertaining to the various heads aforesaid can be ascertained by looking at the mortgage deed itself.

16. The first question, which Sri Jagadish Swamp has raised, is whether it is established that the consideration mentioned in the mortgage deed was paid because the supporting documents had not been filed in this suit. No doubt, so far as the registered mortgage deeds are concerned, even if the originals were still with the mortgagees of the two deeds, dated the 30th of July, 1919 and the 14th of May, 1926, certified copies thereof could have been obtained and produced, but it cannot be suggested for that reason that these mortgage deeds do not exist because full reference is made to the registration records.

17. So far as the mortgage deed of the 30th of July, 1919, executed by Sital Das is concerned., we have the independent evidence of Harbans Singh to show that Sital Das borrowed Rs. 10,000/- from the said Akhara in 1919 by means of this mortgage deed. From the particulars given in his deposition it would appear that Onkar Prasad was in a position to know about this borrowing and the fact remains that Saheb Das had accepted the liabilities on behalf of the Gaddi Shanter Shall created by this mortgage deed and the liabilities had not been repudiated by any of the succeeding Mahants.

It may, therefore, be taken that the amount spoken of by Harbans Singh, was, in fact, loaned when the mortgage deed aforesaid was executed.

We might mention that in Exhibit A-31, which is a list of documents filed in suit No. 3 of 1943 on behalf of the Akhara Panchayati Kalan Udasiyan, this original mortgage deed is shown as being for Rs. 10,000/- at item No. 1 in the list of documents thus filed. So far as the mortgage deed dated the 14th of May, 1.926 executed by Saheb Das is concerned, that mortgage deed is again mentioned as item No. 4 in the aforesaid list. This mortgage deed was undoubtedly executed while the litigation (i.e. suit No. 70 of 1925) which started on the 4th of March, 1925 and ended on the 21st of June, 1928 was still going on.

18. In regard to the pronote amounts, no doubt these are all pronotes subsequent to the 21st of June, 1928 but that would not necessarily show that the debts in question were not taken at all and were fictitious or were not originally taken during the course of the litigation because these pronotes may well have been renewals. If there was a decree of Bhagwan Das and Co., it is likely that the money in respect thereof would be left with the mortgagees.

The amount in favour of Radhey Lal is not such a big sum as would lead to a suggestion that there was no pronote debt and that this was a false entry. Both Saheb Das and Sital Das are dead so that their evidence is not available, but we do find that apart from speaking about the money borrowed under the mortgage deed of 1919, Harbans Singh has also stated that a substantial sum said to be between Rs. 40,000/- and Rs. 50,000/- was spent over suit No. 70 of 1925. Harbans Singh says that he had done Pairavi for Saheb Das in the aforesaid suit.

The amount mentioned by Harbans Singh, as having been spent might have been an exaggeration but one knows that substantial amounts are spent over litigation which have no co-relation to the decreed costs in a suit of this character. In a replication filed in the course of suit No. 70 of 1925 by the next friend through whom Anand Prakash sued, in the first instance, it is stated by Gyan Nand, the said next friend of Anand Prakash, that the Akhara had lent a huge sum of Rs. 55,000/- to Saheb Das defendant and had deposited a security of Rs. 15,000/- on behalf of Saheb Das.

We may point out that Gyana Nand was fighting the application of Swami Maha Purush, who was the certificated guardian of Anand Prakash and who was eventually substituted as the next friend in the litigation. It also appears that there were proceedings for the appointment of a curator in a suit numbered as suit No. 86 of 1923. Apparently in June, 1923 Mahant Sital Das had died. He had, according to the plaint, instituted suit No. 70 of 1925 claiming that Anand Prakash was the owner of the Gaddi.

Presumably then an application for appointment of a curator was made and this may have involved Mahant Saheb Das in litigation expenses also. Sri Jagdish Swarup contended that any borrowings, after the 21st of June, 1928 when suit No. 70 of 1925 came to an end, could not be justified on the basis that the

borrowings were for legal expenses.

No doubt the mortgage deed gives a general coverage to the loans on the ground of legal expenses also but it also recites that Mahant Saheb Das for the benefit of the said Gaddi, had created the debts and amounts were due to creditors so that the recital does not entirely justify the debts taken by Mahant Saheb Das on the basis that they were debts taken to cover the legal expenses only.

19. The transferees of the impugned sale deed are not transferees from Saheb Das or Sital Das and they cannot be expected to produce the account-books and original pronotes relating to the period of the borrowings which were eventually merged in this mortgage deed of the 1st of June, 1933.

20. Some attempt seems to have been made by the defendant transferees of the impugned deed to get the original promissory note executed by Saheb Das as also other documents mentioned in the impugned mortgage deed D/- 1-6-1933 from the Akhara Panchayati Kala Udasujan.

21. A witness, Mahant Bishun Das made a statement in November, 1947 as the Manager of the aforesaid Akhara to the effect that

"papers of all sort such as pronotes documents and mortgage deeds, belonging to Mahant Saheb Das and Sheetal Das, were returned to Saheb Das after the disposal of the case under the Encumbered Estates Act".

It was said by the witness that Saheb Das himself had asked for the same. Therefore, it is evident that upto 1936, the documents referred to above were with the Akhara even though a credit had already been given in the mortgage bond of 1933. It is evident that those pronotes etc. were still retained upto then by the Akhara. Saheb Das is dead and it is very easy for the Akhara to say that the documents were all returned to Saheb Das. We are in grave doubt as to whether those documents were in fact returned. There would be no point in asking for their return in 1936 when they were not so asked for in 1933 and, particularly so, because suit No. 66 of 1935 had the result of merging the liability created under the mortgage deed dated the 1st of June, 1933 into the mortgage decree passed in that suit. Moreover, the decree passed was an installment decree and it is unlikely that without an express order of the court, the supporting promissory notes would have been returned until the property mortgaged had been brought into possession or the mortgage decreed had been discharged. With reference to suit No. 3 of 1943, vide list of documents, Exhibit A-31, we find that on the 20th of July, 1943, the original mortgage deed dated the 30th of July, 1919 as also the mortgage deed of the 21st of August, 1924 and other documents are still in possession of the Akhara.

22. Even though it may not be fully established that the Akhara is at the back of the litigation, there is a suggestion in the evidence that it is so end, in any case, since the Akhara has been deprived of the Haveli by the course pursued by Mahant Narendra Das, the present Mahant of the Gaddi Shanter Sah, it was not

likely to be anxious to help establish the case of defendants Nos. 3 and 4, the transferees under the impugned sale deed dated the 14th of June, 1945.

23. We may then point out that this mortgage deed has never been challenged by the succeeding Mahants in regard to it in suit No. 3 of 1943 filed by the present Mahant, Narendra Das, and two other persons on behalf of the public, to which suit we have already referred, against the Akhara Panchayati Kalan Udasiyan and others including Mahant Pooran. Das. It is noteworthy that no direct attack is there made in regard to the passing of consideration of the mortgagee deed.

The declaration asked for in that suit was to the effect that the Dharamshala was a wakf property and that no right had accrued to the Panchayati Akhara under the said mortgage deed of 1919. The ground of attack was that the said property, being a waqf property, was not transferable and that no Mahant or Manager had any right to hypothecate the property and, according to law, the transfer was null and void.

Even such a challenge, as there was to the mortgage deed, must be deemed to have been given up when suit No. 3 of 1943 was dismissed upon a compromise between the Panchayati Akhara and Mahant Pooran Das on the one hand and Jamuna Das and Harish Chand on the other. Mahant Narendra Das, the other plaintiff, had withdrawn at that stage because he had become a Mahant and that withdrawal was only natural. The fact that this representative suit was withdrawn is a fact which can be taken into consideration in coming to the conclusion that the present objections to the consideration of the mortgage deed of 1-6-1933 may not have any force.

Nothing is established on the record to suggest that the successive Mahants were wasters and profligates and that they would confirm prior transaction of predecessor Mahants recklessly. On the contrary, the very terms of the mortgage deed of the "1st of June, 1933 show that there is a great deal of concern shown by Saheb Das in regard to the mortgaged property so that its value should not fall and its income should not go down during the pendency of that mortgage.

24. Finally, it may be pointed that the mortgagee under the said mortgage deed D/-21-6-1933 was the Panchayati Akhara which is an Akhara of the same sect and though because of the subsequent conduct of Mahant Narendra Das, the Akhara is showing some hostility at this stage, at that point of time, there is no reason to think that it would be a party to a fraudulent document. There is evidence to show that the Akhara is interested in keeping up the Other Gaddis "belonging to the Udasiyan so that it is considered to be a sort of "high command" to use the language of the plaintiffs" witness, Suresh Nand.

25. We are of the view that because of the entire circumstances we cannot put an impossible burden on defendants 3 and 4 so as to demand of them the same high "degree of proof which we might have demanded from the Akhara itself, a party to the mortgage deed D/- 1-6-1933 in the circumstances of the case. It

must not be further overlooked that the aforesaid mortgage deed was eventually merged in a decree passed in suit No. 66 of 1935 and that that decree was satisfied by execution without a challenge from anybody, on the ground that the decree was not binding on the Mahant.

We may point out that even in the present plaint, no direct attack has been made against the decree passed in the said suit No. 66 of 1935, nor is there any specific prayer made to have that decree set aside, nor is there even a challenge to the execution proceedings relating to that decree.

26. It was almost conceded by Sri Jagdish Swamp that if the decree stood, then the impugned transaction would be justified. In point of fact, the evidence is of the clearest character that everything was done to cut down the liability created by the mortgage of 1933 and to save the Haveli as far as possible. The result of suit No. 66 of 1935 was that full advantage was taken of the U. P. Agriculturists' Relief Act with the result that the liability under the mortgage was permitted to be liquidated, in the first instance, by payment of installments and the mortgaged property came back to the Gaddi.

The mortgaged Haveli (Dharamshala) was subsequently leased out in such a way that the lease money would provide the installments due. It was upon the lessee's failure that the decree was eventually put into execution and the property was put up for sale. Even then every step was taken to see that the property was sold for a proper price. The auction-sale in favour of the Akhara would have yielded a sum of Rs. 1,50,000/- but for the whole Dharamshala.

The matter was taken to the High Court and eventually the position was that a substantial part of the Dharamshala, valued at least at Rs. 2 lacs, as shown by the evidence, was saved and only a small portion of the Dharamshala was transferred to the present vendees i. e. defendants Nos. 3 and 4, for a sum of Rs. 1,50,000/-. Even in the course of this arrangement, the desire was that the property should remain with an Udasi Akhara and more than one chance was given to the Akhara Panchayati Kalan Udasiyan to satisfy its decree by accepting a small part of the Haveli but the Akhara having obtained the entire Haveli for a value much below its market value, was not naturally prepared to sacrifice its interest and hence the method of selling a part of the Haveli to the defendants was adopted with the result that the estate of "Gaddi Shanter Shah" benefited considerably.

The impugned transaction of sale had not only the support of the then Mahant but it also had the support of a committee which the Mahant had constituted. The arrangement whereby defendants Nos. 3 and 4 had acquired the property had, in fact, the approval of the managing committee of the Gaddi. Moreover, it must not be overlooked that it was this Court itself which sanctioned the course which the Mahant eventually followed.

27. Would we be justified, in the circumstances of the case, in placing an onus on defendants Nos. 3 and 4 of such a character as could legitimately be placed on

the Akhara, if it had to up-hold the mortgage transaction of 1-6-1933? In our view, we must have regard to the impossibility of the present defendants 3 and 4 providing the same degree of proof which the Akhara could have provided, in case there had been an immediate challenge to the said mortgage deed when it was executed in 1933.

28. We would, in this connection, invite attention to the case of *Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sannadhi*, reported in ILR Mad 402 : (AIR 1917 PC 6). At p. 408 (of ILR Mad) : (at pp. 7-8 of AIR) in the judgment of their Lordships of the Judicial Committee, there are observations to the following effect:-

"The Board does not wish to cast any doubt upon the proposition that, in the case of mortgages granted over the security of an adinam or mutt by the head thereof, it lies upon the mortgagee, or those in his right to prove that the debt was a necessary expense of the institution itself. But it is a circumstance of great weight when holder after holder of the headship recognizes and deals with the debt on that basis; and, as time goes on, this may itself come to be a not unimportant element of probative value upon the issue. It must also be fully borne in mind that, with the lapse of time, the parties to the transaction may be or disappear. In the present case, Pillai, the lender, is dead; Manickavasaka, the borrower, is also dead; and it is conceivable that, as years elapse, in such cases nearly all the material evidence may in the course of years disappear, while the debt itself still remains, having from its initiation till almost the date of suit been recognized by all concerned as a debt truly constituted by the adinam. In such cases a Court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent, and can, therefore, be the subject of more exact evidence, or where the transaction, although remote, has been the subject of challenge or dispute by those charged with the interest of the institution".

The spirit of these observations of the Judicial Committee should, in our view, govern the consideration of this instant case both in regard to the proof of consideration and in regard to the right of the then Mahant to execute the deed in dispute,

29. In *Konwar Doorganath Roy v. Ramchunder Sen* ILR Cal 341 at p. 351 where the Judicial Committee was dealing with certain deeds 30 years old and where the executant had come as plaintiff into court to get them set aside on the ground that they were collusive, their Lordships observed that:-

"If he (the plaintiff) could have shown that the representation, although made, was not believed by the grantees, and that they colluded with him to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantee did not believe the statements appearing upon the face of the deeds; indeed, if they had made inquiry, they would have found that the

fact agreed with the statement, for it appears upon the evidence and" upon the findings of the subordinate judge that the temples were out of repair".

It was pointed out by their Lordships that unless the purchaser was aware at the time he made the purchase that the statement in the deed was a colourable one, he could not be injured by any concealment of the true object or the subsequent application of the same. The plaintiff was seeking to set aside the alienation of the land on the ground that the land was a debutter land.

30. In the instant case, there is nothing to suggest that there was any collusion in regard to the statements made in the 1933 mortgage deed and, in any case, there could have been no overreaching of the Akhara by Saheb Das in the recitals because the Akhara would have fully known the truth. We realise that the observations made by the Judicial Committee are with reference to the facts of the case they were considering but we do think that general guidance flows from those observations in regard to how this instant document of mortgage should be dealt with by us for the purpose of determining its validity.

31. We will now come to the next question as to the power of the Mahant to alienate the endowed property. In Konwar Doorganath Roy's case ILR Cal 341, the power of a shebait or manager of a debutter estate has been stated to be analogous to that of a manager of an infant heir under the Hindu law, as defined in Hunoomanpersad Pandey v. Mussamut Babooee Munraj Koonweree, reported in 6 Moo Ind App 393 at p. 423. In that case, the Judicial Committee observed as follows:-

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the bona fide lender is not affected, by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is "the thing to be regarded. But, of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted mala fide, will not be affected though it be shown that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that, under such circumstances, he is bound to see to the application of the money."

Situated as it was, the Akhara was bound to be fully cognizant of the necessity of Saheb Das to create his mortgage of 1933. It is not shown that it was acting mala fide. It is evident that in Sital Das's time the management could not have been very efficient even if we assume that there was enough income to meet the spiritual and other obligations of the Gaddi because the mortgage of 1919 was not yet paid up by 1933. There is nothing to suggest that a certain amount of borrowing by Saheb Das for the purpose of carrying out the functions of the Gaddi Shanter Shah could be avoided and we think that, in this case, having regard to the circumstances, it may be assumed that the creditor was reasonably satisfied that there was a necessity to create the mortgage.

We think that the inherent circumstances are such -- particularly having regard to the care which Saheb Das has taken to see that the maximum income was obtained from the mortgaged property --that there must have been, apart from the pressure of the previous mortgage of Sital Das and the pressure of the expenses which Saheb Das himself had to repay and which expenses he had to incur in the course of the litigation against him, necessity, otherwise also, to borrow money in order to maintain the functions of the Gaddi Shanter Shah.

32. We may now deal with the argument of Sri Jagdish Swamp to the effect that money borrowed for meeting the legal expenses in this case, which formed part of the consideration for the mortgage deed in question, could not be chargeable to the Gaddi Shanter Shah because both in suit No. 135 of 1915 and suit No. 70 of 1925, the dispute was with regard to the lights of Sital Das and Saheb Das to hold the office of the Mahant which is merely a personal right.

33. Sri Jagdish Swarup, in this connection, cited some cases in order to establish "that there was a clear distinction between a suit filed to establish a claim to an office and a suit filed to establish the rights to an endowment as such. In *Shri. Shri Sharada Peeth Math Vs. Shri Rajrajeshvarashram*, , it was held that a suit for a declaration of title to the property is for vindication of private and personal right and not for vindication of the rights of the Math.

This case is somewhat peculiar because the endowment property was held by an administrator appointed under Regulation 8 of 1927 and possession was asked from him and an injunction was also prayed for against the defendants preventing them from recovering possession of property and from asserting their claim as Acharya of the Math. This was, therefore, not a case where relief was being sought to recover from a third party who was in possession of the Math property upon a false allegation of Mahantship.

34. In *Babajirao v. Laxmandas* ILR 28 Bom 215 at p. 223 a distinction between two classes of cases, namely, where the manager seeks to enforce his private and personal rights and those where he seeks to vindicate those of the Math was again pointedly brought out. This distinction is undoubtedly there, but the question to be Considered is whether suits No. 135 of 1915 and No. 70 of 1925 were merely suits to establish the right of the then plaintiffs to the Mahantship or

whether they were suits to get the endowment property into the possession of persons who are the rightful Mahants.

In our view, the right to Mahantship in both the cases came to be adjudicated upon not as a matter of pure determination of the personal rights of the contestants, but because the relief asked for was that the property should be put in possession of the rightful Mahant who was entitled to the Gaddi property so that the Gaddi might properly function through the rightful Mahant. The office of Mahant is such that it cannot be a matter of difference to the Gaddi as to who is holding the office. It is one of the purposes of a Math that it should function through its proper Mahant.

35. In this connection, we would invite attention to the case of AIR 1940 24 (Privy Council) where the Judicial Committee has observed as follows:-

"It is clear, therefore, that in the opinion of both the parties, the secular and the religious duties of the Mahanta in the temple in question, are interdependent and inseparably blended: and such must be the case in any well-organised institution, if the obligations of the Mahantaship have to be effectively discharged.

The interconnection of the two aspects of the office was explained by Lord Shaw, who in delivering the judgment of the Board in *Ram Parkash Das v. Anand Das* ILR Cal 707 : (AIR 1916 PC 256) observed:-

(The observations of Lord Shaw printed in AIR 1940 24 (Privy Council) have not been given in the certified copy of this judgment.)

"The two capacities are thus closely intermingled and a proper and efficient discharge of the one depends on the control of the other. The Mahanta must have authority over the funds and income of the institution to be able to discharge his religious duties efficiently, in conformity with the customary and traditional obligations of the office and to the satisfaction of those who claim the benefit of the worship. He necessarily enjoys large patronage in the discharge of his religious functions. He cannot, in consequence, depend, for the due performance of such duties, on the mercy or caprice of another functionary, with separate or coordinate authority over the funds of the institution. Any division of the two Capacities would lower his prestige, as also impair the efficiency of his religious functions. On the other hand, the funds of the institution have to be administered with a proper regard to the religious traditions of the institution and the sentiments of its worshippers, of which the Mahanta, for the time being, is the Custodian and interpreter. He furnishes a salutary check upon the tendency, which experience proves, is not at all infrequent, to administer the funds of the endowment with sole regard to secular and utilitarian considerations. In other words, in all such religious endowments, where tradition and custom¹ play a vital part in intermingling the two functions, their division is unthinkable,"

36. In *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, , their Lordships of the Supreme Court have stated as follows:-

"If we take for example the case of a religious institution like a Math at the head of which stands the Mathadhipati or spiritual superior, the Mathadhipati is a trustee according to the provisions of the Act and if the court is competent to appoint the Charity Commissioner as a superior of a Math, the result would be disastrous and it would amount to a flagrant violation of the constitutional guarantee which religious institutions have under the Constitution in regard to the management of its religious affairs. This is not a secular affair at all relating to the administration of the trust property. The very object of a Math is to maintain a competent line of religious teachers for propagating and strengthening the religious doctrines of a particular order or sect and as there could be no Math without a Mathadhipati as its spiritual head, the substitution of the Charity Commissioner for the superior would mean a destruction of the institution altogether."

It will thus be seen and we are of the view that it is of prime importance that the Math should have as its spiritual head, the person who is entitled to be the spiritual head because it is such a person who would be in a position to propagate the true doctrines,

37. We might also refer to the case of the Commr. The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , their Lordships of the Supreme Court observed as follows:-

"As regards the property rights of Mathadhipati, it may not be possible to say in view of the pronouncements of the Judicial Committee, which have been accepted as good law in this country ever since 1921, that a Mathadhipati holds the Math Property as a life-tenant or that his position is similar to that of a Hindu Widow in respect to her husband's estates or of an English Bishop holding a benefice. He is certainly not a trustee in the strict sense. He may be, as the Privy Council, (vide *Vidya Varuthi v. Balusarni Ayyar* AIR 1922 PC 123) says, a manager or custodian of the institution who has to discharge the duties of a trustee and is answerable as such; but he is not a mere manager and it would not be right to describe Mahantship as a mere office. A superior of a Math has not only duties to discharge in connection with the endowment but he has a personal interest of a beneficial character which is sanctioned by custom and is much larger than that of a Shebait in the debutter property. It was held by a Full Bench of the Calcutta High Court (vide *Manohar Mukherji v. Bhupendra Nath* ILR Cal 452 : (AIR 1932 Cal 791), that Shebaitship itself is property, and this decision was approved of by the Judicial Committee in AIR 1936 318 (Privy Council) and again in AIR 1943 89 (Privy Council) The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasise the proprietary element in the Shebaiti right and to show that though in some-respects an anomaly, it was an anomaly to be accepted as having been admitted into Hindu law from an early date. This view was adopted in its entirety by this court in *Angurbala Mullick Vs. Debabrata Mullick*, , and what was said in that case in respect to Shebaiti right could, with equal propriety, be applied to the

office of a Mahant. Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. It is true that the Mahantship is not heritable like ordinary property, but that is because of its peculiar nature and the fact that the office is generally held by an ascetic, whose connection with his natural family being completely cut off, the ordinary rules of succession do not apply."

We think that a consideration of the observation quoted above will bring out the true nature of the office of the Mahant and that it is requisite for the proper functioning of a Math that its real head should be in possession of the property belonging to the Math.

38. We are, therefore, of the view that the legal expenses for which the money was borrowed with reference to the two suits hereinbefore mentioned were justifiable expenses, and that the creation of the mortgages to cover those expenses was in the interest of the Math and not merely in the personal interest of the contestants.

39. For all these reasons, we think that the mortgage deed of the 1st June, 1933 is fully binding on the Math. We have already mentioned that that mortgage deed became the subject-matter of suit No. 66 of 1936. That decree has not been challenged in the present suit, or in any other litigation. The immediate cause (or the execution of the impugned sale deed D/- 14-6-1945 was that decree, though it was not the remote cause of the borrowing.

Even if the remote cause of the borrowing, namely, the mortgage deeds of 1919 and 1933 shown to have been due to profligate expenditure of the Mahant -- which is not the case here -- it is no answer to the vendee of the impugned sale deed to say that the causa causans, namely, the remote cause of the alienation in his favour was a mortgage deed which should not bind the Math. In our view, so long as that decree stands or so long as the subsequent proceedings in execution have not been challenged, the impugned transfer D/-14-6-1945 would be justified as being a transfer which was made in order to meet the obligation under that decree which had to be discharged. Moreover, we consider that the impugned transfer was, in every way, beneficial to the Math estate,

40. The last question raised which we have to consider is whether the decision given in suit No. 3 of 1943 constitutes *res judicata* in this case. A perusal of the plaint in that case shows that it was filed by Mahant Narendra Das, Mahant Jamna Das and Mahant Harish Chand against Akhara Panchayati Kala Udasiyan as a representative suit and a declaratory decree to the effect that no right had

accrued to the creditor mortgagee by virtue of the purchase of the property in suit in execution of the decree in suit No. 66 of 1935 (sic).

The contention advanced was that there was no evidence to show that all the formalities, which ere the pre-requisite to constitute a properly instituted suit under Order 1, Rule 8 C. P. C., have been complied with. An effective answer to this has been given by the learned Civil Judge who lias pointed out that it was clearly alleged in the present plaint that suit No. 3 of 1943 was a suit under Order 1, Rule 8 C. p. C.

41. It was then contended that inasmuch as Mahant Narendra Dab had withdrawn from the Suit No. 3/1943, the suit, upon such withdrawal, lost its character of a suit under Order 1, Rule 8 G. P. C. In this connection we have looked at the provisions of Order 1, Rule 8 of C.P. C and we do not find that it is provided therein that in case one of the plaintiffs withdraws, then the character of the suit ceases to be that of a suit under Order 1, Rule 8 and becomes a personal suit concerning the remaining plain tills alone.

42. Reliance has been placed by Sri Jagdish Swarup on the case of Abdul Rahim v. Abu Mohamed Barkat Ali Shah AIR 1928 PC 16, in support of the proposition that if one of the original plaintiffs in the action under Order 1 Rule 8 dropped, out, then the whole suit ceases thereafter to be one under Order 1 Rule 8. Abdul Rahim's case AIR 1928 PC 16 was a case in which a suit in respect of trust property was instituted by seven persons with the consent of the Advocate General.

It was subsequently amended without his sanction by adding strangers to the suit as defendants and by adding prayers for relief not covered by Section 92. The suit was later on compromised by six out of seven plaintiffs. The Judicial Committee held that the nature of the suit was changed, that it ceased to be one of representative character and the decree based on the compromise, however binding as against the consenting parties, could not bind the rest of the public.

The observations were, as the report shows, made having regard to the language of Section 92 C.P.C. We do not think that Abdur Rahim's case, AIR 1928 PC 1.6, which is specifically u/s 92, would govern a representative suit under Order 1 Rule 8 C. P. C. The permission granted u/s 92 C. P. C. is not by the court but by an extraneous authority, namely, the Advocate-General and the right to sue in the persons who file the plaint flows from the grant of the said permission, Under Order 1 Rule 8 C. P. C. it is the court itself that: permits the persons, named in the plaint, to function in a representative capacity.

43. It was contended that permitting two out of three plaintiffs in this suit under Order 1 Rule 8 to continue the suit as a representative suit would in effect mean that some part of the public might remain un represented because it is possible that some part of the public has confidence only in the withdrawing plaintiff. It is contended that there are authorities which lay down that when one out of several persons, who are permitted to conduct the representative suit, dies then fresh

proceedings have to be taken in order that a chance may be given to other members of the public to apply to be brought on the record as the representatives of the public.

44. Two cases were cited in support of this view.

45. In the case of Venkatakrishna Reddi and Others Vs. Srinivasachariar and Others, it was suggested that in a case where sanction was originally given by the Court to a certain number of persons either to prosecute or defend a suit and one of them died and his heirs were not competent to prosecute or defend the suit, as sanction was accorded to certain individual persons *eo nomine* therefore, in such a case the proper procedure would be for the remaining persons to apply to the Court for directions, bringing it to the Court's notice that one of the persons to whom original sanction had been given was dead and requesting the Court for directions whether the Court would be pleased to permit the remaining persons to continue to prosecute or defend the suit, or if it thought that the original number was necessary, directions be given authorising an additional person to join the survivors.

46. This procedure it appears to us is not obligatory under Order 1 Rule 8 C. P. C. We do not think that, although the procedure is eminently reasonable and might be followed in a particular case, failure to follow such a procedure can bring about a change in the character of a suit which was originally constituted as a suit under Order 1 Rule 8 C. P. C.

47. In the case of G.F.F. Foulkes and Others Vs. A.S. Suppan Chettiar and Another, , the same sort of procedure seems to have met with a judicial pronouncement.

48. No authority of our Court has been shown which has adopted the same view, and we do not see that the procedure outlined in the aforesaid two cases, even though it has the support of judicial authority, can be said to be a necessary procedure in the absence of which a representative suit would, in those circumstances, lose its representative character.

49. The next contention of Sri Jagdish Swamp was that without the sanction of the Court it was not open to the two remaining plaintiffs in suit No. 3 of 1943 to effect a compromise. Support was sought from the observations made in the case of Sundarambal Ammal and Kamalambal Ammal Vs. Yogavanagurukkal, at p. 568, where it was held that a judgment by consent would not bind the public even if the consent was not purchased.

50. A contrary view was taken in the case of Krishnamachariar v. Chinnammal 24 Mad LJ 192.

51. A similar view appears to have been taken in the case of Chandar Bhan Vs. Des Raj and Others, where Kapur, J. held that a compromise in a representative suit under Order 1 Rule 8 could not be allowed to be recorded unless the Court considered the matter and after consideration gave sanction to the compromise

and that unless it was clear from the proceedings that the matter was brought to the notice of the Court and that the Court considered the question, permission could not be given and it could not be inferred that the Court ordered the compromise to be recorded.

The case proceeds on the basis of a decision of Cozens Hardy M. R. in the case of *Re Calgary & Medicine Hat Land Co. Ltd., Pigeon v. Calgary & Medicine Hat Land Co. Ltd.* (1908) 2 Ch. 652 at p. 659. It is to be observed, however, with respect that the rules of the English Court provide by Order 16 Rule 9A that the plaintiff cannot Compromise without the sanction of the Court, which is not the case under our statute.

52. In our own Court in the case of *Ram Sarup Vs. Nanak Ram*, , it was held that where a suit brought under Order 1 Rule 8 C. P. C. with the permission of the Court is compromised, no permission of the Court is necessary at all in order to make the compromise binding.

53. We may also point out that Order 23 Rule 3, C. P. C. which empowers the Court to record a compromise is silent about obtaining any such permission.

54. No doubt, a representative suit is different in its character to a non-representative suit by individuals. But it seems to us that once permission is given to certain representatives to litigate on behalf of the general public, then that right should, carry with it the right to compromise. The plaintiff in a representative suit cannot be put on the same position as minors or disqualified persons. The case of *Muthukaruppa Ethandar and Others Vs. Appavoo Nadar and Others*, , recognises that a representative suit can be compromised,

55. Having regard to the entire position, we are of the view that the decree passed in suit No. 3 of 1943 is not invalid by virtue of the fact that no sanction was given by the Court.

56. It was pointed out on behalf of the respondents to this appeal that the Court had an application for withdrawal of Narendra Das as also an application for a compromise to be recorded to which the remaining parties to the action were signatories, and it was aware that the suit was being adjusted by means of a compromise, which compromise is itself recorded. In the circumstances, M is contended that it must be taken that if sanction is necessary, such sanction at least was given. We think that there may be a case where sanction of the court may be implied, as here.

57. The next contention advanced by Sri Jag-dish Swarup was that under the compromise the suit merely ended in dismissal, and it could not, therefore, be said that the specific questions in controversy were disposed of by consent. In our view, even when the terms of a compromise merely are that the suit be dismissed this involves a disposal by agreement against the plaintiff of the contentions raised by him. In this view of the matter, it must be taken that as a result of the consent decree in suit No. 3 of 1943 the plaintiffs' case as set out in

the plaint, failed and the effect of the decree in suit No. 3 of 1943 was that the auction-sale in pursuance of the decree passed in suit No. 66 of 1935 was upheld.

58. The next objection of Sri Jagdish Swarup was that the parties to the suit No. 3 of 1943 and to the present suit are not the same and that the plaintiffs eo nomine in that suit are different to the plaintiffs eo nomine in this suit. So far as the array of plaintiffs is concerned, it is true that the plaintiffs eo nomine are different persons, but in both cases they are representatives of the same public and, as such, the plaintiffs in both cases are in substance the same.

So far as the defendants parties are concerned, in the previous suit the Panchayati Akhara was the defendant because it was the Panchayati Akhara who was the auction purchaser. The other defendant was Pooran Das, who was the then Mahant. In the instant case, the 6rst defendant is Narendra Das who is also the Mahant. The defendants 3 and 4 are, however, different being the vendees under the impugned sale deed.

So far as defendant No. 2 is concerned, he figures merely because he has joined in the impugned sale deed. He has really no legal standing because the transferred property never vested in him, as it could only vest in the Mahant. Defendant No. 2 seems to have been put on to the Committee which was helping the Mahant to administer the Gaddi.

59. The position thus is that the principle defendants against whom relief is sought in the instant suit are different to the defendants against whom relief was sought in the previous suit. Moreover in the previous suit the auction sale which is of a date anterior to the present sale deed was challenged. In the instant suit the impugned sale deed which is of a subsequent date is challenged.

The court below has taken the view that defendants Nos. 3 and 4 are in a sense representatives of the Panchayati Akhara defendant in the previous suit because its view is that the impugned sale deed in favour of the vendees defendants Nos. 3 and 4 came into existence really as a substitute for the auction purchase. This line of reasoning at first sight seems plausible.

But we do not think that defendants Nos. 3 and 4, the vendees under the impugned sale-deed, are really representatives of the interest of the Panchayati Akhara, nor can they be said to be the representatives of the interest of the judgment-debtor, because the sale is a private sale and their title accrues not from the auction sale unlike the title of Panchayati Akhara.

The auction purchase was no doubt set aside as a result of the arrangement approved of by the High Court, but we do not think that for that reason defendants 3 and 4, the vendees under the impugned sale deed, can be equated with the Panchayati Akhara and considered to be auction purchaser deriving title from the Akhara. Moreover, the sale deed which is impugned in this case came, into existence on a date subsequent to the auction purchase, which was impugned in the earlier case and with respect to the sale-deed there is,

therefore, a fresh cause of action. In the circumstances, we do not think that the decree in suit No. 3 of 1943 can operate as res judicata u/s 11 C. P. C. nor do we think that it can operate as estoppel so as to shut out an enquiry into the matters which we have already discussed.

60. Lastly, we may say that during the pendency of this appeal Kesho Chandra, respondent No. 2 in the appeal, and defendant No. 2 in the suit, died. We have already indicated how he was impleaded. A contention had at first been advanced on behalf of the respondents to this appeal that the effect of Kesho Chandra's death was that there was an abatement, but that contention was fully withdrawn and, in our view, rightly. We may add that it was not shown to us that any new member of the so called Committee has been appointed in place of Kesho Chandra, although time was given for this purpose, presumably because the respondents have withdrawn their objection.

61. The result of our findings on the points canvassed before us, therefore, is that this appeal fails and is dismissed with costs.