

(1944) 08 CAL CK 0012
In the Calcutta High Court

Sri Sri Iswar Sridhar Jieu Thakur represented by his shebait
Jyoti Prosad Bandopadhyaya

APPELLANT

Vs

Jahor Lal Mukhopadhyaya and Others

RESPONDENT

Date of Decision : 17-08-1944

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Contract Act, 1872 — Section 62
Evidence Act, 1872 — Section 91

Citation : AIR 1945 Cal 268

Hon'ble Judges : Biswas, J; Ali, J

Bench : Full Bench

Judgement

Biswas, J.—The first two appeals, F. A. 82 of 1939 and F. A. 40 of 1939, arise out of one and the same judgment which was pronounced by the Subordinate Judge, Second Court, Hooghly, on 9th November 1938, in a suit by a Hindu deity Sri Sri Iswar Sridhar Jiu Thakur for the recovery of money lent, while the third F. A. 4 of 1942, is from a judgment of the same Court, but passed by a different Judge, dated 17th November 1941, in another suit in which one Kumar Krishna Banerjee claimed a declaration of his right to act as a shebait of the said deity in succession to his father who had admittedly been one of its shebait. The appeals have been heard together, as many common questions of fact and law are involved, but the deity is not a party to the third appeal. Both the suits were decreed by the Court below.

2. In F.A. 40 of 1939, which is the main appeal in the money suit, the appellants are defendants 1 and 2. sons and heirs of the original borrower, Suresh Chandra Mookerjee, whose estate they now represent, and it is directed against the decree made against them by the trial Court. The other appeal, P. A. 32 of 1989, is by the plaintiff deity, and merely challenges the decision of the Court refusing to allow interest pendente lite on the sum decreed.

3. F. A. 82 of 1939. -- As regards the last mentioned appeal, we may state at

once that in view of the provisions of the Bengal Money. Lenders Act, 1940, which came into force since it was filed, Mr. Gupta on behalf of the appellants has not thought it fit to press the appeal, and the appeal is accordingly dismissed with costs to the principal defendants. No order is necessary on the application u/s 151, Civil P. C. Of the remaining two appeals, we propose to take up p. A. 40 of 1989 first, which will doubtless be subject to the result of the other appeal, P. A. 4 of 1942, so far as the question of representation of the plaintiff deity is concerned.

4. F. A. 40 of 1939.--The suit out of which this appeal arises has had a long and chequered history. At several stages it came up before this Court previously: see the judgment reported *Jaharlal Mukherjee Vs. Jyoti Prosad Banerjee and Others*, (S. K. Ghose and Edgley JJ.), *Nirmal Chandra Banerjee Vs. Jyoti Prosad Bannerjee and Others*, (S. K. Ghose and Patterson JJ.) and *Nirmal Chandra Banerjee and Another Vs. Jyoti Prosad Bandopadhyaya and Others*, (Mukherjea and Biswas JJ.). Another judgment (Guha and Bartley JJ.) will be found printed at p. 29 of the paper-book in F. A. 32 of 1939. It will be seen that the suit was contested at every step by the principal defendants, but the litigation was complicated to no small extent by the question of the proper person or persons entitled to represent the deity in these proceedings.

5. The facts of the case have been set out more or less fully in the previous judgments, but it would be just as well to recapitulate them and complete the story for the purposes of this appeal. The plaintiff deity Sri Sri Iswar Sridhar Jiu Thakur was the family idol of one Harish Chandra Banerjee of Bhadra-kali, who died leaving three sons Bidhu Bhusan, Priyanath and Karunamoy, and a grandson, Kumud, by predeceased son, as his heirs, and they became the shebaites of the idol on his death. By a registered deed dated 21st February 1890, these heirs of Harish dedicated certain properties to the idol and also divided the turn of worship in equal shares among the four branches of the family which they represented. Of the shebaites, Bidhu Bhusan was comparatively better placed in life, and he erected a pucca ghat and a pucca thakhurbari at his own expense for the location of the deity. He was childless, and died on 13th February 1909, leaving a registered will dated 1st January 1908, by which he endowed these and other properties to the idol, including Government promissory notes of the value of Rs. 10,000 which he set apart for its worship and the performance of connected charities and religious functions.

6. By his will Bidhu Bhusan also appointed three shebaites, one from each branch of the family other than his own, with power to each shebait to appoint his successor, expressed in terms which, as will appear later, were and still are the subject of contention among the parties. The three shebaites so appointed were Harimohan (son of Priyanath), Nirmal (son of Karunamoy) and Nihar Banjan (son of Kumud). The parties are agreed, and it was so held by this Court in *Nirmal Chandra Banerjee Vs. Jyoti Prosad Bannerjee and Others*, following the principle laid down in *Gosaami Sri Giridhariji v. Bamanlalji Gossami* ('90) 17 Cal. 3 and

Ashutosh Seal Vs. Benode Behary Seal and Others, that the terms of Bidhu Bhusan's will must be taken to govern the endowment, particularly as regards the devolution of shebaitship. Bidhu Bhusan left the bulk of his properties to Harimohan whom he appointed his residuary legatee, and Harimohan duly obtained letters of administration to the estate with a copy of the will annexed. It appears that Harimohan thereafter converted the Government promissory notes for Rs. 10,000 which the testator had left for the deity, and with the proceeds thereof, granted a loan of Rs. 10,000 to Suresh Chandra Mukherjee of Uttarpara, father of the present appellants, defendants 1 and 2, by means of a cheque drawn on his personal account, and, on taking from Suresh a promissory note in his own name. The loan was given on 6th May 1910, and purported to carry interest at the rate of 7 per cent, per annum. It is this loan which forms the subject matter of the present suit. At the instance of the other two shebait, Nirmal and Nihar Banjan, who claimed that the money advanced was the property of the deity, Harimohan afterwards endorsed the promissory note in favour of the three shebait as such, including himself. Suresh went on paying the interest regularly, but paid nothing towards principal, and so he renewed the promissory note from time to time. There were in fact four such renewals in his life-time, namely, on 28th February 1913, 14th March 1916, 14th March 1919 and 11th April 1922. The original promissory note is Ex. 3, and the renewed notes are Exs. 4, 5, 6 and 7 respectively in order of date.

7. Suresh died on 3rd April 1924, leaving defendants 1 and 2, Jaharlal and Pannalal, and another son, Manilal as his heirs, and they in their turn are said to have executed a fresh promissory note in favour of the three shebait on 5th April 1925, by way of renewal, but carrying interest at a higher rate, namely, at 8 per cent, per annum. This renewed note is not forthcoming, though the suit as originally framed was based upon it. Manilal died some time in 1926, leaving a childless widow Abhamoyi Debi as his sole heir. It is said that the heirs of Suresh thereafter made several payments of interest on different dates in 1927 and 1928, aggregating to a sum of Rs. 1200, the last of such payments being made on 8th January 1928. Then, on 2nd April 1928, the present suit was instituted against Jaharlal, Pannalal and the said widow of Manilal, as defendants 1, 2 and 3 respectively, claiming to recover from them, as representing the estate of Suresh, a sum of Rs. 11,193-5-7 gds. with costs, of which Rupees 10,000 was alleged to be due on account of principal and the balance on account of interest. Pending the suit, Manilal's widow died, leaving defendants 1 and 2 to represent the entire estate of Suresh. It appears that of the three shebait of the plaintiff deity, Nihar Ranjan had died on 2nd October 1926, and his son Tushar Ranjan thereupon succeeded as shebait in his place under the terms of Bidhu Bhusan's will. Tushar Ranjan accordingly claimed to represent the deity in the suit as one of the plaintiffs (plaintiff 2), the suit being constituted as one by the deity represented by its shebait. Nirmal joined as the only other plaintiff (plaintiff 1), the other surviving shebait Harimohan being impleaded as pro forma defendant 4. Harimohan afterwards got himself transposed to the category of plaintiff, but

later, again on his own application, he was relegated to his former position as pro forma defendant.

8. It was alleged that Harimohan, who had, at one stage after Bidhu Bhusan's death, been the de facto managing shebait of the idol, subsequently became a waster and debauchee, and thus disqualified himself for the office of shebait. At any rate, there can be little doubt that for many years the worship and sheba of the deity as well as the management of the debutter properties suffered greatly due to his continued negligence and incompetence. Harimohan seems to have realised this himself, and, on 8th August 1925, he of his own accord executed a deed of appointment or *niyoga-patra*, by which, purporting to act under the power of nomination given by the terms of Bidhu Bhusan's will, he divested himself completely of his office as shebait and appointed one Jyoti Prosad Banerjee of Bhadrakali as shebait in his place, Jyoti Prosad being a mere relation, a maternal cousin of Nihar, but not a member of the family of Harish. By this deed Jyoti Prosad was expressly vested with authority to realise the loan due from the heirs of Suresh on behalf of the deity. Jyoti Prosad appears thereafter to have duly carried on the sheba to the knowledge of the other shebait, but he was nevertheless not made a party to the present suit. Defendants 1 to 3 actually took an objection on this ground in their written statement, giving rise to issue 3 in the case. Jyoti Prosad, as will be seen, did, however, come into the suit later on his own application, and has in fact been since prosecuting the litigation on behalf of the deity.

9. As already stated, the suit as originally framed was based on the renewed promissory note of 5th April 1925, which had been executed by the heirs of Suresh after his death. It was, however, stated on behalf of the plaintiff that the original had been mislaid shortly before the institution of the suit, and the plaint was accordingly filed with what was claimed to be a true copy, Ex. 2. The defendants maintained that the promissory note was insufficiently stamped, and had therefore been purposely withheld by the plaintiff. Apparently in view of this objection, the plaintiff afterwards applied for amendment of the plaint so as to convert the suit into one on the original consideration, and by an order of the learned Subordinate Judge dated 12th November 1929, the amendment was allowed and the plaint was duly amended accordingly. It is this amendment which has given rise to the two main contentions in the present appeal: first, that the suit is not maintainable, and secondly, that it is barred by limitation.

10. Before dealing with these points, it is necessary to state a few other facts. Among the various objections raised by the defendants, there was one which struck at the root of the deity's claim. This was to the effect that the money which Harimohan had advanced to Suresh was not the deity's property, inasmuch as it was said that under the terms of Bidhu Bhusan's will there had been no absolute dedication of the Government promissory notes for Rs. 10,000, out of which the advance was made. The learned Subordinate Judge gave effect to this contention, and, in the result, dismissed the suit by his judgment dated

2nd July 1930. Against this Nihar took an appeal to the High Court, and on 1st March 1935, the High Court (Guha and Bartley JJ.) set aside the decision and remanded the suit for determination of the other questions which, in the view the Court below had taken, it had left undecided. On a construction of Bidhu Bhusan's will, the High Court held that the money lent to Suresh was the property of the deity. (See the judgment at p. 29 of the paper-book in F. A. NO. 32 of 1939.) The remand had an unexpected sequel. The trial Court fixed 12th August 1935, for further hearing, but on this date none of the plaintiff shebait appeared, and their pleader informed the Court that he had no instructions to proceed with the case. The defendants were also absent. The result was that the suit was dismissed for default.

11. It was at this stage that Jyoti Prosad appeared on the scene. Relying on his appointment as shebait under the *niyogapatra* of Harimohan and claiming as such to represent the deity, he actually presented an application to the Court on 10th September 1935, under Order 9, Rule 4, Civil P. C., asking for restoration of the suit on the allegation that the shebait on record had wilfully caused the suit to be dismissed for default by entering into a collusive arrangement with the debtors at the expense of the deity. On the day following, Jyoti Prosad also filed a suit (T. S. 3 of 1935) in the Court of the Subordinate Judge at Hooghly for removal of Nirmal and Tushar Ranjan from their office as shebait on various charges of malfeasance, misfeasance and breach of trust, and for declaration of his own right to act as the sole shebait. On 21st December 1935, Nirmal in his turn instituted a suit (T. S. 4 of 1935) in the same Court against Jyoti Prosad, in which he impugned the validity of the *niyogapatra* and asked for a declaration that Jyoti Prosad had not been legally "appointed a shebait thereunder. Nirmal also made Harimohan a party defendant to the suit, and asked for his removal on the ground that by executing the *niyogapatra* he had forfeited his right as a shebait. Pending decision of these suits, the Court below stayed the hearing of the application for restoration. On 5th June 1937, the learned Subordinate Judge gave his decision in the two suits, which was in favour of Nirmal and against Jyoti Prosad: the suit by the former was decreed, and that by the latter dismissed. Jyoti Prosad preferred two appeals to the District Judge, and pending the disposal of the appeals, the hearing of the application for restoration was further stayed. On 7th January 1938, both the appeals were allowed. Reversing the decision of the trial Court, the District Judge held that the *niyogapatra* was a valid document, and that Harimohan was quite competent to appoint Jyoti Prosad as a shebait in his place. In that view, Nirmal's suit (T. S. 4 of 1935) was dismissed outright, while as regards the other suit (T. S. 3 of 1935), the learned Judge gave Jyoti Prosad the declaration he had asked for, and directed a remand for a finding as to whether there were Sufficient grounds for the removal of Nirmal and Tushar Ranjan.

12. On 25th January 1938, Nirmal preferred a second" appeal to the High Court in his own suit (S. A. No. 231 of 1938). Defendant 1 in the present suit, Jaharlal, thereupon moved the learned Subordinate Judge for a further stay of the

restoration case, but this was refused, and on 3rd February 1938, the Court, after hearing the parties, made an order setting aside the dismissal for default and restoring the suit, and at the same time directed that Jyoti Prosad as de facto shebait should be added as plaintiff 8, but subject to objection at the time of hearing. Jaharlal moved the High Court against this order and obtained a Rule (Civil Revision No. 259 of 1938), and it is the judgment in this rule (by S. K. Ghose and Edgley JJ.) which is reported in Jaharlal Mukherjee Vs. Jyoti Prosad Banerjee and Others, The further progress of the suit was ordered to be stayed till the disposal of the second appeal, and it was further directed inter alia that if in the second appeal it was decided that Jyoti Prosad had title to the shebaitship, the order of the Subordinate Judge would stand. The second appeal was dismissed by S. K. Ghose and Patterson JJ. on 14th June 1938. By their judgment, which is reported in Nirmal Chandra Banerjee Vs. Jyoti Prosad Bannerjee and Others, their Lordships upheld the validity of Jyoti Prosad's appointment as shebait under the *niyogapatra*, rejecting the contention that under the terms of Bidhu Bhusan's will the shebaitship had been made hereditary. The material provision in the will was as follows:

Each of the shebaits is empowered to appoint a future shebait in his own place (to act) after his death (*abartamane*). If any shebait dies without appointing a future shebait in his own place, then his eldest heir will be the shebait in his place.

[After quoting the original Bengali provision, his Lordship proceeded.] The word "*abartamane*", meaning "after death", was regarded as of no significance, and relying on the decision in *Giris Chandra Saw and Another Vs. Upendra Nath Giridas and Others*, it was held that as the will gave each shebait the right to nominate his successor, this carried with it the power to make a nomination and then relinquish the office in favour of the nominee even during his lifetime. The second appeal being thus disposed of, the learned Subordinate Judge then set down the present suit for peremptory hearing, and three applications were presented to him. One was on behalf of plaintiff 2, Tushar Ranjan, by his mother, alleging that her son had been adjudged a lunatic, and asking that as guardian of the lunatic she should be appointed as *Ms* next friend in the suit. The application was not opposed, and was allowed. The second application was that of Jyoti Prosad, who asked that in view of the High Court decision he should now be recognised as shebait *de jure*, and no further question raised as to the validity of his appointment. This was also granted, and an order made accordingly. The third application was by Kumar Krishna Banerjee, son of plaintiff 1 Nirmal,, claiming to be substituted as plaintiff shebait in his father's place on the allegation that by a deed of appointment or *niyogapatra* dated 30th August 1938, his father had retired from the shebaitahip and appointed him as his successor in office. The factum of the deed was not disputed, but Nirmal's right to make the appointment was strenuously challenged by Jyoti Prosad on the ground that Nirmal by his conduct had forfeited his right as-shebait. The learned Subordinate Judge held that as this matter was still pending decision in Jyoti Prosad's suit, T.

S. 3 of 1935, the proper course would be to add Kumar Krishna as plaintiff jointly with Nirmal, instead of substituting him in his father's place. Kumar Krishna, it may be stated, afterwards instituted a suit, T. S. 26 of 1940, on 3rd July 1940, for a declaration of his right as a shebait under the said deed of appointment. It is this suit which has given rise to the other appeal before us.

13. F. A. 4 of 1942 -- The present suit as so constituted was then taken up for final hearing, and neither party adducing any further evidence, the learned Subordinate Judge gave his judgment on 9th November 1938, decreeing, the suit for a sum of Es. 10,990 inclusive of principal and interest, but disallowing interest pendente lite. On 18 January 1939, Jyoti Prosad filed an appeal to this Court, objecting to this refusal of interest pendente lite No. F.A. 82 of 1939. This appeal was not pressed at the hearing, and we have already dismissed it with costs. Another appeal was preferred on 9th February 1939, by the principal defendants, Jaharlal and Pannalal, directed against the decree as passed, and this is P. A. 40 of 1939 with which we are now concerned. All the persons claiming to be shebaites were made parties respondents as representing the plaintiff deity. Meanwhile, the trial Court having returned its findings in Jyoti Prosad's suit, T. S. No. 8 of 1940, regarding the conduct of Nirmal and Tushar Banjan, the learned District Judge disposed of the appeal before him in that suit by his judgment dated 23rd December 1938. Jyoti Prosad had already been declared a duly appointed shebait, and the District Judge now made an order for removal of both these shebaites. Nirmal was absolved from the charge of actual misappropriation and of neglect of duty in the performance of the deity's sheba, but was removed on the ground that in the circumstances he had allowed the present suit to be dismissed for default, he had acted with gross impropriety and in violation of his trust. The charges of maladministration were also found not established against Tushar Ranjan, and he was removed solely on the ground of his lunacy. The learned Judge further made an order for accounts against Nirmal, and remanded the case to the lower Court for the purpose.

14. After the remand the matter came back to the District Judge by way of appeal against the decision of the Subordinate Judge on the question as to the basis of accounting as well as the period for which accounts were to be taken. The appeal was allowed, and by his judgment dated 4th April 1940, the District Judge sent the case back again to the Court below for the taking of accounts in accordance with the directions he gave. Both the judgments of District Judge were carried to the High Court in second appeal. Second Appeal NO. 481 of 1939 was preferred on 8th March 1939, against the judgment of 23rd December 1938 while S. A. No. 830 of 1940 was from the judgment of 4th April 1940, and filed on 24th May 1940. The two appeals were heard together and disposed of by Mukherjea and Biswas JJ., by the same judgment dated 12th March 1941 and that is the judgment reported in Nirmal Chandra Banerjee and Another Vs. Jyoti Prosad Bandopadhyaya and Others, The appeals were allowed in part. The declaration that Jyoti Prosad was a validly appointed shebait was confirmed. So also was the order for removal of Nirmal, but the order for removal of Tushar

Banjan on the ground of his lunacy was set aside. Jyoti Prosad's claim to act as sole shebait was thus negated. A decree for accounts was made against Nirmal, directing him to render accounts to both Tushar Banjan and Jyoti Prosad, and the suit was sent back to the trial Court for the purpose. It was held that the subsequent resignation by Nirmal of his shebaitship during the pendency of the suit in favour of his son Kumar Krishna could not affect his liability to removal, but the Court refrained from expressing any opinion on the question as to the validity of Kumar Krishna's appointment, which was then pending decision in Kumar Krishna's own suit, T. S. No. 26 of 1940, referred to above.

15. This last mentioned suit came to be disposed of later on 17th November 1941, the Court below granting Kumar Krishna the declaration he had asked for. Against this decision Jyoti Prosad, who was the main contesting defendant in the suit, brought an appeal to this Court on 16th December 1941, and this is the other appeal before us, P. A. No. 4 of 1942, which we propose to consider separately. The appellants in P. A. No. 40 of 1939, Jaharlal and Pannalal, are not interested in it, and were not in fact parties to the suit, just as they were not parties to Jyoti Prosad's suit, T. S. No. 8 of 1935, or to Nirmal's suit, T. S. No. 4 of 1935. In their own appeal, following the decree of the trial Court, they made the deity party respondent, as represented not only by Nirmal and Tushar Banjan, but also by Jyoti Prosad and Kumar Krishna, Tushar Banjan himself being represented by his mother as guardian on account of his lunacy. But it is not disputed that the deity's representation in these proceedings must ultimately depend upon the final decision in the aforesaid suits. As a result of the decision of this Court in T. S. No. 3 of 1935 and T.S. No. 4 of 1935, Nirmal's name must now, therefore, be removed from the category of plaintiff-respondents, and that of Jyoti Prosad retained, while on our decision in P. A. No. 4 of 1942 will depend the question as regards Kumar Krishna. Turning now to the appeal before us in the money suit, P. A. No. 40 of 1939, it may be stated that a great many of the issues which were raised in the suit have been already disposed of by the previous proceedings which have been detailed above, and only two questions have been left outstanding which have been argued in this appeal, one as to the maintainability of the suit, and the other as to limitation. On each of these questions the appellants have sought to support their contentions on a variety of grounds which have been fully elaborated by them in their memorandum of appeal.

16. As we have seen, the appellants' principal defence that the money advanced to Suresh Chandra Mookerjee on 6th May 1910, which is the subject-matter of the suit, was not the deity's property, but belonged to Harimohan personally, and that the deity was consequently not competent to sue for it, had been first given effect to by the learned Subordinate Judge by his judgment dated 2nd July 1930, but was finally negated on appeal by Guha and Bartley JJ. on 1st March 1935. (See page 29 of the paper-book in F. A. 32 of 1939.)

17. In the present appeal, therefore, it is not open to the appellants to attack the

maintainability of the suit on this particular ground. " The main ground they now raise is founded on the amendment of the plaint which was allowed on 12th November 1929, altering the cause of action from one based on the last of the renewed promissory notes to one on the original consideration. It is said that as contemporaneously with the alleged loan of 6th May 1910, there was a promissory note, Ex. 3, executed by the borrower on the same date, no cause of action was available to the plaintiff deity independent of the promissory note, and, in support of the argument, strong reliance is placed on the decision of E. O. Mitter J. in (Firm) Tarachand-Protapmal Vs. Tamijuddin Sheikh, In that case there was a finding of fact by the lower appellate Court that there was no completed transaction prior to and independently of the promissory note, and upon that it was held that the plaintiff was not entitled to recover on the original consideration. The learned Judge purported to follow the earlier decision of Garth C.J., in the much discussed case in Sheikh Akbar v. Sheikh Khan 7 Cal. 256 and quoted with approval the following passage from the Full Bench decision of the Allahabad High Court in Nazir Khan and Another Vs. Ram Mohan Lal and Another which was said to be in consonance with the Calcutta decisions:

It is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provisions of Section 91, Evidence Act. In cases in which there is already a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is afterwards given as a collateral security, the creditor may, if the promissory note be inadmissible in evidence, recover on the original consideration, and evidence aliunde can be given to prove the same. But where a promissory note and the lending of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note the contract of loan cannot be proved apart from the document itself, and the plaintiff's suit must fail if the document itself be inadmissible in evidence.

18. None of these cases, in our opinion, is an authority for the proposition that wherever there is a promissory note executed at the time of the loan, an independent cause of action on the original consideration is necessarily excluded, and yet this is what the appellants must establish in order to succeed on their present contention.

19. In Sheikh Akbar v. Sheikh Khan 7 Cal. 256 Garth C. J., expressly drew a distinction between two classes of cases, one in which the cause of action for money is complete in itself, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, and the other where the original cause of action is the bill or note itself, and does not exist independently of it. It is only in the latter class of cases that the bill or note is held to be the only contract between the parties, and if for want of a proper stamp or some other reason the document is not admissible in evidence, the creditor is without

a remedy. But in cases coming under the former class, the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration. The difficulty often is, as the learned Chief Justice points out, to ascertain as a matter of fact to which class a particular case belongs. The true effect of this decision was later explained by Petheram C. J. in *Pramatha Nath v. Dwarka Nath* 23 Cal. 851 where, if we say so, a clearer and perhaps a more correct exposition of the law was given. In that case a suit was brought on a hatchitta which was found to be insufficiently stamped and hence inadmissible in evidence, but the defendant admitted the loan, merely pleading payment in answer. The learned Chief Justice observed:

There can be no doubt that an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it

and he might have added, "even though an express promise is made in writing to repay." Referring to the facts of the case, the learned Chief Justice went on to say:

It must follow that, when the defendant admits that he borrowed the Rs. 200, he also admits that he promised to repay it; and if he has not done so, the plaintiff may maintain an action against him for breach of his implied promise or contract, entirely independently of any security which may have been given for the advance.

20. It is worthy of note that Mitter J. himself adopted this view of the law in two later decisions of his *Mahatabuddin Mia Vs. Mahammad Nazir Joddar*, and *Indra Chandra Bag and Others Vs. Hiralal Bong and Others*, where he also referred to other cases in which the same view had been taken, such as *Abdul Rabbani v. Shyam Lal* 128 I. C. 194 a decision of Mukerji J. and *East Bengal Commercial Bank Limited v. Surendra Narayan Saha* 39 G.W.N. 1235 a decision of Derbyshire C. J., and Mukerji J. In *Mahatabuddin Mia Vs. Mahammad Nazir Joddar*, Mitter J. in fact observed as follows:

The fact that money has been lent, therefore, gives a cause of action to the plaintiff which is independent of the promissory note. In my judgment, as soon as the plaintiff in such a case proves that he paid to the defendant a sum of money by way of loan, he is entitled to get back the money lent with interest, though the promissory note cannot be introduced in evidence on the ground of insufficiency of the stamp.

21. And in the other case, *Indra Chandra Bag and Others Vs. Hiralal Bong and Others*, he said:

It has been laid down in this Court that if a promissory note is inadmissible in evidence on account of it being insufficiently stamped, the plaintiff is entitled to sue on a cause of action which is independent of the promissory note. It is not

necessary that there should be an independent express contract prior to the execution of such a promissory note. The fact that the money has been lent implies a promise to repay it, and the plaintiff in such a case has a cause of action on the implied promise which is independent of the promissory note.

22. These observations, in our judgment are clear refutation of the appellants' contention that merely because there was a promissory note executed in this case at the time of the loan, the plaintiff deity was precluded from suing on the loan without relying on the promissory note as cause of action. In our opinion, the true position is that where A lends money to B, A can always sue B for the money as for money lent, whether there is a promissory note executed contemporaneously with the loan or at any time thereafter on account of it. As between an actual lender and an actual borrower, a promissory note can never be anything but collateral security, and the lender can, therefore, always sue on the original consideration, disregarding the security. The promissory note in such a case, containing as it does an express promise to repay, cannot wipe out the promise to repay which is implied in the loan itself. There can be no question of any merger of the original consideration in the promissory note so as to make the promissory note the only available cause of action. It so happens that in the present case the original promissory note, Ex. 3, does not suffer from any infirmity on the ground of insufficiency of stamp, and no question can, therefore, arise as to its being inadmissible in evidence in proof of the loan u/s 91, Evidence Act, which seems to have been the basis of the Allahabad Pull Bench decision in Nazir Khan and Another Vs. Ram Mohan Lal and Another. The first objection which the appellants raise to the maintainability of the suit must consequently fail. Their next ground of objection is that the cause of action on the original loan is no longer subsisting, and cannot, therefore, support the suit. The argument is that the loan must be taken to have been satisfied by the execution of the second promissory note of 28th February 1918, Ex. 4, which, it is pointed out, was taken not in renewal of, but in substitution for, the original note of 6th May 1910, Ex. 8, and stress is laid in this connection on the endorsement "Cancelled" appearing on the latter. The attempt is to bring the case within the terms of Section 62, Contract Act, which provides that

if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

23. The argument is wholly misconceived. In the first place, the second note, Ex. 4, is on the face of it expressed to be in renewal of the earlier one, Ex. 3; and secondly, if there was a novation, it was a novation of the promissory note, and not of the loan. The liability under the original loan was quite independent of the promissory note, and could no more be extinguished by execution of a fresh promissory note than an original debt could be by substitution of a new security. The argument can derive no additional support from the consideration that in point of fact the parties had all along proceeded on the footing of promissory notes, and not of a loan independent of the same. The second objection of the

appellants must, therefore, be also overruled. A third point which they raise is that if the suit be treated as one based on the original loan, the loan being an actionable claim within the meaning of the Transfer of Property Act, it is only the person making the advance who could recover, namely, Hari-mohan and not the deity, as there was no transfer to the latter by an instrument in writing, as required by Section 180 of the Act. In answer, it is sufficient to refer to the decision of Guha and Bartley JJ. (at p. 29 of the paper-book in P. A. No. 32 of 1939) that the money advanced by Harimohan was the property of the idol, so that the advance was really an advance by the idol, and not by Harimohan. There could be no question of any transfer of the claim to the deity by a registered instrument or otherwise, and there is no reason, therefore, why the deity should not be held competent to sue. The third objection must accordingly also fail, and we must hold that the suit is maintainable. The next question is that of limitation, and it will have to be decided on the plaint as amended, and not as it originally stood. The relevant dates to be considered in this connexion may be stated in one place:

6-5-1910

-- Loan, and promissory note Ex. 3

28-2-1913

-- Second pronote (in renewal), Ex. 4

14-3-1916

-- Third pronote (in renewal), Ex. 5

14-3-1919

-- Fourth pronote (in renewal), Ex. 6

11.4-1922

-- Fifth pronote (in renewal), Ex. 7 (These notes were all properly stamped, and duly admitted in evidence).

5-4-1925

-- Fresh note executed by the heirs of Suresh in renewal. Original not forthcoming, but copy produced, Ex. 2 (subject to proof of loss of original and of adequacy of stamp on original).

2-4-1928

-- Suit instituted.

12-11-1929

-- Haint amended."

3-2-1938

-- Jyoti Prosad added as party.

24. The first point taken is that the claim is not shown to have been saved from the bar of limitation by payments of interest or by acknowledgments. This, however, need not detain us long. In para 4 of the plaint it was definitely alleged that after the execution of the second promissory note of 28th February 1913, which was within three years of the loan, Suresh paid the interest regularly every year in four quarters, and each renewed note was executed only for the principal sum after all interest due had been paid off. Paragraph 7 then specifically mentioned the dates and amounts of the payments made by the heirs of Suresh subsequent to the last renewal by the latter on 11th April 1922: these were 30th January 1927--Rs. 200, 18th July 1927--Rs. 600, and 21st November 1927--Rs. 200. These last three payments were said to have been endorsed on the back of the last note which was not forthcoming. There was no denial of any of these averments in any of the written statements, and as the learned Subordinate Judge points out, there was no denial either by defendant 1 Jaharlal in his evidence. There can be no doubt that these payments of interest are sufficient to save limitation u/s 20(1), Limitation Act. It is said that the payments were made on the promissory notes and not on the original loan, and could not, therefore, keep the loan alive. The objection has only to be stated to be rejected. Admittedly there was no other loan except that evidenced by the promissory notes to which the payments could possibly be referred.

25. It is not necessary to rely on the evidence of Nirmal reciting the payments of interest with dates, which he gave on reference to the entries in his note-book, inasmuch as the notebook was rejected in evidence on the ground that it had not been filed in time, and Nirmal did not claim to have any independent recollection. Apart from the payments of interest, there is evidence of acknowledgments of liability in respect of the loan which would save limitation u/s 19(1), Limitation Act. The renewed promissory notes themselves, except the last of which the original was not produced, will operate as such acknowledgments. It is futile to say that they are mere acknowledgments of liability under the promissory notes, and not in respect of the loan, for, after all, the promissory notes are the best evidence of the loan, and there is no suggestion that there was any other transaction between the parties. It is, again, immaterial that there is an interval of more than three years between the first of such notes (Ex. 4) and the second (EX. 5), and between the third (Ex. 6) and the fourth (Ex. 7): as already explained, the second and the fourth were both kept alive by payments of interest. Secondly, as the learned Subordinate Judge has shown, there are a number of letters in Ex. 12 series written by Jaharlal himself on various dates between 28th January 1924 and 20th February 1928, which also amount to valid acknowledgments u/s 19(1).

26. For the reasons aforesaid, we must accordingly reject the first branch of the appellants' contention on the plea of limitation. It remains now to consider the second ground on which the appellants seek to rest this plea. The contention is

that as Jyoti Prosad was found to have been a duly appointed shebait, the suit must be deemed to have been instituted, not on 2nd April 1928, when the plaint was filed, but on 3rd February 1938, when Jyoti Prosad was brought on the record, and it is not disputed that if this be taken as the material date, the claim is hopelessly barred. Reliance is placed in this connection on Section 22 (1), Limitation Act, which provides as follows;

Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

27. Section 22 (1), it may be pointed out, will apply only if Jyoti Prosad can be regarded as "a new plaintiff," but that will not be the case, if the suit is really a suit by the deity,, and not by the shebait or shebaits representing the deity. That raises the fundamental question as to who is the real plaintiff in the suit, and on this basis, the argument may be, and is, put before us independently of Section 22 (1). The extreme contention on behalf of the appellants is that the right of suit belongs to the shebait, and not to the deity, and the deity can, therefore, never be the plaintiff in a suit to recover debutter property. Supposing, however, the deity has the right to sue, it must nevertheless be recognised that the right is exercisable only through the shebait who is the accredited representative of the deity. In either view, it is further argued where the deity has more than one shebait, all the shebaits must join in order that the suit may be at all competent. It follows, therefore, in the present case, whether the suit be regarded as one by the deity or as one by the shebaits, it cannot be deemed to have been validly constituted until Jyoti Prosad was added as a party.

28. The suit here, it will be observed, is in form a suit by the deity represented by its shebaits, but it was brought by only two of the shebaits, Nirmal and Tushar Banjan, the third, Hari-mohan being joined as a pro forma defendant on the allegation that by his conduct he had forfeited his shebaitship. In point of fact Hari-mohan had already abdicated his office and appointed Jyoti Prosad in his place by the *niyogapatra* of 11th August 1925, and as Jyoti Prosad's appointment was ultimately upheld as valid by the judgment of this Court in *Nirmal Chandra Banerjee Vs. Jyoti Prosad Bannerjee and Others*, he must be deemed to have been a competent shebait at the date of the suit. He was not, however, as already stated, brought upon the record till 3rd February 1938, which was admittedly long after the claim had become barred by limitation. The two questions, therefore, which arise for consideration are: (1) whether the deity had a right to sue, and (2) whether the suit instituted by two out of the three shebaits as representing the deity failed to be a suit by the deity.

29. On the first point, the appellants' sheet anchor is the dictum of Sir Arthur Wilson in the Privy Council case in *Maharaja Jagadindra Nath v. Rani Hemanta Kumari* ("05) 32 Cal. 129 that the right of suit is vested in the shebait, and not in the idol, but as has been explained in various decisions this does not and cannot mean that a Hindu idol is incapable of suing. The power of suing (as also of being

sued) undoubtedly resides in the idol, though ex necessitate rei the power must be exercised by and through a sentient being representing the idol. As was pointed out by Pal J. in *Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others*, , where this question is discussed, the suit in *Maharaja Jagadindra Nath v. Rani Hemanta Kumari* 32 Cal. 129 was not by the idol represented by its shebait but by the shebait himself as such to enforce the proprietary right of the idol in certain properties. The High Court had dismissed the suit as barred by limitation on the ground that as the interest was admitted to be in the idol, there was nothing to prevent a suit being brought on behalf of the idol by the plaintiff's mother during his minority, but the Judicial Committee reversed the decision, holding that as the possession and management of the dedicated property belonged to the shebait, and this carried with it the right to bring whatever suits were necessary for the protection of the property, the right to sue accrued to the plaintiffs, and as he was a minor at the time, he could bring the suit within three years after he attained majority, u/s 7 of Act 15 of 1877 (corresponding to Section 6 of the present Limitation Act). It is in this connexion that Sir Arthur Wilson made the observation on which the appellants rely.

30. In *Pramatha Nath Mullick v. Pradyumnakumar Mullick* dwelling on the nature of a Hindu idol, Lord Shaw, delivering the judgment of the Judicial Committee, expressly recognised it as a "juristic entity," and observed that "it has a juridical status with the power of suing and being sued." In AIR 1927 128 (Privy Council) again, their Lordships of the Judicial Committee drew a clear distinction between a suit in which the idol itself is the plaintiff and a suit in which the plaintiffs are shebaits of the idol. It is quite true that a Hindu idol is a juridical person capable of holding legal rights only in an ideal sense, and it may also be, as was indicated by Sir George Bankin in the Privy Council decision in AIR 1940 116 (Privy Council) , that the procedure of our Courts only allows for a suit in the name of an idol, but nevertheless the position remains incontestable that a Hindu idol may be a competent plaintiff in a suit in respect of property held or claimed by it, and that this is a right quite distinct from that which belongs to its shebait or shebaits to sue on its behalf. In our opinion, the law was correctly laid down by a Full Bench of the Allahabad High Court in *Jodhi Rai v. Basdeo Prasad* 33 All. 735:

An idol has been held to be a juristic person who can hold property. Therefore where a suit is brought in respect of property held by an idol, it is the idol who is the person bringing the suit or against whom the suit is brought, the idol being the person beneficially interested in the suit. No doubt, in every suit the party bringing it or the party against whom it is brought must, when he is suffering from an incapacity, be represented by some other person, as in the case of an infant or a lunatic. Therefore when a suit is brought on behalf of or against an idol, there must be on the record a person who represents the idol.

31. In this very suit, this Court had to consider the same question at an earlier stage in the proceedings when the present appellants challenged the right of

Jyoti Prosad to make the application for restoration after the suit had been allowed by the two original shebait plaintiffs to be dismissed for default. It was contended on their behalf that it was only the plaintiffs on record and not any other person who could make such an application. That raised the question, who was the real plaintiff in the case, and it was held by S. K. Ghose and Edgley JJ. in *Jaharlal Mukherjee Vs. Jyoti Prosad Banerjee and Others*, that the real plaintiff was the idol, and not the shebait who were suing in its name. The shebait was said to be mere representatives of the idol, just as a guardian is the representative of a minor, though no doubt, it was pointed out, there was a difference between a minor and an idol, a difference which, it may be stated, has since been more elaborately explained by Nasim Ali and Pal JJ. in *Tarit Bhusan Roy's* case referred to above, *Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur* by Krishna Chandra Chandra and Others,

32. In our opinion, therefore, the only reasonable interpretation which can be placed on the statement that the right of suit is vested in the shebait, and not in the idol, is that the idol is incapable of suing except through a person entitled to represent it, and such person is normally the shebait, for, as Rankin C. J. puts it in *Surendrakrishna Roy Vs. Shree Shree Ishwar Bhubaneshwari Thakurani*, , affirmed on appeal by the Judicial Committee in AIR 1937 185 (Privy Council) "until the shebait is removed or controlled by the Court, he alone can act for the idol."

33. We must consequently reject the appellants' extreme contention on this part of the case, and hold that in so far as the suit was one by and in the name of the deity, it was a competent suit, and as such, as already explained, there could be no question of Section 22(1), Limitation Act, applying. That takes us to the second point raised, whether the suit, treated as a suit by the deity, was imperfectly constituted until Jyoti Prosad as a co-shebait was added as a party. It is well settled that where there are more trustees than one, none of them can, save in exceptional cases, act otherwise than jointly with the others, for the authority of trustees is a joint and not a several authority: *Ex parte Griffin* 2 G1 & J. 116 Thus it was held in *Luke v. South Kensington Hotel Co* (1879) 11 Gh. D. 121 that a majority of the trustees cannot bind a minority, nor the trust estate, in anything that may do.

34. Shebait is not trustees in the strict sense of the term as understood in English law, *Vidya Varuthi v. BalusamiAyyar* AIR 1922 P. C. 123 but the same principle of unity among co-trustees has been extended to the case of co-shebait, and it has accordingly been held that where there are several she-bait, they are deemed to constitute one body, as it were, in the eye of law, and none of them can claim to represent the deity in part or to possess any specific share or interest in the deity's property. Ordinarily, therefore, all the shebait should, if possible, join in a suit on behalf of the deity, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs. This is in fact the view which was taken

by this Court (Mukherjea and Biswas JJ.) in this very litigation in connexion with the second appeals arising out of Jyoti Prosad's suit against Nirmal and Tushar Ranjan, I. L. R. (1941) Cal. 128. Nirmal Chandra Banerjee and Another Vs. Jyoti Prosad Bandopadhyaya and Others, . The same view had been taken in several earlier decisions, and has also been taken in several later decisions, on all of which the appellants rely. Among the earlier cases, it is sufficient to refer to Kokilasari Dasi v. Mohunt. Rudranand Goawami 5 C. L. J. 527 and to Narendra Nath v. Atul Chandra A. I. R. 1918 Cal. 810 which was approved by the Privy Council in AIR 1934 58 (Privy Council) and among the later, to Sree Sree Iswat Lakshi Durga Har Tatneswar v. Surendra Nath 45 C. W. N. 665 and Radha Charan Saha Vs. Sree Sree Iswar Joykali Bigrha represented by Shebait Mukunda Kumar Choudhury and Others, See also Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others, .

35. As is, however, recognised in many of these cases, and is in fact implied in the statement of the rule, it cannot be maintained as an absolute rule of law that all the co-shebait must join in representing the deity. The rule is subject to exceptions, and circumstances may exist in which the deity may be validly represented by some only of the shebait, and even by a person who is not a shebait. Where a suit is a suit by the deity represented by some of its shebait, the question whether or not the other shebait should be joined as parties is often, in the last analysis, a mere question of procedure and expediency: the test is whether or not, having regard to all the circumstances of the case, the interest of the deity may be said to be sufficiently represented.

36. Applying this test to the present case, we cannot say that the non-joinder of Jyoti Prosad at the initial stage at all affected the representation of the plaintiff deity. It is doubtless a fact that Jyoti Prosad had already been appointed a shebait in Harimohan's place and it also appears that he had been claiming to act and acting in that capacity ever since his appointment. But as the plaint itself will show, neither Nirmal nor Tushar Banjan admitted his claim, and it was not to be expected that they would join him in the suit even as a pro forma defendant. On the other hand, any attempt on the part of Jyoti Prosad at this stage to assert his right as a co-shebait by claiming to intervene in the suit would only have created unnecessary difficulties in the way, and hampered the prosecution of the claim against the principal defendants, and this would certainly not have been in the best interest of the deity. So long, therefore, as Nirmal and Tushar Banjan did not become incapacitated, or guilty of conduct which disqualified them for their office, we see no reason why they should not be held to have been fully competent to represent the deity in the suit. It is only upon failure of that representation that Jyoti Prosad's intervention became necessary in the further stages of the proceedings.

37. We must accordingly also reject the appellants' second line of argument to show that there was no valid suit by the deity until Jyoti Prosad was added as a co-plaintiff. It is only necessary to add that even if we were to regard the suit as

one by the shebait, and not by the deity, the suit as instituted by Nirmal and Tushar Bajan would, in the circumstances of the case, have been equally competent. In either view, therefore, the date of institution of the suit must be the date on which the original plaint was filed, and as we have seen, the claim was not barred on that date. All the grounds on which plea of limitation is based thus fail. The result is that in our opinion the appeal, P. A. No. 40 of 1939, must, therefore, fail, and it is accordingly dismissed with costs.

38. F. A. No. 4 of 1942 --We may now take up the other appeal, p. A. No. 4 of 1942. This appeal arises out of the suit which Kumar Krishna Banerjee instituted on 3rd July 1940, for a declaration of his right as a shebait in succession to his father, Nirmal. Prior to that, he had, on 31st October 1938, that is just a day after the execution of the *niyogapatra* in his favour, applied for being substituted as a shebait plaintiff in his father's place in the money suit against Jaharlal and Pannalal. The learned Subordinate Judge did not allow substitution, but on 4th November 1938, made an order that "Kumar Krishna Banerjee should be added as a co-plaintiff" he and his father Nirmal Chandra representing together a 1/3rd interest. By the way, this last condition that he and his father would together represent a specific 1/3rd interest was opposed to the Privy Council decision in AIR 1934 58 (Privy Council) Nirmal had not yet been removed from his office as shebait. The order for his removal was finally made by this Court only on 12th March 1941, by the judgment of Mukherjea and Biswas, JJ. in *Nirmal Chandra Banerjee and Another Vs. Jyoti Prosad Bandopadhyaya and Others*, Thereupon, on 23rd June 1941, Kumar Krishna made an application for amendment of his plaint. In the plaint as originally framed he had based his claim solely on the *niyogapatra* Ex. I, which his father had executed in his favour on 80th October 1933, in exercise of the power of appointment conferred by Bidhu Bhusan's will. Upon Nirmal's removal from shebaitship, Kumar Krishna claimed in the alternative that he should be declared to have succeeded to his father in the office as the eldest of his heirs in terms of Bidhu Bhusan's will, presumably on the footing that Nirmal's removal operated, as civil death. The deity was not a party to the suit, but the defendants were Jyoti Prosad, Tushar Banjan and Nirmal. The suit was contested by Jyoti Prosad alone, whose title as shebait had already been declared by the High Court on 14th June 1938, *Nirmal Chandra Banerjee Vs. Jyoti Prosad Banerjee and Others*, The learned Subordinate Judge by his judgment dated 17th November 1941, decreed the suit, giving the plaintiff the declaration he had prayed for, both under the *niyogapatra* and under the terms of Bidhu Bhusan's will. Hence the present appeal by Jyoti Prosad. In supporting the appeal, Mr. Gupta is at the very outset faced with the fact that his own client had derived his title to the shebaitship in much the same way as the plaintiff in the present case. Jyoti Prosad's appointment was also based on a *niyogapatra* executed in practically the same terms and in exercise of the same powers of appointment as the *niyogapatra* under which Kumar Krishna claimed. Either appointment was made by the out-going shebait in his lifetime upon relinquishing the office himself, though on a literal reading of the relevant clause

in Bidhu Bhusan's will, EX. 2, it might be supposed that it gave power to a shebait to make an appointment to take effect only after his death. There is certainly no question of estoppel, nor is it possible to argue that the decision in favour of Jyoti Prosad in his contest with Nirmal would operate as *res judicata* between Jyoti Prosad and Kumar Krishna. But there is no reason why the construction of the identical clause in Bidhu Bhusan's will which was adopted by this Court in the other case should not be accepted as binding authority in the present suit.

39. In *Nirmal Chandra Banerjee Vs. Jyoti Prosad Bannerjee and Others*, their Lordships, S. K. Ghose and Patterson JJ., definitely held that under the will the shebaitship was not hereditary, but that each of the shebait had been given power to nominate his successor, and it was further held that this included the power to relinquish the shebaitship in favour of the nominee during the shebait's life-time. In support of this view, they purported to follow and apply the decision in *Ashutosh Seal Vs. Benode Behary Seal and Others*, in which it was ruled by Suhrawardy and Graham JJ. that a shebait was entitled to relinquish his office in favour of a person who would succeed after his death according to the terms of the grant. That was a case where the relinquishment was in favour of a shebaitship next in the line of succession, but said the learned Judges:

If it is conceded that relinquishment may be made in favour of the rightful successor, it would seem to make no difference whether the successor is there by inheritance or by nomination in accordance with the terms of the grant.

40. In that view, their Lordships upheld the appointment of Jyoti Prosad, and we see no reason why Kumar Krishna's appointment should not likewise be held to be valid on the same construction of the will. Mr. Gupta tries to find a way out of the difficulty by suggesting that that was not the real ground of the decision. The real ground, according to him, was that the relinquishment by Hari-mohan as well as the appointment of Jyoti Prosad was distinctly for the benefit of the idol. We do not think that this was so. Nirmal's objections to Jyoti Prosad's appointment were two-fold: (1) that it was no appointment at all, but a sale of the office, and (2) that if it was an appointment, it was invalid under the terms of the will. These were two independent grounds, and the decision on each was a separate one. Mr. Gupta's first point that Kumar Krishna's appointment was invalid under the terms of Bidhu Bhusan's will must accordingly be rejected. His next ground of attack is that it was not a bona fide appointment made in interest of the deity, but in the private interest of Nirmal himself. In support of his argument Mr. Gupta relies on the decision of the Judicial Committee in *Bamalingam Filial v. Vythilingam Pillai* ('93) 16 Mad. 490 in which the appointment of a dharmakarta of a devasthanam or temple at Bameswaram in Madura was set aside on the ground that it had not been made bona fide in the interest of the institution, but was in furtherance of the personal interests of the previous dharmakarta. This case was followed and applied in a later decision by the Judicial Committee, *Nataraja Thambiran v. Kailasam Pillai* AIR 1921 P. C. 84

We are not at all satisfied that on the facts of the present case there is any room for the application of the above doctrine. Nirmal cannot be accused of having had any ulterior interest of his own to serve at the expense of the idol by appointing his son as a shebait in his place. It cannot be said that in making the appointment he had any secret motive to escape liability for accounting, inasmuch as the order for accounts against him was not made until 23rd December 1938, and the *niyogapatra* had been executed about four months earlier on 30th August 1938. Nor do we think there is any substance in the contention that he had given false reasons in the *niyogapatra* for making the appointment, and that this showed his *mala fides*. The reasons were stated to be that he had become old and was no longer in a position to perform the duties of his office. On the evidence we are not prepared to hold that this was a false statement, and no adverse inference can, therefore, be drawn against him from it. In any case, it hardly lies in the mouth of Jyoti Prasad, who actually brought a suit against Nirmal for his removal on charges of misconduct and mal-administration of the debutter estate, to say that by removing himself Nirmal caused any injury to the interests of the deity.

41. It remains to consider the last point raised by Mr. Gupta on the alternative case made by the plaintiff by his amendment of the plaint. In the first place, it is argued that the incapacity or removal of Nirmal could not operate as death as contemplated in Bidhu Bhusan's will, and secondly, that even if it did, it could not let in the plaintiff to succeed to the shebaitship as Nirmal's eldest heir, inasmuch as the second part of the provision in the will regarding the devolution of the shebaitship was invalid in so far as it purported to lay down a rule of succession unknown to Hindu law. Mr. Gupta relies, in this connexion, on the Privy Council case in AIR 1936 318 (Privy Council). In answer, it is sufficient to state that in the view we have taken regarding the validity of the appointment under the terms of the *niyogapatra*, it is not necessary to express any opinion on this contention. Secondly, it seems to us to be more than doubtful if the will can be said to have made any general provision for the devolution of the shebaitship, so as to attract the operation of the ruling cited. It would be more correct to say that the will contained a provision limited to the three shebaites named and their eldest heirs. We must consequently also reject the appellant's argument on this head. The result is that in our opinion the appeal fails, and is accordingly dismissed with costs". Hearing fee 5 gold mohurs.

Ali, J.

42. I agree.