
(1938) 09 AHC CK 0039
In the Allahabad High Court

Sri Behariji Maharaj Birajman Thakurdwara

APPELLANT

Vs

Lala Manmohan Das and Others

RESPONDENT

Date of Decision : 16-09-1938

Acts Referred:

Citation : AIR 1939 All 141 : (1939) 9 AWR 43

Hon'ble Judges : Bennet, Acting C.J.

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Bennet, Ag. C.J.

1. This is a first appeal by the receiver of the estate of Sri Behariji, an idol in Allahabad City, against a simple mortgage decree. The suit was brought by the plaintiff, Lala Manmohan Das, against three persons originally, defendant 1, Janki Prasad, son of Mukundi Lal, for himself and as mutwalli, manager and karkun of Thakurdwara Sri Behariji Maharaj, (2) Brij Mohan Das, son of Mukandi Lal, and (3) Munnu Lal minor, son of Brij Mohan Das. The original plaint set out that the plaintiff was mortgagee and the mortgagors were defendants 1 to 3. The date of the mortgage was 4th December 1926. The plaint set out further that one Mt. Lalta Bibi had caused a Thakurdwara to be constructed, and for defraying the expenses relating to the construction of the Thakurdwara and other expenses she borrowed from Bisheshar Das and Misri Lal Rupees 3000 under a mortgage deed of 15th July 1895 and constructed the Thakurdwara and installed Sri Behariji, the appellant, therein. Para. 4 set out that for payment of this mortgage of 1895 Mt. Lalta Bibi on 11th July 1907 borrowed Rs. 4000 from another idol called Sri Thakurji. Para. 5 set out that on this mortgage of 1907 a suit No. 141 of 1919 was brought on behalf of Sri Thakurji against Sri Behariji and was decided in favour of the plaintiff and the decision was upheld by this High Court. Para. 6 set out that the property in the plaint, which is No. 14 consisting of four pucca shops in the Allahabad City, was advertised to be sold on 9th December 1926 and that in order to protect the property advertised for sale, defendant 1, Janki Prasad,

borrowed a sum of Rs. 14,500 from the plaintiff by hypothecating the property No. 14. Para. 7 states that as the money was used to pay off this debt the amount was recoverable from the mortgaged property as well as from the person of the defendants.

2. Defendants 1 to 3 did not make any written statements. On behalf of the appellant Sri Behariji, an application was made by Kishun Lal and others which is printed on pp. 224 and 224a of the supplementary record No. 2. This sets out that the description of Janki Prasad as mutwalli of Sri Behariji Maharaj does not show whether Sri Behariji Maharaj was or was not made a party to the suit and that if the plaintiff wanted any decree against Sri Behariji he should be ordered to implead Sri Behariji. Previous to this application of 10th November 1932, on 10th October 1932 Kishun Lal and others had applied to the District Judge of Allahabad under Rule 92, Civil P.C. for the removal of Janki Prasad from the position of mutwalli of Sri Behariji on this ground that he had made a claim to the property No. 14 as his own private property by inheritance through his father from Mt. Lalta Bibi and had repudiated his position as mutwalli. Accordingly the Civil Judge ordered on 5th January 1933 that the plaintiff was to decide whether he wished to fix any liability on Sri Behariji and if so, he should amend his "plaint accordingly. In accordance with that order certain amendments were made in the plaint on 5th January 1933. These amendments consisted in adding the idol Sri Behariji as defendant 4 through Mr. R.N. Basu, who is receiver of the property of the idol in the suit u/s 92, Civil P.C. para. 2 of the plaint remained stating that the mortgagors were defendants 1 and 3, and para. 7(A) was added to the plaint as follows:

That Janki Prasad, defendant 1, did not in the mortgage deed sued on write himself as the mutwalli, manager and karkun of the Thakurdwara of Sri Behariji Maharaj installed in the temple situate in Mohalla Sarai Mir Khan, even then as the amount of consideration of the mortgage deed was paid for the protection of the property of Sri Behariji Maharaj, defendant 4, and as defendant 1 is the mutwalli, manager and karkun of Sri Behariji Maharaj it is also binding on Sri Behariji Maharaj defendant 4, installed in the temple situate in Mohalla Sarai Mir Khan, City Allahabad (Janki Prasad for self and as the mutwalli, manager and karkun of) Sri Behariji Maharaj has been made a party to the suit.

3. It is to be noted that in this para. 7(A) it was not stated that the property No. 14 was owned by the idol Sri Behariji. In fact on a later date 22nd February 1934 some words were added to para. 1 of the plaint stating "and that the owners thereof are defendants 1 to 3". Therefore the case for the plaintiff in the plaint is that property No. 14 is owned by defendants 1 to 3 and not by defendant 4 Sri Behariji. Written statement was then filed on behalf of Sri Behariji, the appellant, and it set out the case that the property belonged to Sri Behariji, that Janki Prasad, defendant 1, was one of the trustees but he did not properly safeguard the interests of Sri Behariji, that the property was advertised to be sold on 9th December 1926 but that the action of Janki Prasad in borrowing the Rs. 14,500

from the plaintiff to pay off the decretal amount was not for the protection of Sri Behariji, that the income of the trust property had been sufficient to pay off the debt on the property and that Janki Prasad had sufficient funds in his hands for such a purpose, that in the course of Suit No. 141 of 1919 Janki Prasad and his father Mukandi Lal had denied the trust. and claimed the property in suit as their personal property but remained unsuccessful in attempt, that on 30th March 1926 Janki Prasad, defendant 1, and his brother defendant 2 filed a Suit No. 54 of 1926 in the Court of the Subordinate Judge for a declaration that the property No. 14 was their personal property and that it was not trust property, that that suit was dismissed on 20th August 1926, that the mortgage deed in suit was merely in furtherance of the endeavors of defendant 1 to set up his title in this property No. 14, that the property adjoined the property belonging to the plaintiff and that the plaintiff had notice of the fact that the property in the plaint was trust property but nevertheless he got the mortgage, deed executed by defendants 1 to 3 as their personal property and thus helped them in trying to establish, a claim to the property as their private property, that the mortgage deed was not binding on defendant 4 and that the action of defendants 1 to 3 in their private capacity could not bind defendant 4, and that there was no privity of contract between the plaintiff and defendant 4, and that the mortgage deed was not executed by persons who were competent to mortgage on behalf of defendant 4.

4. Now various points arose in the case and the Court below has granted a decree in favour of the plaintiff holding that the property No. 14 was liable for sale on this mortgage debt. On the question of the ownership of the property the Court found that the property No. 14 belongs to defendant 4 and does not belong to defendants 1 to 3. The claim of defendants 1 to 3 was based on a pedigree which is shown on p. 141 in a suit which they brought, No. 54 of 1926, against Sri Thakurji claiming that they were entitled to this property in their private capacity and that it might be held that the decree in Suit No. 141 of 1919 was null and void against them, the plaintiffs, for this reason. Now, in regard to this pedigree in the present case, the Court below has held that even if the pedigree were proved, Mukandi Lal, the father of Janki Prasad, was not fifth in the line from the last male-holder of the property Jagannath, and therefore he could not inherit as a "bandhu". The claim of Mukandi Lal is derived through his father Babu Lal and through. Mt. Banno Bibi, the mother of Babu Lal. Therefore his claim set up is that of a "bandhu" and it has been held in *Ram Chandra v. Vinalik* AIR (1914) P.C. 1 that a bandhu can only inherit if he is related within the fifth degree from the common ancestor. Applying this test to the pedigree on p. 141 we find that Mukandi Lal is more remote from Jagannath, the last male owner, and therefore he could not succeed on such a pedigree even if proved. We may note also that the evidence in the present case is not sufficient to prove the pedigree. This matter has also been the subject of litigation and has been held in a case between *Brij Mohan Vs. Kishun Lal and Others*, decided on 19th April 1938 by this Bench printed on p. 254 to 257 of the supplementary record No. 3.

This decision was subsequent to the decision of the Court below. The papers in the original Suit No. 83 of 1932 are printed on p. 185, the judgment of the Subordinate Judge which was exhibited in this case as Ex. DD, and certain other papers. We consider that the judgment of the Court below was correct on this point and there is not sufficient evidence) on this record to prove this alleged pedigree, and further that the pedigree if proved would not establish the right of Mukandi Lal or the defendants through Mukandi Lal. Therefore we find that the property does not belong to defendants 1 to 3. The title of the defendants and the history of the case is as follows:

About the year 1865 one Jagannath died leaving a widow Mt. Lalta Bibi who died in 1908. She built the temple in question in the years 1895-96 and p. 31 shows the mortgage deed of 15th July 1895 by which she received Rs. 3000 for the construction of this temple. This debt was a debt which has been renewed and paid off by the different mortgages. She made two wills. The first of these wills is printed from p. 35 and is dated 7th July 1903. This will sets out at line 21:

I have in accordance with the directions of my husband built a Thakurdwara at Sarai Mir Khan, City Allahabad, and installed therein an idol of Sri Bohariji Maharaj. I have, according to the directions of my husband defrayed the expenses of worship, food offerings and other expenses relating to the temple with the income of the immovable property. As life is uncertain and I have become old and as there is no heir of me or of my husband.... I have...made...of my own free will and accord...this will and have given the following directions, namely that after my death Sri Behariji Maharaj will be the owner of all sorts of my property and shall exercise all sorts of proprietary rights.

5. Then follow certain directions, para. 5 of which is that there should be five mutwallis for the trust set up. The second will printed from p. 41 onwards is dated 14th March 1907 and recites again the passage set out. In para. 5 of that will there are three persons set up as mutwallis, administrators and managers, one of whom is Janki Prasad, defendant 1, son of Mukandi Lal; and Gopi Nath and Jugal Kishore. The powers of these managers are laid down in that paragraph. In para. 8 it is provided that none of them has power to transfer for their own benefit, and in para. 12 it is laid down that any one of the superintendents and managers for the time being who may be present at the time can jointly and severally carry on the necessary business of Sri Behariji and anyone of them can realize rents or get a decree executed, that Janki Prasad was to be the karpardaz. In the following year Mt. Lalta Bibi died on 25th November 1908 and Janki Prasad and the others acted as mutwallis of the temple. On p. 47 there is the Civil Suit No. 2689 of 1910 brought by Janki Prasad and Gopi as managers and karpardaz of the temple of Mt. Lalta Bibi against one Ram Adhar.

6. Shortly after this the Secretary of State unsuccessfully brought a Suit No. 95 of 1913 (page 49) against Mukandi Lal and Janki Prasad, his son, claiming that Jagannath had died half a century ago, that the widow was the sole survivor, that the widow had executed a will, which was voidable by the Secretary of State, and

that there were no heirs to Jagannath and Mt. Lalta Bibi and therefore the property escheated to the Secretary of State. This plaint was filed on 19th July 1913. On page 53 is the written abatement of Janki Prasad of 22nd December 1913 setting out in para. 16 that he is the mutwalli of Sri Behariji who is the owner of the property in dispute which comprises houses Nos. 14 and 15. On p. 57 in the written statement of Mukandi Lal and he pleaded in para. 17 that his grandmother was the "chacheribahin" of Jagannath and that he was not realizing the rents of the shops and therefore was not liable for payment of the mesne profits and was not in possession of the property, that there were other relations of Jagannath alive. This is a very vague claim and it is not clearly set out that Mukandi Lal considered himself to be an heir. His deposition of 23rd February 1915 is printed on pages 59 and 60. He set out that since the death of Mt. Lalta Bibi his son Janki Prasad had been in possession of the house and shops in question and he was living in the house on behalf of Janki Prasad, that his son was in possession by virtue of the will and on page 60, line 28 he stated that the Thakurji had been installed in the house for a long time and that there was an old temple in the house. On p. 65 there is the deposition of Janki Prasad in the suit and he stated that Lalta Bibi's husband had directed her to make this will and that he was in possession of the property under the will. On page 66, line 3 it is stated:

All those things belong to Thakurji. The rent which I realize is spent on Thakurji. I live in a portion of the, house and the remaining portion is used as Thakurdwara.

7. On pages 69 onwards is the decision of the Subordinate Judge of Allahabad dated 2nd March 1915 and he held that the evidence put forward to prove the pedigree on p. 71 was concocted evidence and mere hearsay and quite unreliable. He therefore held that when Lalta Bibi died there was no legal heir of Jagannath in existence and consequently Jagannath's estate escheated to the Secretary of State as regards the real property, but the ornaments in suit had been set apart by Lalta Bibi for the use of the Thakurji and he did not give a decree for those articles. An appeal was brought and the judgment of this Court is on p. 211, Supplementary Record No. II, F.A. No. 214 of 1916. The learned Judges considered that the burden lay on the Grown to prove that Jagannath had no heirs, that Mukandi Lal alleged that he was an heir through his grandmother Banno Bibi, that it is clear that the allegation of Mukandi Lal was not a complete fiction, that the only weak point was the proof that Mohan Lal was the brother of Bajinath but even about that there was some evidence of the pedigree which was filed before the dispute arose in 1896, and that the Secretary of State had failed to prove that Jagannath died without heirs, and therefore the appeal was allowed and the suit dismissed.

8. After this decision in 1919 a change came over the attitude of Mukandi Lal and Janki Prasad and they considered that as the High Court had held that Mukandi Lal was an heir therefore they should repudiate the trust and take possession of

the property on their own behalf. This attitude was accentuated by the fact that Sri Thakurji filed Suit No. 141 of 1919 against Sri Behariji Maharaj through Janki Prasad and Gopi Nath and Jugal Kishore, the mutwallis, as defendant 1, and certain other pro forma defendants who were also trustees of the plaintiff. During the pendency of that suit Jugal Kishore died. He is however in the preliminary decree for sale which was dated 30th June 1920 printed on page 213 of the Supplementary Record No. II. There was in fact no defence that was possible to make on behalf of Sri Behariji in that suit. These persons, Mukandi Lal and his son Janki Prasad, saw that it would not be possible to evade the decree of Sri Thakurji against Sri Behariji in any way except by claiming the property as their own personal property, and this of course also was to their own advantage. On p. 97 is the written statement of Janki Prasad and he sets out in para. 14 that on Mt. Lalta Bibi's death Mukandi Lal, the subsequent heir of Jagannath deceased, became the owner of the property, that the Secretary of State brought his Suit No. 95 of 1913, that Mukandi Lal was the subsequent heir to Jagannath; in para. 16 that Mukandi Lal had entered into possession of the property as heir; in para. 17 that Mt. Lalta Bibi executed a will on 14th March 1907 and willed and vested the property in favour of Sri Behariji; in para. 19 that Mukandi Lal defrayed the expenses of the worship and that Mukandi Lal should be made a party. On p. 99 in the deposition of Kishun Lal Mr. Bhagwan Das, vakil for defendant 1, Sri Behariji, stated that the will was executed by Lalta Bibi under the direction of her husband and that the idol has been in existence before the husband's death. Mukandi Lal was made a witness on p. 101. He was not allowed to state who was the owner of the house. He stated that the will was made in the presence and he had identified Mt. Lalta Bibi before the Sub-Registrar. His evidence was rather indefinite.

9. Now the judgment of the High Court in appeal, in F.A. No. 41 of 1921, is printed on pp. 131 to 133. It states that it was difficult to understand the position taken up by the defendants in the case, that it was not clear whether the defendants-appellants were claiming the property under the will or otherwise. The appeal was dismissed. The final decree was printed on pp. 135 and 136 and was dated 8th May 1924. In that the defendant is described as Sri Behariji through Janki Prasad. As noted already one of the mutwallis, Jugal Kishore, had died by that time, 8th May 1924, and the other mutwalli had apparently ceased to act. Now certain suits were brought for arrears of rent. One of these is printed on p. 105, suit No. 736 of 1920 in the Court of the Munsif (West), brought by Mukandi Lal against Ram Adhar. About the same time Janki Prasad brought a suit No. 701 of 1920, a little later, against Ram Adhar also for arrears of rent - plaint p. 107. The judgment of the Munsif in the suit of Janki Prasad is on p. III and he decreed possession of the shop and arrears of rent. This decree was reversed by the Appellate Court on pp. 115 and 116 on the ground that Janki Prasad admitted that his father Mukandi Lal was the next reversioner and that his father had separately sued; it therefore appeared that he was treating the will as a nullity and on this ground also Janki Prasad had no title. The Court also found,

that the will was void as a Hindu widow had no right to make a will. Against this decree there was a second appeal in the High Court, the judgment of which is printed on p. 121, and the High Court agreed with the Court below that a Hindu widow has no power to make a valid endowment of her husband's property. It will be noted that that judgment of this Court was between Janki Prasad and Ram Adhar, a tenant. It is dated 20th July 1922. In the suit of Mukandi Lal, civil suit No. 736 of 1920, the judgment of the trial Court is printed on page 215 of the supplementary record No. II. The question of right as an heir was raised and the Munsif held that the plaintiff was entitled to succeed and he granted a decree to the plaintiff. An appeal was taken and the judgment of the District Judge dated 8th September 1922 is printed on p. 123. He upheld the judgment of the Court below.

10. After this on p. 137 on 11th November 1924 Ram Adhar executed a kabuliat in favour of Mukandi Lal in regard to his rent. Mukandi then died and p. 204 shows an order for mutation of his name in favour of his sons Janki Prasad and Brij Mohan in the municipal registers. The order is dated 1st July 1926 and is in regard to this house No. 14. On page 145 last line it is stated in the pleading of Sri Thakurji that Mukandi Lal died about four months before the date of 30th April 1926. This will make his death about 1st January 1926. We then come to the date 30th March 1926 when Janki Prasad and Brij Mohan brought a suit against Sri Thakurji, the decree-holder of decree in Suit No. 141 of 1919 against Sri Behariji. This plaint is printed on pp. 141 to 143. The relief asked is that a declaration be granted that the decree is null and void against the right of ownership of the plaintiffs. In para. 3 it is said that on the death of Mt. Lalta Bibi Mukandi Lal became the actual owner of the property and was in possession during his lifetime and that the plaintiffs are described as heirs of Mukandi Lal. On p. 145 was a written statement on behalf of Sri Thakurji filed by Kishun Lal and Ajudhya Prasad who had been named as the persons through whom he was sued in the plaint. They set out the claim of the idol and denied the title of Mukandi Lal as an heir and denied that the plaintiffs had entered into possession as heirs. It is to be noted that this Sri Thakurji is the plaintiff in the mortgage suit No. 141 of 1919 and that one of the persons who appeared on his behalf has also been concerned later on behalf of Sri Behariji. There are also some other persons common to the committees of the management of the two idols, one of whom is Janki Prasad himself.

11. In this suit, No. 54 of 1926, there is an order on p. 149 which sets out that the parties made an application on 5th August 1926 asking that the suit may be dismissed as there was a compromise on the terms of the plaintiffs Janki Prasad and Brij Mohan executing a deed of endowment of certain property for religious purposes, that the parties had asked the Court to dismiss the suit and not to pass a decree in the terms of the compromise, that the compromise was to cover execution proceeding No. 306 of 1925. The Court ordered that the suit be dismissed as desired. On p. 151 there is the corresponding order in the case for the execution of the mortgage decree in suit No. 141 of 1919, Sri Thakurji

against Sri Behariji. In that, it is set out that the compromise was that Janki Prasad and Brij Mohan were to make a wakf unconditionally, without reserving any benefit whatever and that the wakf which they did execute provided that the office of the inutwalli should be held by Janki Prasad and thereafter by his family, that the niutwalli should appropriate one-fourth of the profits as his remuneration and that he should not be liable to account to anyone (or administration. The decree-holder objected to this waqf and therefore the compromise was not carried out. Accordingly the Court hold that the decree-holder could proceed with the execution. The proclamation for sale then followed on p. 153 dated 1st November 1926 which stated that the property No. 14, four pucca shops, should be sold by public auction on 9th December 1926 for the decretal amount of Re. 13,958-14-6.

12. It was under these circumstances that Janki Prasad found it necessary to pay off the mortgage decree of Sri Thakurji. The property was advertised for sale on 9th December 1926 and if that sale had taken place the property would have been lost. Janki Prasad was at this time in possession of the property on his own behalf and he had been asserting his title to the property as his private property as an heir of Mukandi Lal. The view had been accepted by the Courts that the will of a Hindu widow was invalid and Janki Prasad accordingly considered that he was safe in his title as a private owner of the property, he therefore approached the present plaintiff who is a wealthy money-lender as his deposition shows on page 224-b where he states that he pays Rs. 25,000 per annum as Income Tax. The plaintiff states that he advanced the money to Janki Prasad and Brij Mohan and got a mortgage deed, that the loan was taken to pay off a decree, that he was shown a High Court paper-book and several other papers in the case and he settled the amount of loan and rate of interest and left the matter to his mukhtarams to look into it and complete it and take the opinion of Damodar Das Vakil. Now the legal opinion given by Mr. Damodar Das is printed on page 157 dated 2nd December 1926. He states that he saw the following documents : F.A. No. 214 of 1916, decided on 28th January 1919, by which he means the judgment of the High Court in the suit of the Secretary of State S.A. No. 1763 of 1921, decided on 20th July 1922, which is the judgment on page 121, Janki Prasad v. Ram Adhar F.A. No. 41 of 1921, decided on 30th May 1923, which is the judgment of the High Court in the mortgage Suit No. 141 of 1919. He states in his opinion:

The property left by Jagannath is now in possession of Janki Prasad and his younger brother who are the sons of Mukandi Lal deceased.... In S.A. 1763 of 1921 it was held that Mt. Lalta Bibi could not make a waqf of the property left by Jagannath. The property of Jagannath is now put up for sale in execution of a decree No. 141 of 1919 obtained on foot of a mortgage executed by Lalta Bibi. That mortgage was held to have been executed for valid necessity, vide High Court judgment in F.A. No. 41 of 1921. In my opinion Janki Prasad and his brother can execute a mortgage and raise money for payment of the decree passed on foot of the mortgage executed by Mt. Lalta Bibi.... Money can safely

be advanced by a creditor on the security of the property left by Jagannath provided that both Janki Prasad and his brother combine in executing a mortgage.

13. It will be noted that although Mr. Damodar Das had before him the judgment in the case of Sri Thakurji v. Sri Behariji in which the property was to be sold as the property of Sri Behariji, Mr. Damodar Das did not consider that it was necessary that the mortgage deed should be executed by any mutwalli on behalf of Sri Behariji. There is no doubt that the facts of the case were brought to the notice of counsel and counsel preferred the view that the title of Sri Behariji was non-existent and" had no legal validity because he considered that Mt. Lalta Bibi was not entitled to execute the will endowing Sri Behariji. On p. 16 Mr. Damodar Das gave evidence that he had been appearing for Janki Prasad in all his cases, and therefore he was perfectly familiar with the character of the litigation. He was shown the statement of Mukandi Lal in the High Court paper-book and asked if Mukandi Lal had stated that Lalta Bibi executed the will and constructed the building according to the direction of her husband, but he was not allowed to answer the question. Ha had also appeared for Janki Prasad in the High Court Appeal No. 41 of 1921 which was an appeal in the mortgage suit in question. So he was perfectly familiar with all the facts. There is also the evidence on pages 10 and 11 of Shadi Lal who has been mukhtaram of the plaintiff for 30 or 32 years and he states that enquiry was made about the rights of the proposed mortgagors and the judgments in these various suits wore seori including that in the mortgage suit and that he got this mortgage deed executed under his supervision. He was aware that Janki Prasad and Gopi Nath were mentioned as mutwallis of the temple of Sri Heharji in the will of 1907 made by Mt. Lalta Bibi (page 11, line 27). It was under those circumstances that the plaintiff advanced the money to defendants 1 and 3 and the mortgage deed in suit was executed. This document is printed on page 219 of the supplementary record and we also have a translation of this mortgage deed filed by the respondent-plaintiff. There is some slight difference in the translation of Clause 5 of the mortgage deed. Taking it from the plaintiff's translation it is as follows:

That for the satisfaction of the creditors aforesaid we have in lieu of the amount of principal and interest due under the mortgage deed, mortgaged without possession the property, house No. 14 aforesaid, constituting of four shops specified us below, which is not pledged or hypothecated anywhere else except under the decree aforesaid in satisfaction whereof the said property has been advertised for sale; and it is free and exempt from all other charges and claims. We have hypothecated the entire property without the exception of any rights or thing together with land covered by the said house and all the rights and interests appertaining thereto, which are enjoyed by us the executants at the present time or which may come into existence in future. We shall not mortgage at any other place the mortgaged property specified below till the entire amount of demand due under the mortgage deed has been paid in full.

14. Learned Counsel for the plaintiff admits that the words "and interest" should

be cut out before the words "appertaining thereto"; but this is of no importance. The document begins as follows:

We, Janki Prasad, son of Mukandi Lal, and, Brij Mohan Das alias Gabru, for self and as guardian of Munnu Lal, my minor son, sons of Mukandi Lal...declare as follows:

Then is set out the various facts in the case and it is stated:

Mt. Lalta Bibi died in 1908, Since her death Mukandi Lal, father of us, the executants, had; been in possession by right of inheritance. Since the death of Mukandi Lal, we the executants have been in proprietary possession of the house property aforesaid.

15. It is set out that it is necessary to pay the mortgage debt of the mortgage executed by Mt. Lalta Bibi as this debt was upheld by the High Court in F.A. 41 of 1921 as having been taken for valid and lawful expenses and the liability of the said debt had been put on the house sought to be sold by auction. Hence it is very necessary to pay the said debt for the safety of the property which is likely to be beneficial to the family and the minor. Now in the whole of the document from beginning to end there is no mention whatever that Sri Behariji has any rights in this property, house No. 14, nor do any of the executants purport to execute this mortgage as mutwalli on behalf of Sri Thakurji. On the contrary the executants set out clearly that they are in proprietary possession by right of inheritance. The claim of the appellant is that the execution of this document was in part intended to be a furtherance of the right and title of the executants in this property. The idol has been altogether brushed aside and Janki Prasad and his brother and his brother's sons are treating the property as their own private property. In pursuance of this document on page 159 there was a tender by the plaintiff of the decretal amount of Rs. 13,949-14-7 on 4th December 1926 and the decree in the mortgage suit of Sri Thakurji against Sri Behariji was therefore satisfied. There was some excess amount paid and on page 161 there was an application for refund made by Janki Prasad and he obtained the refund of Rs. 402-8-0 on page 161.

16. In supplementary record No. Ill on page 227 there is a plaint in Suit No. 85 of 1927 dated 27th July 1927 brought by Kishun Lal and others against Janki Prasad and Gopi Nath asking for a declaration that the property house Nos. 14 and 15 be declared a wakf property belonging to Sri Behariji and that the defendants are trustees. In para. 11 it was set out that Janki Prasad now claimed the property as his own and denied that it was wakf property.

17. In page 230 Janki Prasad filed a written statement stating in supplementary pleading para. 6 on p. 231 that the wakf created by Mt. Lalta Bibi was abortive and infructuous against the rightful heir and owner of the property and it was no longer subsisting and that the answering defendant was not in possession of the property under any trust nor was the property wakf; but that the property was the private property of Janki Prasad and his brother. The judgment of the trial

Court in the suit is printed on pages 232 to 238. The Court held on page 236 that it was not shown that Jagannath had given authority to his wife to create a trust and therefore the property was not trust property and the suit was dismissed. An appeal was filed in the High Court, F.A. No. 505 of 1928 and decided on 11th May 1932. The judgment is printed on pp. 167 to 181. The High Court held that the plaintiff was entitled to a decree that the property was endowed property and that the defendants were validly appointed trustees by Mt. Lalta Bibi under her will of 1907. On p. 179 the Court held that the initial burden which lay on the plaintiffs to prove the oral authority of the husband had been adequately discharged and that there was authority from the husband for the will made by Mt. Lalta Bibi which was therefore valid. Against this judgment an appeal was filed in the Privy Council and the Order in Council is printed on page 258 of the supplementary record No. III. The appeal was dismissed for want of prosecution. We may note that on page 165 Gopi Nath on 2nd September 1927 had made an application stating in the trial Court that he had made great efforts for the enforcement of the trust but remained unsuccessful, that Mukandi Lal had been declared to be the owner of the property and he held possession as a proprietor and after his death Janki Prasad and Brij Mohan have been in proprietary possession and that he asked to be exempted from the case.

18. It is clear that Gopi Nath has not acted as a trustee for some time. But nevertheless there is this judgment of the High Court which holds that he was validly appointed as a trustee. On 12th October 1932 Lala Kishun Lal and others whose interest in these matters has already been noted and who had obtained permission from the Legal Remembrancer brought a suit u/s 92, Civil P.C. for the removal of Janki Prasad and Gopi Nath from the office of trustee. That suit has since been decreed on 23rd August 1938 as a certified copy now filed shows. It was in these proceedings that Mr. R.N. Basu was appointed a receiver by an order of 9th December 1932 printed on page 183. Now when the judgment of the High Court was given on 11th May 1932 holding that the dedication of the property was valid, the plaintiff considered that it was high time for him to file a suit to endeavour to recover his money. The mortgage of 4th December 1926 stipulated payment of the principal amount within five years which would be December 1931, and there would have been a further period of 12 years from that date within which a suit could have been brought, but presumably on account of the decision of the High Court the suit was filed by the plaintiff on 16th July 1932. We have already dealt with the allegations in the plaint and we have noted the position of the plaintiff in the matter. Even in his amended plaint he did not specify that the property belonged to Sri Behariji. But he stated in para. 1 as amended that the owners were defendants 1 to 3. This then is the attitude which the plaintiff took up in his plaint. It will be noted that in the plaint he made a claim only for the sale of the property as the property of defendants 1 to 3. As that fact has now been found against him learned Counsel for the plaintiff-respondent attempted to justify the decree of the Court below on various other theories of law, none of which have been the subject of any allegation

whatever in the plaint.

19. It is obviously a great weakness in the case for the plaintiff to put forward in a first appeal entirely new theories of the liability for sale of this property for which there is no foundation whatever in the allegations in the plaint. This case therefore differs from the various rulings in which from the first a plaintiff has sued on the grounds that there are certain claims in equity which entitle him to relief. No such claim of equitable relief against defendant 4 was put forward in the plaint. We may note that this aspect of the matter has been dealt with most inadequately by the trial Court in a single paragraph on page 25 where from line 33 to line 39 the Court merely sets out that because Clause 5 of the mortgage deed was an all estate clause and conveyed not only the title of Janki Prasad mentioned expressly in the bond but whatever other title he had, it would also convey his title to the property as trustee and. manager of Sri Behariji; that the clause involved the transfer of all the right and title of the transferee whether patent or latent and it was not necessary to discuss rulings on the point. It may be noted that there was no issue whatever on the point among the issues set out on page 22. The appeal was brought on the ground firstly that the trial Court erred in its finding on this Clause 5 of the mortgage deed in suit and that the Court erred in holding that Janki Prasad was a de facto manager and trustee and was entitled to act in emergency and was competent to mortgage the property. This finding of the Court is on page 26. Further the trial Court found that on the strength of the ruling *Butler v. Rice* (1910) 2 Ch. 277, the plaintiff was entitled to the rights of subrogation, and the Court further found that defendant 4 had received the benefit and the property therefore was liable to sale. It is clear that on the face of the document there is no liability of the property of the Thakurji in this mortgage deed. The mortgage deed refers merely to the personal property of the executants which they are stated to have obtained by inheritance from Mukandi Lal. The deed therefore does not purport to mortgage the property of Sri Behariji. Learned Counsel for the plaintiff-respondent put forward various grounds on which the judgment of the Court below might be upheld and which would indicate a liability in law of this property for sale. The first point advanced by learned Counsel for plaintiff-respondent was : What were the powers of Janki Prasad alone? Now learned Counsel referred to the will on page 41 and under this will he contended that Janki Prasad alone could execute a transfer on behalf of Sri Behariji. It is true that in para. 12 on page 43 it is set out:

Any one of the superintendents and managers for the time being who may be present at the time can jointly or severally carry on all the necessary business for Sri Behariji Maharaj and the Thakurdwara. He can himself or by means of Court realize the rents and get a decree executed. The manager shall after deducting the sum of Rs. 15 per mensem on account of the expenses of the worship of Thakurji pay Rs. 3000(?) the amount of debt due by me, the executant, and the amount that would remain after satisfaction of the amount of principal and interest shall be spent on the Thakurdwara aforesaid.

20. It is to be noted that this paragraph conveys lesser power than was given in the corresponding paragraph on page 37 as the provision was omitted:

In order to take all these proceedings necessary to the recovery of the amount due to Sri Behariji it shall not be necessary for all the managers and administrators to assemble together.

21. In our view all the powers that the will gave to a mutwalli to act alone were emergency powers to realize rents and get a decree executed and to carry on the necessary business. The document does not give the power to a single mutwalli to execute a deed of transfer. Learned Counsel for the appellants cited to us numerous authorities on trust for the proposition that all trustees must join in executing a deed of transfer. This is laid down in Underbill's Law of Trust and Trustees, Bdn. 7, Article 51, p. 305, and also in Agnew on Trust, Edn. 2, p. 246. This was further laid down in Kokilasari Dasi v. Rudranand Goswami (1907) 5 C.L.J. 527, where it was held that where property of a trust was to be recovered all trustees should be made parties, those not consenting to be made defendants. In Abdul Gafur Mandal and Another Vs. Uma kanta Pandit, it was held that both she baits must agree to a suit to enhance the rent of a tenant, and reference was made also to the principle laid down in Luke v. South Kensington Hotal Co. (1879) 11 Ch. D. 121 at p. 125 and also to In re Flower and Metropolitan Board of Works (1884) 24 Ch. D. 592. Mr. Dar further relied on the fact that page 135 shows that the final decree in the mortgage Suit No. 141 of 1919 was granted against Sri Behariji through Janki Prasad alone as mutwalli. That may be so but we have shown from the conduct of Janki Prasad that for a number of years previously he had repudiated his position as mutwalli and had taken up the position that he was entitled to this property in his private capacity. Under these circumstances we consider that the Court below is incorrect in finding that at the time of this mortgage deed in 1926 Janki Prasad was a de facto manager and mutwalli of the appellant Sri Behariji. On the contrary Janki Prasad had ousted the possession of Sri Thakurji from the property in suit and he was holding it adversely to Sri Behariji. Under these circumstances Janki Prasad neither purported to represent Sri Thakurji nor would lie have been a proper person to represent Sri Thakurji in any transaction whatever. Our opinion therefore is that in 1926 Janki Pnisad having repudiated his position as trustee had no power whatever to act on behalf of Sri Behariji. This really removes the basis of all the arguments of learned Counsel for the plaintiff-respondent because on our finding that Janki Prasad represented himself alone and was quite incapable of in any way representing the rights or interests of Sri Behariji no doctrine of subrogation or equity can be applied by the plaintiff against Sri Behariji.

22. The next proposition of Mr. Dar was that there was subrogation of the plaintiff to the position of the mortgagee under the mortgage held by Sri Thakurji. This argument is based on the concluding paragraph in the mortgage deed in question, para. 8, which provides on page 221 as follows:

The creditor shall have all the powers and prior rights (like) the decree-holder in case No. 41 of 1921 aforesaid in execution of which decree the property stands advertised for sale.

23. Now there is no clear provision here for subrogation. All that is stated is that the creditors will, have the powers and prior rights of the decree-holder. Whatever this clause is intended to mean it does not appear to be intended to create subrogation. Learned Counsel for the plaintiff-respondent admitted that his case for subrogation would not come under the language of Section 92, T.P. Act, Act 4 of 1882, which has been amended by the Amending Act, Act 20 of 1929, to provide a detailed right of subrogation. Formerly there was a more limited right of subrogation given u/s 74. The new Section 92 is a comprehensive Section dealing with the rights of different classes of persons. The para. 1 of Section 92 deals with the rights to subrogation of persons mentioned in Section 91 which are persons who have an interest in the property, such as other mortgagees. Paragraph 3 provides in) follows:

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

24. This para. 3 deals with the case of a person who has advanced money to a mortgagor. Now in the present case the money was advanced to Janki Prasad and his relatives and as we have pointed out he was not representing Sri Behariji who alone was the mortgagor of the property in the mortgage which was redeemed. Therefore the language of this paragraph will not apply. Learned Counsel however contended that apart from Section 92, T.P. Act, there was an equitable right of subrogation. Now one difficulty which we have in accepting this contention is that the Legislature appears to have fully provided for rights of subrogation in the amended Section 92. T.P. Act, and learned Counsel for the respondent has not shown us any case in which the suit was filed after the Amending Act came into force on 1st January 1930 in which any Court has held that there was an equitable right of subrogation. Learned Counsel did refer to two rulings, *M.P. Venkatachari Vs. Karruppan Chetty and Others*, and *(Maramittathi Theruvil Motha Chettiam) Veetil Kelu Vs. Kuttiyil Machikandy Chakkara Chappan and Others*, . In each of these cases we find that the suit was brought prior to the Amending Act. In the latter ruling the appeal was a Letters Patent Appeal from a judgment in *(Maramittathi Theruvil Motha Chettiam) Veetil Kelu Vs. Kuttiyil Machikandy Chakkara Chappan and Others*, . Clearly the second appeal of 1931 would refer to a suit brought before 1930. Now in the Bengal, Agra and Assam Civil Courts Act, 12 of 1887, which is still in force in these Provinces, Section 37(2) provides:

In cases not provided for by Sub-section (1) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

25. This sub-section states that equity is to be applied in cases not provided for by any other law for the time being in force. There is another law for the time being in force in regard to subrogation, namely Section 92, T.P. Act. Learned Counsel argued that as a certain case does not come u/s 92 therefore it might be considered to come in equity. We consider that this argument is certainly not what the Legislature intended, otherwise the provision in the Civil Courts Act would be meaningless. On the theory of learned Counsel where there is a provision of law you can bring any suit on any matter outside the provision under the rule of equity. We consider that what is meant by Section 37(2), Civil Courts Act, is that where the statute law deals with a subject and allows certain rights, equity cannot be invoked to extend the rights which are provided by the statute. This provision of the Civil Courts Act is in accordance with the former rules of equity in the Courts in England under which equity would not be applied where there was a statutory provision. But where there was no statutory provision equity could be brought in to supplement a rigidity of the doctrines of the common law. Learned Counsel for the respondent referred to various cases for his claim in equity. One of these was *Butler v. Rice* (1910) 2 Ch. 277 referred to by the lower Court, and another was *Chetwynd v. Allen* (1899) 1 Ch. D. 353. In each of these cases there was the property of a wife on which the husband obtained money to pay off the mortgage debt and the wife pleaded that the loan was without her knowledge. It was held that the person who had paid off the mortgage had an equitable charge against the property of the wife. We consider that the Courts in England applied the doctrine of equity in those cases because there was no statutory provision. But where there is statutory provision as there is in Section 92, T.P. Act, we consider that we should follow the statutory provision and that we are not entitled to extend that provision. Learned Counsel further referred to Section 69, Contract Act, which provides as follows:

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

26. Now the Section says that the person must be a person interested in the payment of money. The plaintiff was not a person interested in the payment of the mortgage decree of Sri Thakurji against Sri Behariji. He had no interest at all before his mortgage deed and we consider that it cannot be claimed that he might procure his mortgage deed and then have an interest when he has later advanced the money under that deed. Reference was made by learned Counsel to *Mt. Munni Bibi and Another Vs. Triloki Nath and Others*. That was a case in which the Court did not allow recovery. On p. 144 the Court summarized the rulings in two lots. In one set of rulings the person who made the payment was actually interested and made the payment in good faith. In the other set the plaintiff knew perfectly well that he had no title and it was held that he could not recover. Learned Counsel also referred to the rulings of their Lordships of the Privy Council in *Dakshina Mohun Ray v. Saroda Mohun Ray* (1894) 21 Cal. 142 their Lordships stated:

Now, it seems to their Lordships, to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents.

27. Now the proposition laid down by their Lordships was one which cannot possibly be applied to the present case. In the present case the plaintiff was not holding the property as a contending party in litigation and there was no duty cast upon him to preserve the property. He had no connexion with the property but was merely a money-lender who chose to make an advance on terms which he thought would be profitable to himself. The ruling therefore cannot possibly be applied to cover the case of the present plaintiff.

28. Another ruling of their Lordships of the Privy Council on which learned Counsel for the plaintiff-respondent relied was *Biraj Nopani v. Pura Sundary Dasee* A.I.R (1914) P.C. 92. This ruling may be considered first by a reference to a ruling which it reversed : *Pura Sundari Dasi v. Bijraj Nopani* (1910) 37 Cal. 362. The facts which were some what complicated are that Premchand Basack, a Hindu under the Dayabhaga School of Hindu law died in 1886, leaving a will by which he devised a house No. 8, Sobharam Bysack's Street in Calcutta to his daughter Sreemati Katyani Dasi and her heirs absolutely, subject to two charges of twenty rupees a month each for his two daughters-in-law. A probate of the will was granted on 12th July 1887 to the executors appointed under the will. On 12th December 1900, a conveyance of this house was executed by Hemendra Nath Bysack and his two surviving brothers in favour of the defendants. Hemendra Nath was the sole surviving executor of the three executors. The High Court in construing this document considered that it was a transfer by the three brothers in their private capacity. In law actually the property was the stridhan of Sreemati Katyani and passed not to her sons but to her daughters. She had died intestate on 8th April 1891. Her sons therefore had no right whatever to transfer her property. The Calcutta High Court therefore held that the vendees took no right under the sale deed. When the case came before their Lordships of the Privy Council, a different set of arguments were advanced and their Lordships set a different construction on this document. They point out in *Bijraj Nopani v. Pura Sundary Dasee* A.I.R.(1914) P.C. 92 that the document contains a recital and the provisions of the will and that Hemendra Nath on 4th December 1900 obtained an order whereby the Registrar of the High Court was to enquire whether there was any necessity for the sale of the house and what provision should be made to secure payment of the legacies and the document recited that Hemendra Nath had paid all the debts and liabilities. Other recitals were made that the vendors had taken upon themselves the liability for the maintenance of their sisters. On p. 62, it is set out that the vendors grant, sell and convey the property to the purchasers in ordinary form. Then followed a covenant which is quoted. Their Lordships did not interpret this covenant in the same way in which the Calcutta

High Court had interpreted it, and they pointed out on p. 63:

It is plain that at the date of this conveyance the property was still in the hands of the sole surviving executor, Hemendra Nath Bysaok, and therefore he was competent as executor to sell it to the appellant....

29. The contention of the respondent that the brothers were the sole beneficial owners was not accepted by their Lordships on p. 63 and 64. It is clear therefore that the ruling is no authority for the present case. Learned Counsel however points to a single sentence on p. 64 which runs as follows:

But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner), the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor.

30. Learned Counsel for respondent therefore argued that in a similar manner the sale deed by Janki Prasad and others in the present case ought to carry the right and title which Janki Prasad possessed as manager of Sri Behariji. In reply to this contention, it is sufficient to observe that we have held that at this period Janki Prasad had altogether repudiated his duties-as mutwalli of Sri Behariji. On the other hand, their Lordships had held on p. 63 that the property was still in the hands of Hemendra Nath Bysack as the sole surviving executor. The case is therefore fundamentally different on this important point of fact. Further, we are convinced that their Lordships by this very phrase did not mean to lay down a general rule for a class of cases which was not before them and the remark should not be read in isolation from its context. On the other hand, the appellant relies on another ruling of their Lordships : *Balwant Singh v. R. Clavncy* (1912) 34 All. 296. That was a case in which an estate had been granted by Government not as an impartible estate. There were two brothers who were entitled to the estate, Sheoraj Singh and Maharajs Singh. In 1892 a mortgage deed executed by Raja Sheoraj Singh alone. The mortgage-deed was purported to have been made, between Raja Sheoraj Singh, mortgagor of the first part, Maharaj Singh, his brother of the second part, and the Bank of Upper India Ltd. of the third part Sheoraj Singh was the sole mortgagor and by the deed of mortgage declared that he was the absolute owner of the property and that there was no sharer in the property. Maharaj Singh was not a mortgagor, nor did it appear by the mortgage deed that he had any proprietary interest in the mortgaged property nor was he obtaining any benefit from the loan-to his brother, Sheoraj Singh. He was made a party to the deed only to afford evidence that he had assented to the taking of the-loan by Sheoraj Singh and the granting of the mortgage. The suit was brought against the property. On pages 305 and 306, their Lordships stated:

Having found as a fact that Maharaj Singh was a minor on 28th October 1892, it is not necessary for their Lordships to consider any other issue. This suit has

been brought on the mortgage deed" of 28th October 1892, by the assignee of that-mortgage, and as their Lordships have held, that, the mortgage was not made by Sheoraj Singh as the manager of the family, or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against, him and his interest in the estate was not merely voidable; it was void and of no effect, and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage-deed which did not affect him or his interest in the estate.

30. We find it impossible to distinguish this principle laid down by their Lordships from the facts of the present case. In the present case the idol, Sri Behariji, was a person under a disability and defendant 1 had set up an adverse title to the idol. In *Balwant Singh v. R. Slancy* (1912) 34 All. 296 it is stated that Sheoraj Singh asserted that the family estate was impartible and that his brother, Maharaj Singh, was only entitled to an allowance for maintenance and that it was in that assumed position as the absolute owner of an impartible estate that Sheoraj Singh had purported to execute the mortgage deed. There is therefore a similarity between that case and the action of Janki Prasad in the present case by which Janki Prasad and his brothers claim to be the sole owners of this property and claim that Sri Behariji had no rights in the property whatever. Following the principles of their Lordships, we consider therefore that the mortgage deed would be invalid. Their Lordships did not in that ruling apply any principle of equity to enable the mortgagee to enforce his mortgage against the property in question and we do not see why any principle of equity or subrogation should be applied in the present case. In another ruling of their Lordships *Har Prasad v. Fazal Ahmad* A.I.R (1933) P.C. 88, there was a case where there was a transfer by a person not authorized to transfer in one capacity entered in the deed, although that person was authorized to transfer in another capacity. It was held that she had no intention to transfer in the other capacity and although she had that right, it was held by their Lordships that even to the extent to which she could have transferred in the other capacity, her deed of transfer would not be valid.

31. In *Nandan Prasad and Another Vs. Hafiz Abdul Aziz and Another*, there was a case before this Court where a Hindu died leaving three sons, and also left a will by which he purported to bequeath certain property, which was joint ancestral property, to his widow. The widow executed a mortgage deed in the capacity of full owner under the will and not as guardian of her minor sons, although the money which she received on the mortgage deed was employed for the benefit of the sons. The mortgagees brought a suit to enforce their mortgage and the two surviving sons were made parties. It was held that the sons and their property could not be in any way affected by the mortgage executed by their mother. This again was a case in which the mother could have made a valid mortgage deed if she had purported to execute it as the guardian of her sons. Furthermore, in this case the money was used for the benefit of the sons and still the Court did not allow any relief in equity. The Court followed the ruling of their

Lordships in *Balwant Singh v. R. Slancy* (1912) 34 All. 296. We consider that this case is very similar to the present case. Reference for similar cases may also be made to *Pateshri Partab Narain Singh v. Nageshar Pershad Pande* (1911) 8 A.L.J. 358, *Mohammad Khan Vs. Mt. Nasiban and Others*, and *Alkhu Ram Vs. Raman Lal*.

31. On a consideration of these rulings, we find that the authority of their Lordships is in favour of the defendant-appellant. The defendant-appellant is a deity and therefore a person under a disability and it is incumbent on persons like the plaintiff who deal with property of a person under a disability to take certain precautions. The evidence shows that the plaintiff and his legal adviser and general attorney were well aware of the circumstances of the present case. With that knowledge of these circumstances the plaintiff chose to take a mortgage from defendants 1 to 3 in their personal capacity as owners of this property. We do not consider that any rule of law or equity has been shown to us by reason of which we should allow the property of the appellant deity to be sold in a transaction of the nature of the mortgage deed in suit. It is necessary for the Courts to protect the interest of persons under a disability and in our view an idol, a juristic person, is just as much entitled to that protection from the Court as a minor. For these reasons, we consider that the appellant has established his case and we allow this appeal with costs throughout and we dismiss the suit of the plaintiff with costs throughout.