

(1896) 02 CAL CK 0007
In the Calcutta High Court

Girijanund Datta Jha and Another

APPELLANT

Vs

Sailajanund Datta Jha

RESPONDENT

Date of Decision : 25-02-1896

Acts Referred:

Court Fees Act, 1870 — Article 17(iii), 16
Limitation Act, 1908 — Article 116, 128, 129

Citation : (1896) ILR (Cal) 645

Hon'ble Judges : Gordon, J; Banerjee, J

Bench : Division Bench

Judgement

Banerjee and Gordon, JJ.—The suit, out of which this appeal arises, was brought by the plaintiffs appellants against the defendant Sailajanund Datta Jha, described as the ojha or high priest of the temple of Baidyanath, for the recovery of the sum of Rs. 18,279-2; and for a declaration that the said amount is realisable by attachment of the surplus of the offerings called charao made to the deity Sri Sri Iswar Baidyanath, and is recoverable from the defendant's successors in office. The main allegations, upon which the claim is based are, that the temple of Baidyanath in the town of Deoghur has from time immemorial been under the management of its ojha or high priest; that the offerings made to the deity in the shape of gifts of money and other things, called charao, were formerly divided between the high priest on the one hand and the Raja of Birbhum, and in succession to him the British Government on the other, but since the relinquishment of its share by the British Government in 1791, the whole of the said charao has been taken by the high priest, who is entitled to appropriate to his own use the surplus left after providing for the expenses of the worship and the performance of other obligations appertaining to the institution; that the office of high priest is elective, but confined to the family of the plaintiffs and the defendant, and subject to the final confirmation of the ruling power; that the last ojha Isrinund Datta Jha, father of the plaintiffs and grandfather of the defendant, gave the plaintiffs an ekhar in 1271, stipulating thereby to pay to them and their heirs the sum of Rs. 2,400 annually out of the said charao for their maintenance;

that on the death of the said Isrinund Datta Jha, disputes having arisen between the plaintiffs and the defendant as to the right of succession to the office of ojha, the defendant by an ekrar, dated, the 27th of February 1878, promised to pay the plaintiffs and their heirs Rs. 2,400 annually, and the plaintiffs allowed the office of ojha to pass to the defendant; and that the arrears of the said annual allowance of Rs. 2,400 together with interest amount to the sum claimed in the suit.

2. The defence alleges that the temple of Baidyanath is a public place of Hindu worship; that the property appertaining thereto including the charao or offerings is debutter property belonging to the idol Baidyanath, which the ojha or high priest holds only as manager without having any personal right to the same, save and except the right to maintain himself out of it; that the office of high priest is not elective, but passes by succession by primogeniture to the eldest son of the last incumbent, and in his default to his eldest son, and so on; that the ekrars referred to in the plaint cannot create any valid charge in the charao or offerings which constitute debutter property, nor can they bind any succeeding ojha; and that of the amount claimed only a portion, namely the sum of Rs. 5,280, is due to the plaintiffs, and the defendant is personally liable for the same. It appears from the issues that two more objections were subsequently taken by the defendant, namely, that a part of the claim was barred by limitation, and that the claim for interest was not tenable.

3. The Court below has held that the charao or offerings are debutter property, and cannot be charged with liability for the plaintiff's claim; that the ekrar executed by the defendant is not binding on his successors in office, but that the defendant is personally liable under it; that no part of the claim is barred by limitation; and that interest is claimable for the last three years before suit; and it has accordingly given the plaintiffs a decree against the defendant personally for the greater portion of the claim, disallowing only interest in part.

4. Against that decree the plaintiffs have preferred this appeal, and the defendant has filed a cross-appeal, valued at Rs. 6,286-7-0, the difference between the amount decreed and the amount admitted to be due.

5. In the appeal it is urged : First, that the Court below ought to have declared that the amount decreed was realisable by attachment of the charao or offerings;

Secondly, that the said amount was recoverable from the defendant's successors in office; and

Thirdly, that the defendant is not entitled to raise any objection against the terms of his own ekrar. And in the cross-appeal it is contended-

First, that a part of the claim was barred by limitation;

Secondly, that there was no personal covenant to pay, nor any valid and legal consideration for the ekrar, and that no personal decree ought to have been made against the defendant; and

Thirdly, that the claim for interest ought to have been disallowed altogether.

Before proceeding to the determination of the appeal and the cross-appeal, it is necessary to dispose of a preliminary question, namely, whether proper Court fees have been paid on the memorandum of appeal and on the petition of cross-appeal.

6. The Court fee paid on the memorandum of appeal is Rs. 10, and the learned vakil for the appellants contended that this was the proper fee chargeable under clause iii of Article 17 of Schedule II of the Court Fees Act, the object of the appeal being only to obtain a declaration that the amount decreed is realisable from the surplus of charao or offerings, and is recoverable from the defendant's successors in office, the prayer for consequential relief, that is, for recovery of the money, having already been granted by the Court below. He further urged that the cross-appeal could not be heard, unless the respondent paid the fee payable on the amount at which it was valued as required by Section 16 of the Court Fees Act. On the other hand, it was argued for the respondent that, as the declaratory decree asked for by the appellants would not amount to a mere declaration, but must necessarily carry with it some consequential relief, the fee payable on the appeal was the ad valorem fee on the amount decreed as required by Article 1 of Schedule I of the Act; and if that was paid, no additional fee would be payable by the respondent u/s 16.

7. The point not being altogether free from doubt, we reserved judgment upon it, and allowed the hearing of the appeal and the cross-appeal to proceed, upon the parties undertaking through their learned vakils to pay any amount that they might be declared liable to pay.

8. After giving our best attention to the point, the conclusion we arrive at is that the memorandum of appeal has been properly stamped, and that the petition of cross-appeal requires to be stamped with the fee payable on the value of the cross-appeal as provided by Section 16 of the Court Fees Act.

9. It is true that the case does not come under clause iii of Article 17 of the second Schedule of the Court Fees Act upon a literal construction of that clause; for that clause refers to the nature of the suit as the criterion for determining whether an appeal comes under it, and the suit here was clearly not for a declaratory decree without consequential relief. But though that is so, still Section 16 of the Act clearly indicates that, where an appeal is only against a part of a decision, and that part relates only to a portion of the subject-matter, the memorandum of appeal is sufficiently stamped, if it bears the Court fee stamp chargeable upon such portion of the subject-matter. Now, the subject-matter of the suit here was a claim for a certain sum of money, coupled with a claim for a declaration that it was realisable from the offerings to the idol and was recoverable from the successors in office of the defendant. The Court below has allowed the former claim with a small reduction, the correctness of which is not questioned in appeal, but disallowed the latter; and the appeal is only

against that part of the decision which relates to the declaration. The memorandum of appeal should therefore be held to be sufficiently stamped, if it bears the Court fee stamp chargeable in a suit for a mere declaratory decree, that is, if it bears a stamp of Rs. 10 as provided by clause iii, Article 17, Schedule II of the Act.

10. It has been contended that if the declaratory decree asked for is granted, it will necessarily carry with it some consequential relief; that is to say, as soon as the declaration is obtained, the plaintiffs will become entitled to realise their claim out of the offerings, so that it cannot be said to be a declaratory decree without consequential relief. But this contention is not sound. The correct view of the matter is that the declaratory decree results in consequential relief, not by its own force, but only by reason of such relief having already been granted.

11. Several cases were cited on each side during the argument, but only two of them can be said to have any bearing upon the question before us. These are : Venkappa v. Narasimha ILR 10 Mad. 187 and Vithal Krishna v. Balkrishna Janardan ILR 10 Bom. 610. The first-mentioned case, Venkappa v. Narasimha, may in one sense be regarded as the converse of the present one. There the suit was based on a mortgage bond; the first Court made a decree for payment of the money and for sale of the mortgaged property; some of the defendants appealed against the decree, in order, as the report says, "to exonerate the lands from liability for the amount decreed," and the High Court of Madras held that the Court fee chargeable on the memorandum of appeal was not Rs. 10, but an ad valorem fee on the amount of the decree. The case seems at first sight to favour the contention of the respondents before us; but when the ground of the decision is examined, it does not appear to be quite in point. For the learned Judges say: "The defendants appealed against so much of the decree as declared the liability of their property and in order to be released from the decree. The relief they sought was, therefore, not a mere declaratory decree, but to be released from the decree."

12. In the other case cited, Vithal Krishna v. Balkrishna Janardan ILR 10 Bom. 610, the suit was brought by a judgment-creditor to establish the right of his judgment-debtor to certain property and the liability of that property to attachment in execution of his decree, after the property had been released from attachment on the claim of a third party; and a Full Bench of the Bombay High Court held that the proper stamp on the plaint was Rs. 10 under Schedule II, Article 17, Clause (i) of the Court Fees Act. This too is not, therefore, a case quite in point.

13. The language of the Act not being" clear, and there being no case in point, we think the correct view of the law is that indicated above, as being the one most consonant to reason.

14. We shall now proceed to the determination, of the appeal and the cross-appeal, taking the appeal first and then the cross-appeal; and we shall consider

the grounds urged in each in the order in which they have been stated above.

15. The first contention of the appellants, namely, that the Court below ought to have declared that the amount decreed was realisable by the attachment of the charao or offerings, involves some of the most important questions raised and discussed in the argument. In support of this contention it is urged that the surplus of the offerings left after defraying the expenses of worship and certain other necessary expenses, such as those required for keeping the temple in proper order, belongs to the ojha or high priest; that the defendant was therefore competent to create a charge on such surplus by the ekhar on which this suit is based; and that the plaintiffs are entitled to the declaration asked for. And the right of the high priest to the surplus of the offerings is sought to be based as well upon the general Hindu law as upon the special custom of the shrine. It is further urged that, even if the surplus of the offerings be not the property of the ojha, they are still chargeable by him with the maintenance of members of his family. The attempt made in the Court below to support the plaintiffs' claim to a charge on the offerings, even if they are the property of the idol, on the ground of the charge being created for the benefit of the endowment, was not repeated here, evidently because the contention was, as shown in the judgment of the learned Subordinate Judge, utterly untenable. In dealing with the first ground of appeal, therefore, we may confine our attention to the two questions, whether by the general Hindu law the surplus of the offerings belongs to the high priest, and whether by the special custom of the shrine they belong to him or are chargeable by him with the maintenance of members of his family.

16. Notwithstanding the existence of numerous richly endowed Hindu shrines all over India from the earliest times, the Hindu law strictly so-called is, as Sir T. STRANGE complains (see his *Hindu Law*, Ed. of 1839, Vol. I, p. 32), meagre in its provisions relating to religious endowments, a fact which may perhaps be accounted for on the supposition that the high reputation for piety and purity of character justly enjoyed for the most part by the priestly classes of ancient India who had the management of the shrines, was deemed a sufficient safeguard against breach of duty, so as to render detailed rules of law to regulate their conduct unnecessary. The subject of religious endowments does not form one of the distinct topics of litigation enumerated by Manu (Chap. VIII, 3-6), and Narada (Introduction 16-19), and a few scattered texts here and there enjoining kings to establish and endow colleges of Brahmins, directing the consecration of tanks and other works of public utility, dwelling on the merits of religious gifts, and providing for the succession to religious devotees (see Yajnavalkya, I, 339; II, 132; Colebrooke's Digest, III, ii, 4, 6; Manu, IV, 226) appear to be all that is worth notice relating to the subject in the institutes of the early sages. In the later Commentaries and Digest there are, it is true, whole chapters devoted to religious gifts and endowments (see, for instance, Hemadri's *Chaturvarga Chintamani*, Danakhanda and Raghunandana's Digest, *Matha Pratishtha Tattwa*); but they relate mostly to matters of ritual and to the spiritual merit of different sorts of gifts. There is one passage in the last-mentioned work, namely, a text

quoted from the Matsya Sukta, which has some bearing on the present question, and which runs thus:"

Having made offerings to a god, the sacrificial fee also should be given to the god. The whole of that should (then) be given to a Brahmin, otherwise (it) is fruitless. [Raghunandana's Institutes, Ed. of 1834, Vol. II, p. 358.]

17. Relying upon this text and upon a remark of Jagannatha, in which the learned author speaks of an idol as a being "whose essence is a text of Scripture" (see Colebrooke's Digest, Book V, Ch. I, 2 Commentary, 2 M Ed 191), the learned vakils for the appellants contend that offerings made to an idol are only nominally the idol's property, but belong really to the officiating priest. It is argued that according to true Hindu notions, an idol is only an emblem of God, and offerings made to an idol are intended not for the use of the idol, that is a mere symbol, but for the use of God's creatures in general, and of Brahmins or priests in particular as being the most meritorious among them. Whatever weight an argument like this may be entitled to in a purely religious or metaphysical discussion, it cannot, we think, prevail in its broad generality in a Court of law at the present day. Decisions too clear and authoritative to be doubted or disregarded have repeatedly laid down that an idol in Hindu law is capable of holding property, and that property dedicated to an idol belongs to an idol and not to the sebaite, or priest. See *Shibessuri Debia v. Mothoora Nath Acharjo* 13 W.R. P.C. 18 : 13 Moor I.A. 270, and *Prosunno Kumari Debya v. Golap Chand Baboo* 14 B.L.R. 450 : 23 W.R. 253 : L.R. 2 IndAp 145.

18. If it were necessary to give reasons in favour of a view so amply supported by authority, we should add that the opinion of Jagannatha goes merely to show that an idol can be the owner of property only in a figurative sense, possession being held by a manager or trustee, and that dedication of property to an idol is only a mode of creating a trust for religious purposes in perpetuity, which is allowed by law [see *Jaggut Moheenee Dassi v. Sakhi Monee Dassi* 10 B.L.R. 19 : 17 W.R. 41 : 14 Moore I.A. 289]. And as for the text cited above, though it requires the appropriation by a Brahmin of offerings made to an idol, it does not show that the Brahmin intended is the priest attending the idol. What is offered to an idol is required to be devoted to the use of a Brahmin on account of his generally having great religious merit; but the Hindu law regards a priest attending an idol as a Brahmin of a comparatively lower order of merit (see *Manu*, III, 152; *Vishnu*, LXXXII, 8). Where an idol is set up temporarily for worship, or where the offerings are of a perishable nature, such as articles of food, the priest in attendance, as the nearest Brahmin available, generally appropriates the offerings; and the same is the case where the idol itself is the private property of the priest. But where, as in this case, the idol is an ancient one permanently established for public worship, and the offerings are generally of a more or less permanent character, being coins and other metallic articles, in the absence of any custom or express declaration by the donor to the contrary, they are, as they ought to be, taken to be intended to contribute to the

maintenance of the shrine with all its rites, ceremonies and charities, and not to become the personal property of the priest. However much a Hindu votary may wish that his offerings to public shrines should ultimately go to the use of meritorious Brahmins", he can never be supposed to intend, nor does the Hindu law anywhere allow, that they should become the property of the priest, to be squandered by him or devoted to purposes foreign to the endowment. This view is quite in accord with that expressed by the Bombay High Court in *Monohar Ganesh Tambekar v. Lakhmiram Govindram* ILR 12 Bom. 247.

19. We are, therefore, clearly of opinion that there, is nothing in the general Hindu law to support the appellants' contention;

20. Let us next examine how far the special custom of this shrine helps the appellants. It is admitted by the plaintiff Girijanund in his deposition, and it could not very well have been denied upon the evidence adduced by the plaintiffs themselves (see Government letter of 1791, Ex. 4, that of 1822, Ex. 3, and the Assistant Commissioner's Report of 1860, Ex. 7) that the temple of Baidyanath is a public place of worship. But it is urged that by custom the surplus of the offerings made to the idol after defraying the expenses of worship belong to the ojha. The custom is said to be traceable in its origin to the fact that the temple was either built by the founder of the family of the ojhas or made over to him by the king of Gidhaur who had built it; and to the further fact that the right to two-thirds of the offerings which was formerly claimed and enjoyed by the Rajas of Birbhum and afterwards in succession to them by the British Government, was subsequently relinquished by the latter in favour of the high priest in 1791. The custom is said to be proved by evidence showing the mode in which the offerings have been appropriated; and, lastly, it is said to have been recognised by Courts of Justice.

21. The early history of the temple is lost in remote antiquity. The Siva Purana and the Padma Purana, of which extracts, with translations, are given in Dr. Rajendra Lala Mitra's paper on Deoghar in the Journal of the Asiatic Society of Bengal, Vol. LII, p. 164, trace the origin of the temple to the Treta Yuga, the age of the events narrated in the Ramayana. Side by side with the Hindu traditions there is a Santal tradition of the origin of the temple, given by Sir W. Hunter (see the Annals of Rural Bengal, p. 191; Statistical Account of Bengal, Vol. XIV, p. 323). But these materials afford no evidence as to when and by whom the idol was established or the temple was built. The only evidence adduced to show that the temple was either built by some ancestor of the ojhas or was made over to him by the king of Gidhaur consists of the Assistant Commissioner's Report of 1860, Ex. 7, and an attested copy of a deposition of the defendant given in a former suit. The report, however, considering its recent date, and its admitted basis which is popular tradition, apparently unverified by any reference to the inscriptions on which the tradition itself is based, can scarcely be of much value, while the inference drawn from the inscriptions by the scholar and antiquarian, Dr. Rajendra Lala Mitra (see his paper just referred to) is to the effect that it was

not the temple, but only the portico that was built by the ojha or the king of Gidhaur. The copy of the defendant's former depositions is no doubt evidence against him, but the statements there made are mostly based upon hearsay and upon perusal of a copy of a sanad. The non-production of the original sanad is certainly matter for adverse comment. But considering the whole of the evidence adduced on the point, and all the circumstances connected with it, we do not think there are sufficient materials upon which it can be safely affirmed that the temple, as distinguished from the portico, was either built by some ancestor of the ojhas, or was made over to him by some one who had built it. It is quite probable that some semi independent Raja of Gidhaur, within whose territory the temple was situate, made it over to one of the ancestors of the present ojha. But though that may account for the right to the managership of the temple being vested in the family of the present ojha it can afford no safe basis for any inference that the offerings made to the shrine which has been in existence as a place of public worship from before became the private property of the priest. Then as to the effect of the relinquishment by Government of its two-thirds share in the offerings, though there can be little doubt that this share used to be taken by the Rajas of Birbhum and by the British Government, it is not quite clear in what right it was first claimed by the former. But the Government letter of 1791, Ex. 4, by which the right was relinquished, and which is headed "Revenue Department, sayar," indicates that it was claimed as a sayar or tax (something like what is referred to in Regulation XXVII of 1793). And, though the letter says that the gossains or priests "by whom the offerings had been hitherto received" are "to enjoy the whole" under certain conditions, a statement on which the learned vakils for the appellants lay great stress, yet having regard to the conditions mentioned in the letter, and more fully set out in the 7th paragraph of the Assistant Commissioner's Report of 1860, Ex. 7, filed by the plaintiffs themselves, we think it clear that it was never the intention of Government that the offerings should thenceforth become the property of the ojha. It was argued that the offerings were intended to become the property of the high priest, subject only to certain trusts. But if that were so, there would have been no necessity for his submitting accounts as required by the 9th condition set forth in the last-mentioned document, the balance left after defraying all necessary expenses being his property. Again, the trusts imposed are by no means certain; they are of a most indefinite character, and the feeding of the poor and the infirm required by the 10th condition might at any time exhaust the whole of the offerings. The conditions imposed are, in our opinion, incompatible with the supposition that the offerings were intended to belong to the ojha. To our minds they clearly indicate that the ojha was regarded only as a trustee or manager of the shrine and of its proceeds, including the offerings; and this view is fully confirmed by the Board's letter of the 20th September 1822, Ex. 5, filed by the plaintiffs, in the concluding paragraph of which the Board say:

With this view we propose requiring from the ojha who may be eventually nominated such periodical accounts as will be calculated to supply the necessary

information respecting the extent and nature of every source of receipt and object of disbursement, and we believe that with the exercise of an active superintendence on the part of the local agents, it will be practicable so far to control the conduct of the ojha in the administration of the temporal duties of his office, as will preclude the possibility of any extensive misapplication of the funds committed to his charge.

22. The letter of the Local Agent to the Board of Revenue, dated the 23rd February 1825, embodied in the proceedings of the Board, dated the 1st March following, and Exhibit F, support the same view.

23. It is argued for the appellants that the mode in which the offerings have all along been appropriated by the ojha proves that they belong to him. On the other side, it is contended that such appropriation, even if established, will only show abuse of trust on the part of the ojha, but instances of former abuse of trust cannot be pleaded against a trustee who is now seeking to prevent a repetition of abuse; and the case of *Jaggat Mohinee Dassi v. Sakhi Monee Dassi* 10 B.L.R. 19 : 17 W.R. 41 : 14 Moore I.A. 289 is cited in support of this contention. Though that is undoubtedly so, when the trust is admitted or proved, yet, when the question to be determined is whether certain property is trust property, or whether it belongs to the alleged trustee in his own right, instances of the appropriation of such property by the alleged trustee to his own use, if they are numerous and extend far back into the past in a continuous series, will be good evidence of his right; but if the instances are only recent or are few and far between, they are not likely to be of much value, and may be treated merely as instances of abuse of trust. Now after carefully considering the evidence adduced in this case we must say that the instances of appropriation proved are of the latter description and not of the former. The instances given by the witnesses as well as those given in the documents are for the most part recent, and they are few and far between. Moreover, some of the instances deposed to by the witnesses are, when examined, found not to be instances at all of unauthorized appropriation of the offerings by the ojha to his own purposes. Thus witness No. 3, Amrito Saha, admits in cross-examination (see page 27 of the Paper Book) that the dues of the creditors about whose decrees he has spoken, were on account of the worship expenses of the mat; while the expenses of *srads* and of other ceremonies in the family of the ojha, which the ojha is said to have supplied out of the offerings, may be treated as legitimate expenses which he was authorized to make out of the temple funds just as he is authorized to maintain himself out of the same. Then, again, part of the evidence (see the depositions of Ashutosh Jha, witness No. 2, and of Harihar Lall witness No. 6) proves too much, when it seeks to make out that no distinction is made between the offerings and the income of property which is admittedly *debutter*.

24. It remains to consider the effect of the decisions referred to, in which the ojha's right to the offerings is said to have been recognised. These are certain decisions of the civil Courts passed in different stages of a suit for maintenance,

somewhat similar to the present, brought by one Sib Datta Jha in the year 1848 against Isrinund Datta Jha, the predecessor in office of the present ojha. They cannot operate by way of *res judicata*, not being judgments *inter partes*, but they are evidence u/s 13 of the Evidence Act, upon the present question, which is one as to the existence of a right by custom; and they are certainly entitled to careful consideration. The most important of these decisions is that of the Sudder Dewanny Adalat of Calcutta, dated the 7th of June 1856, which is reported in the Sudder Dewanny Adalat Reports of 1856, page 512, and of which a certified copy is filed with the record of this case.

25. In that decision, in dealing with the third issue, which ran in these words-"The income of Baijnath has been specially assigned for the purposes of the temple. Can it be alienated or not the learned Judges of the Sudder Court say: "The objection raised to the third issue of appellant is beside the question before us, for the agreement upon which this suit is based is altogether silent regarding the source whence the yearly payments are to be made; but granted for argument"s sake that it were otherwise, we- hold the objection untenable, the precedents of this Court having clearly established that the surplus of the income arising from offerings made at temples may, after all proper and necessary expenses have been defrayed, be divided amongst the parties interested in any mode that may be agreed to amongst themselves."

26. This passage of the judgment clearly shows that the present question did not properly arise in the former suit, and what was said with reference to it may therefore be treated as an *obiter dictum*. Moreover, what was said by the learned Judges has no reference to any special custom of the temple of Baidyanath, but refers to offerings made at temples generally. With all respect for the learned Judges, we must say that to the broad proposition of law thus laid down by them, we are unable to assent. Where any property is not wholly debutter, but is only charged with certain religious trusts, there the surplus which remains after the performance of the trusts is no doubt attachable for the debts of the person beneficially entitled to the surplus. See *Ashutosh Dutt v. Doorga Charan Chatterjee* ILR 5 Cal. 438 : L.R. 6 IndAp 182. But that is not the case before us. Here the offerings are admittedly made to the idol (see the deposition of the plaintiff Girijanund, page 16 of the Paper Book). Their very name *charao* shows that they are placed either actually or symbolically on the head of the idol when the offering is made. The purposes, again, to which they are required to be appropriated in the first instance, that is, the trusts with which they are said to be charged, are of an indefinite character and may exhaust them completely. And the only definite right which the ojha seems to have in them is to maintain himself and the dependent members of his family out of them.

27. Such being the case, it would be reversing the order of things to say that the offerings constitute the property of the ojha subject to certain religious trusts, when the correct view to take is, that they constitute the property of the idol subject to certain rights of the ojha. When some of the most beneficial objects of

the endowment, such as the feeding of the poor and the infirm (see Clause 10, para. 7 of plaintiffs' Ex. 7) are of an indefinite extent, to hold that the ojha is entitled to the surplus of the offerings, would be to place the trustee or manager in a position to cut down the indefinite expenses to the lowest possible limits for his own individual benefit. Such a view can never be sound.

28. There are two important facts proved in the case, which make the correctness of the view we take clear beyond doubt. One of these is the fact that the ojha, or high priest of Baidyanath is required to be above a certain age and to lead an ascetic life. This is proved by the plaintiffs' witness Ashutosh Jha and by their Exhibit 7, the Report of the Assistant Commissioner, dated the 4th May 1860 (see para. 7, Clause 12). The other is the fact proved by the deposition of the plaintiff Girijanund that, besides making their offerings to the idol, pilgrims pay pranamis or fees to the ojha. The condition imposed on the high priest that he should lead an ascetic life implies that his temporal wants must be of a very limited nature, so that he can have no occasion for misappropriating the funds of the shrine; and the payment of separate fees to him shows that the offerings to the idol are not intended to be appropriated by him.

29. Last of all it was urged in support of the plaintiffs' right to enforce the charge claimed that, even if the surplus of the offerings do not belong to the ojha, they are still chargeable by him with the maintenance of members of his family; and para. 4 of Exhibit 3 was relied upon. Conceding that the humane provisions of the Hindu law relating to maintenance would authorize the ojha to maintain out of the temple funds certain of his relations in the same way as he is authorized to maintain himself, they can only be those dependent and helpless members of his family whom he is under that law bound to maintain; and clearly the plaintiffs in this case do not come under that description. Nor can Exhibit 3, which merely contains a special recommendation with reference to a particular case, help the plaintiff's much.

30. For all these reasons we are of opinion that the first ground of appeal is not tenable upon any view of the case.

31. The consideration of the second ground need not detain us long. The plaintiffs admit in their plaint (para. 5) that the office of ojha or high priest is elective, though the election is confined within their family circle. It is true that the defendant denies this in his written statement; but the evidence adduced by the plaintiffs (see the deposition of the plaintiff Girijanund and of their witness Ashutosh) shows that the office is not a strictly hereditary one. Their documentary evidence leaves the matter to some extent in uncertainty. The earlier proceedings of the Board of Revenue show that the Board exercised some control over the appointment of successors to the office, though they admitted the office to be as a rule hereditary, while in their later proceedings they disclaim all authority to control the succession. But whether the office is elective or hereditary, no holder of it can bind his successors in office by any act, unless it is for the benefit of the endowment; and it is clear, as has been shown in the

judgment of the Court below, that the ekrar upon which the plaintiffs base their claim cannot be said to have been entered into for the benefit of the endowment. The plaintiffs cannot, therefore, have any right to recover the money decreed from the defendant's successors in office.

32. The third ground of appeal is clearly untenable. A former abuse of trust, such as is shown by the stipulation in the ekrar charging the offerings with the allowance to the plaintiffs, cannot be set up against a party who seeks to prevent repetition of such abuse in future. The case of *Jaggut Mohinee Dassi v. Sakhi Monee Dassi* 10 B.L.R. 19 : 17 W.R. 41 : 14 Moore I.A. 289 is conclusive authority on the point.

33. The grounds urged before us therefore all fail, and the appeal must consequently be dismissed with costs.

34. Turning now to the cross-appeal, we think the first ground ought to succeed to this extent, namely, that the claim in respect of the time preceding the last six years before the date of institution of the suit ought to be disallowed, as barred by limitation. The suit being based upon the ekrarnama of the defendant which is a contract in writing registered, the period of limitation applicable to it is six years under Article 116, Schedule II of the Limitation Act [see *Nobocoomar Mookhopadhyaya v. Sent Mullick* ILR 6 Cal. 94]. The Court below has held that the allowance claimed being one for maintenance, the period of limitation applicable to it is twelve years. The learned Subordinate Judge evidently thinks that Articles 128 and 129 govern the case. This view is clearly wrong. Those Articles, in our opinion, apply only to cases in which the right of maintenance is based upon the Hindu law. They can have no application to a case like the present in which the right is based entirely upon a contract, merely because the persons claiming under the contract are Hindus. The application of those two Articles depends not upon the nationality of the plaintiff, but upon the nature of his right; and the words by a Hindu "used in the Articles must be taken to mean" by a person claiming under the Hindu law." If it were otherwise, and if these words were taken literally, it would lead to this anomalous result, that a Hindu servant of a Christian or a Mahomedan, to whom his master may have granted maintenance by a deed in consideration of his past services, would be entitled to twelve years limitation in respect of his claim, while a servant of the master's own nationality and creed would be entitled only to six years or three years in respect of a similar claim, according as the deed in his favour was or was not registered. This could never have been intended. As a further reason for his decision that no part of the claim is barred, the learned Subordinate Judge adds that the plaintiffs have the right to appropriate the payment in satisfaction of the earlier arrears; that they have in fact made such appropriation in the account annexed to the plaint; and that even if they have not done so, the Court can allow such appropriation to be made now. This view is not, in our opinion, correct. Granting that the conditions under which the plaintiffs are entitled u/s 60 of the Contract Act to appropriate payments to the discharge of the earlier debts, were satisfied,

we do not think that the account referred to makes any such appropriation. It is a running account in which every year the amount due at the end of the last preceding year is added to the amount due for the year, and the payment made during the year is deducted from the same" without any specification as to whether the payment is deducted from the former amount or the latter; and the payment cannot now be applied u/s 61 of that Act to the discharge of earlier arrears, which are now barred by limitation. Practically the difference is not very great. The suit was brought on the 16th of January 1891, corresponding to some time in Magh 1297, the allowance is an annual one; and six years being the period of limitation, the claims for the years beginning with 1291 are within time. The only part of the claim that is barred is the balance due at the end of 1290, which according to the account appended to the decree is Rs. 1,064-8.

35. With reference to the second ground of cross-appeal, it is argued in the first place that as the ekrar in question contains no personal covenant to pay, but only creates a charge on the offerings which is invalid, no personal decree ought to have been made; and in support of this argument the case of *Narotam Dass v. Sheo Pergash Singh* ILR 10 Cal. 740 is cited. It is next contended that, even if there was a personal contract, it cannot be enforced, as there was no valid and legal consideration for the contract. On the other side it is urged that it is not open to the defendant now to deny his personal liability under the ekrar, when in paragraph 13 of his written statement he admitted such liability, and merely questioned the correctness of the plaintiffs' account and pleaded payment in reduction of the claim. We are of opinion that the admission of the defendant should be taken in its entirety, and that it is open to the defendant to contest his liability for any sum in excess of that admitted to be due, upon any ground that he may think fit to urge, provided no new case is made in appeal, and the other side is not taken by surprise. We shall therefore examine the argument advanced.

36. Upon the first branch of the argument, it is enough to say that the question is one of construction of the ekrar; that the case cited is clearly distinguishable from the present, the documents in the two cases being very different from one another in their language; and that the ekrar upon which the suit is based contains in our opinion a personal contract to pay, when the defendant in that document says to the plaintiffs: "You and your descendants shall from generation to generation continue to get from year to year the said sum of Rs. 2,400 from me and my representatives, &c.

37. In support of the second branch of the argument the preamble of the ekrar is relied upon, and it is urged that upon the death of Isrinund, the last ojha, either the defendant was entitled to the office, in which case the plaintiffs gave up nothing, and so there was no consideration for the ekrar, or he was not, and one of the plaintiffs was, in which case it was a sale of the office or a bargaining for it, and the consideration was illegal, such sale of, or bargaining for, a public office like that of the high priest of a public shrine being opposed to public policy. And Pollock's Principles of Contracts (5th edition), page 313; Leake's Law of

Contracts (3rd edition), page 624, and the cases of Juggurnath Roy Chowdhry v. Kishen Pershad Surma alias Raja Babu 7 W.R. 266, Durga Bihi v. Chanchal Ram ILR 4 All. 81, Narasimma Thatha Acharya v. Anantha Bhatta ILR 4 Mad. 391, Kuppa Gurukul v. Dora Sami Gurukul ILR 6 Mad. 76, Raja Varmah Yalta v. Rapi Varma Kunhi Kutty ILR 1 Mad. 235 are relied upon as authorities. On the other side are cited the cases of Mancharam v. Pranshankar ILR 6 Bom. 298 and Sitarambhat v. Sitaram Ganesh 6 Bom. A.C. 250.

38. Having regard to the facts of this case, we are of opinion that this contention is not valid. The ekrar (Ex. 2) no doubt recites that both the plaintiffs and the defendant tried to obtain the post of the high priest on the death of Isrinund, and that this dispute concerning the succession was settled by that document; it also recites that Isrinund had by an ekrar dated the 24th Baisakh 1271 granted to the plaintiffs and their heirs in succession an annuity of Rs. 2,400 for their maintenance. The defendant Sailajanund is the eldest son of Purnanund, who was the eldest son of the late ojha Isrinund, but who died before his father; and the plaintiff Ghjjanund appears to be the eldest surviving son of Isrinund. The earlier letters of the Government and of the Board of Revenue (see Exhibits 3, 5 and 6) show that succession to the office of ojha or high priest, though generally hereditary, is still governed by the elective principle to this extent that the priests or members of the family of the ojhas have a voice in the determination of the question whether the person entitled to succeed by inheritance is also qualified by his age (which is required to be above forty years) and his character; and though in their later communications, that is, those of 1839 (see Exhibits 19 and 20) they withdraw their control over the appointment of the ojha, still they regarded the succession as partially elective, when they said "that the priests of the temple should be left at liberty to choose their own superior without restriction of age or other qualification." Moreover, it had never been authoritatively settled that the succession to the office of ojha was regulated solely by the principle of lineal primogeniture as contended by the defendant. In that state of things it is impossible to say that at the date of the ekrar there could not have been any bond fide dispute as to the right to succeed, and that the plaintiffs did not abandon a bond fide claim. And if that was so, it cannot be said that the ekrar was without consideration. (See Pollock's Principles of Contracts, 5th Edition (page 181), and Miles v. New Zealand Alford Estate Co. L.R. 32 Ch. D. 266.

39. Then as regards the contention that the consideration, if there was any, was illegal as it involved the sale of, or bargaining for, a public office, we are of opinion that the English cases relied upon and referred to in Pollock's Principles of Contracts, p. 313, and in Leake's Law of Contract, p. 624 are inapplicable to this case. They are based either upon the provisions of particular statutes, or upon considerations of public policy inapplicable to an agreement like the one embodied in the ekrar, by which parties having bond fide claims to a priestly office effected a compromise of their disputed civil rights. In two of these cases again, Parsons v. Thompson 1 H.B. 322 and Waldo v. Martin 4 B. and C. 319, the

decision against the agreement is based upon the ground of the agreement involving a fraud (upon the public in the first-mentioned case and upon the individual in whose gift the office was in the second).,

40. The Indian cases cited are somewhat in conflict with one another, but they do not really affect the question as to the validity of the agreement upon which this suit is based. *Juggernath v. Kishen Pershad* 7 W.R. 266 only decides that the judgment-debtor's right as sebaite cannot be sold in execution of a decree. In *Durga Bibi v. Chanchal Bam* ILR 4 All. 81, the same rule is laid down, with a qualification, however, which favours the appellants. The learned Judges say: "We are of opinion in default of any proof to the contrary that the right of managing the temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine cannot legally pass outside family of the trustee, Sadhu Misr, until absolute failure of succession in his family." In *Narasimma Thatha Acharya v. Anantha Bhatta* ILR 4 Mad. 391, and *Kuppa Gurukul v. Dorasami Gurukul* ILR 6 Mad. 76, the sale of a priestly office for the pecuniary benefit of the sebaite was declared to be invalid, and in *Raja Varma Valia v. Ravi Varma Kunhi Kutty* ILR 1 Mad. 235, the Privy Council held that a custom allowing the sale of the office of trustees for the pecuniary advantage of the trustees, even if it was established, would be bad in law. On the other hand, the case of *Mancharam v. Pranshanker* ILR 6 Bom. 298, while affirming the invalidity of an alienation of the office of sebaite to a stranger, upholds an alienation made in favour of a member of the founder's family standing in the line of succession; and to the same effect is the case of *Sitarambhat v. Sitaram Ganesh* 6 Bom. H.C. 250.

41. These decisions, so far as they relate to public offices, are based more or less upon one of two principles, namely, first, that the interests of the public might suffer, if bargains relating to public offices are upheld, as their effect is to prevent such offices being filled by the best available persons; and, second, that no such office should be treated as the private property of any incumbent, and as such capable of being sold by him or of being brought to sale in execution of a decree against him, as such a sale might lead to public inconvenience. The agreement before us obviously does not infringe this second principle, as there was no sale of the office of *ojha* here. As far as the first-mentioned principle goes, that can hold good only in those cases in which the office is of such a nature that no one has more claim to it than what his personal fitness gives him, and no one has any right to question in a Court of Justice the correctness of the decision of the person or persons, in whose gift the office is. When, however, as in the case before us, the only persons who can have any claim to the office are members of a family group, and the nature of the office is such that claims to it must be ultimately determined by the decision of a Court of Justice, and bona fide claimants to the office compromise their claims by an agreement for a pecuniary consideration, the propriety of the agreement has to be judged of not merely with reference to the above-mentioned principles, but with reference to various other considerations besides. In fact, conflicting considerations arise in such

cases. On the one hand, it may be said that the rights of the rival claimant should be determined by the Court, so that the office may be held by the person found best entitled to it. On the other hand, it is to be borne in mind that litigation concerning succession to a public office always involves a certain amount of inconvenience to the public and some waste of the funds of the endowment to which the office appertains; and where the qualifications of the rival claimants are evenly balanced, so far as the public are concerned, it would conduce more to the interests of the public by allowing a compromise than by prohibiting it, provided the nature of the compromise is such that it does not interfere with those interests. We are of opinion that in cases like these, it is not possible to lay down any hard and fast rule of law which can be of general application. Each case ought to be determined upon its own facts. And having regard to the nature of the office in this case, to the nature of the dispute relating to it, and to the nature of the compromise effected, we are not prepared to say that the agreement in question is invalid by reason of its being opposed to public policy.

42. It remains only to consider the last ground of cross-appeal, namely, that relating to the claim for interest. Having regard to the terms of the *ekrar*, we are of opinion that interest has been rightly allowed. The claim is one for a certain sum, payable by virtue of a written instrument at a time certain (that is at the end of each Bengali year), within the meaning of Act XXXII of 1839; and the rate at which interest has been awarded, namely, 12 per cent, per annum, may fairly be regarded as not exceeding the current rate, that being the rate allowed by the Legislature in certain oases (Act VIII of 1885, Section 67).

43. The result then is, that the appeal, is dismissed with costs and the cross-appeal allowed with proportionate costs in both Courts to this extent, namely, that the sum of Rs. 1,064-8, being the portion of the amount decreed that is barred by limitation, shall be deducted from that amount; and the appellants are entitled to costs in this cross-appeal in proportion to the amount disallowed; but the order made in the cross-appeal will be subject to the condition that the respondent shall pay within one month from this date the additional Court fee payable on the memorandum of cross-appeal u/s 16 of the Court Fees Act, that is, the sum of Rs. 335, and if this sum is not paid as directed, the cross-appeal shall stand dismissed with costs. Except as indicated above, the decree of the Court below shall stand.