
(1941) 06 CAL CK 0032
In the Calcutta High Court

Tarit Bhusan Rai and Another

APPELLANT

Vs

Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna
Chandra Chandra and Others

RESPONDENT

Date of Decision : 16-06-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1942 Cal 99

Hon'ble Judges : Pal, J; Nasim Ali, J

Bench : Full Bench

Judgement

Nasim Ali, J.—The material facts which are not in dispute in these two appeals are these : (1) On 21st Aswin, 1287 B.S. = 6th October 1869, one Bhagaban Chandra Basu made a gift of 2 bighas of land (now 5 and 6 Karim Buksh Lane) to his sister, Nilmoni Dassi by a registered deed of gift, (Ex. 7). On the same day he and his cousin, Biswa-nath Basu executed an arpannama potro, (Ex. 5 -- deed of dedication). The material portion of this document is this:

Now in order that the deity Sheba (services) and periodical festivals etc., of the idol Sri Sri Iswar Sridhar Salagram Shila Thakur, established by us which we have been carrying on all along may remain in tact in future, I, Bhagwan Chandra Basu, in view of my (advanced) age and state of health and having no wife and children, and being apprehensive of any hindrance being caused to the said services etc., to the deity (Deb Sheba) in future dedicate my interest in the above property for the services of the idol (Deb Sheba) and appoint Biswanath Basu, the shebait (thereof). All the properties appertaining to the 16 annas comprised of the respective share of both of us, mentioned above (1,2, 9 and 10 Karim Buksh Lane) are dedicated entirely for Deb Sheba (services of the idol). Of us, (illegible), I, Biswanath Basu, having appointed me and being appointed to do services to the idol we both hereby promise as follows : That I, Biswanath Basu shall henceforth reside etc, in the said house and hold possession of the estate etc., and shall collect rent from tenants and make arrangement of

collection and repair houses and do all acts in respect of the aforesaid estate dedicated by us as well as get the same done and appropriate (illegible) the profits etc., and shall devote myself to the services to the deity (Deb Sheba) with the help of those profits and shall perform the prescribed acts (illegible) repairs etc., and (illegible) of the estate. After my death my full-sister Srimatya Nilmany Dasi and my wife Srimaty Thakur Dasi Dasi, if they survive me, shall both like myself jointly do services to the deity as my heirs and representatives and shall perform the puja (worship) and daily and periodical rites etc., of the deity by being appointed to do the work of Sheba and by residing in the said house and by managing the properties dedicated for Deb Sheba. After their death my two daughters, the elder Srimaty Bhuvan Mohini Dasi, the younger Srimaty Purit Pabani Dasi shall both jointly be appointed to do the work of Sheba and being possessed of the properties dedicated for Sheba of the idol, they shall make settlement etc., according to the aforesaid rules and shall perform the Sheba of the idol from the income thereof and after their death their heirs shall be appointed shebaites and be possessed of the properties dedicated for Sheba and shall perform the Sheba etc.--according to all the terms etc, mentioned above. None of them shall ever be competent to transfer the said property and even if done it will not be allowed. And whatever building or appurtenances etc. are made in the said house in future by us our heirs or representatives shall also be dedicated for the Sheba of the idol. None shall be competent to remove (illegible) any newly constructed building or appurtenances (illegible) or transfer the same by any machinations and even if done the same will not be allowed and be invalid. If ever for any government purpose or any unexpected and unavoidable (illegible (cause?)) the aforesaid property is to be sold or transferred, from the consideration money thereof other properties shall be purchased and the same shall be dedicated for the services of the deity on the above terms and the work of sheba, etc., of the deity shall be carried out from the income thereof....To the above effect we, of our respective free will, execute this deed of dedication (arpannamahpatra) by dedicating the aforesaid land and the aforesaid house, etc., for sheba of the idol.

2. Biswanath Basu died in the year 1881. On 29th June 1890 Nilmoni Dasi dedicated the properties which she obtained by gift from Bhagaban to the same deity, viz., Sree Sree Iswar Sridhar Saligram Thakur. She died in 1898. The wife of Biswanath, Thakurani Dasi died in 1902. Bhuvanmohini, the eldest daughter of Biswanath died in 1913 without leaving any issue and Patit Paboni, the next daughter of Biswanath died in 1914 leaving a son Jogesh Chandra Chandra. On 20th August 1925, Jogesh Chandra brought a suit (title Suit No. 172 of 1925) in the Court of the Subordinate Judge at 24-Parganas for a declaration that the properties covered by the arpannama (Ex. 5 and Ex. 7) were secular properties and were his absolute properties (Ex. 13). In this suit his four sons, his wife, the wife of his eldest son and two sons of his eldest son were impleaded as defendants. The idol in whose favour the arpannamas (Ex. 5 and Ex. 7) were executed was not made a party to this suit. On 12th November 1925 the

defendants in that suit filed their written statement (Ex. B). On 14th November 1935 the suit was decreed by consent and the properties were declared to be secular and absolute properties of Jogesh (Ex. 12A).

3. On 9th June 1927, Jogesh mortgaged one of the properties (9 and 10, Karim Buksh Lane) covered by the arpanama (Ex. 5) by a mortgage deed (EX. C1) to one Sailendra Chandra Chandra Dutt (defendant 15 in the present suit). On 23rd July 1930 Sailen, sub-mortgaged Nos. 9 and 10, Karim Bux Lane to Tarit Bhusan Roy and Pulin Krishna Roy (defendants 16 and 17 in the present suit) by a deed of sub-mortgage (EX. C). On 30th July 1932, defendants 16 and 17 brought a suit (title Suit No. 209 of 1930) in the Court of the Subordinate Judge, 24-Parganas, against defendant 15 and Jogesh for recovery of money due on the sub-mortgage (Ex. 15). This suit was decreed and the mortgagee put up the mortgaged property to sale in title Execution Case No. 109 of 1933. 25th October 1933 was fixed for sale. The mortgagee also obtained a decree on the basis of his mortgage in Title Suit No. 109 of 1932 in the Court of the Subordinate Judge, 24-Parganas.

4. On 23rd October 1933, Anupama, a daughter of Jogesh who was not a party in Title Suit No. 172 of 1925 brought a suit (Suit No. 106 of 1933) in the Court of the Subordinate Judge, 24-Parganas as next friend of the Idol Sali gram Thakur for a proper construction of the two deeds of dedication (EX. 5 and Ex. 7) and for a declaration that the properties dedicated by them, viz., municipal premises Nos. 1, 2, 5, 6, 9 and 10 Karim Bux Lane were also, lute debutter properties and that the mort-gage by Jogesh in favour of defendant 15 and the sub-mortgage by defendant 15 in favour of defendants 16 and 17 in the present suit were void and inoperative and were not binding on the plaintiff deity. In this suit there was a prayer for permanent injunction restraining the mortgagee and sub-mortgagees from selling the mortgaged properties in execution of their decrees. Jogesh, his four sons, four daughters, the wife of his son Girindra Chandra, the sons of his eldest son Srish Chandra, and the wife of his eldest son were impleaded as defendants in this suit. Interim injunction was issued on 23rd October 1933 but dissolved on 22nd November 1933. An appeal against this order was also dismissed. Thereafter issues in this suit were settled on 17th May 1934 and 6th July 1934 was fixed for the hearing of the suit. The Subordinate Judge while fixing the date of the hearing recorded the following order:

All tadbir must be finished before the date fixed or the suit will be fixed peremptorily for peremptory hearing and no tadbir will be allowed hereafter.

5. On 6th July 1934 plaintiff prayed for time to make tadbir. Thereupon the Subordinate Judge passed the following order : "Seven days time more is allowed for the last time. Fix 14th July 1934 for fixing the date of hearing." On 14th July 1934, the plaintiff prayed for summons to witnesses. The Court thereupon said : "Fix 6th September 1934 for peremptory hearing. Summons to witnesses be issued, parties to come ready accordingly." On 25th August 1934, the suit was transferred to the Additional Subordinate Judge for disposal. On 6th

September 1934, plaintiff prayed for an adjournment. Thereupon the Court ordered: "Time allowed. Suit adjourned to 14th November 1934, for peremptory hearing. The parties do come ready on that date." On the last mentioned date plaintiff again prayed for an adjournment. The Court thereupon made the following order:

Heard both sides. Sreemati Anupama prays for an adjournment on the ground that her husband being ill, steps could not be taken on her behalf. She had prayed for too many adjournments and all necessary papers ought to have been produced long ago. The husband is also present in Court today. I grant adjournment cost of Rs. 4 to each of defendants 16 and 17 as a condition precedent to the hearing of the suit.

6. On 19th November 1934, plaintiffs' pleader applied for time on the ground that the parties were about to come to terms. The Subordinate Judge however rejected the prayer and dismissed the suit for default and awarded cost to the mortgagee and the sub-mortgagees who were ready on that day to go on with the case. On 14th December 1934, plaintiff filed an application under Order 9, Rule 9, Civil P.C, for setting aside the dismissal order passed on 19th November 1934. The Subordinate Judge heard this application on 31st August 1934 and passed the following order:

On 14th November 1934, the case was fixed for hearing. The plaintiff filed the petition for time on the ground of her husband's illness and 19th November 1934 was fixed for positive hearing. On 19th November 1934, plaintiffs pleader applied for time on the ground that the parties were about to come to terms. Defendant 16's pleader said that the application was a bogus one as there was no such talk and it was clear that he was not agreeable to any terms of compromise. When there is no chance of getting an adjournment, it is common place dodge to speak to the Court that there is a talk of compromise and so the case may be adjourned for its materialisation. As there was no sufficient cause for plaintiff's non-appearance on the date fixed for peremptory hearing there is no sufficient reason for setting aside the order of dismissal.

7. Title Execution Case No.109 of 1933 was dismissed for non-prosecution after the institution of Title Suit No. 196 of 1933. There-. after defendant 15 again put his mortgage decree in Execution Case No. 107 of 1935 and put up the mortgaged property to sale. Jogesh died on 27th April 1935. On 13th January 1936, the idol Sree Sree Iswar Sridhar Saligram Thakur represented by his next friend Krishna Chandra Chandra, one of the shebaitis instituted the present suit in the Court of the Subordinate Judge, 24-Par-ganas. In this suit the other co-shebaitis, the daughters of Jogesh including Anupama Dassi, the wife of Girindra Chandra Chandra, the sons of the eldest son of Jogesh, the priest of the idol (defendant 14) the mortgagee (defendant 15) and the sub-mortgagees (defendants 16 and 17) were impleaded as defendants. The allegations of the plaintiff so far as they are material for the purposes of the present appeal are these:

The properties which were the subject-matter of title Suit No. 196 of 1933 were made debutter by the deed of dedication (Ex. 5). This suit brought on behalf of the plaintiff deity was dismissed on 19th November 1934, for default owing to and by reason of the gross negligence and laches of Anupama Dasi defendant 9 who represented the plaintiff deity in that suit as his next friend and that the said next friend was further guilty of gross negligence and laches in not preferring an appeal against the order of the Subordinate Judge dated 31st August 1935, dismissing the application under Order 9, Rule 9, Civil P.C. That there was good ground of appeal against the same. The present suit is therefore not barred by Order 9, Rule 9, Civil P.C. Defendant 15 is about to sell wrongfully municipal premises No. 9 and 10, Karim Bux Lane, in execution of the mortgage decree obtained by him on the basis of the mortgage executed in his favour by Jogesh on 9th July 1927 (Ex. C1) in Execution case No. 107 of 1935. The said mortgage constituted a breach of trust by Jogesh who was in possession of the mortgaged properties as shebait on the basis of an arpannama Ex. 5. The mortgage as well as the decree passed on the mortgage are not binding on the plaintiff deity. On these allegations the deity prays for a declaration that the properties which were the subject-matter of Title Suit No. 196 of 1933 are absolute debutter properties of the plaintiff deity and that municipal premises Nos. 9 and 10, Karimbux Lane are not liable to be sold in Execution Case No. 109 of 1985.

8. The suit was contested by defendant 15, the mortgagee and defendants 16 and 17, the sub-mortgagees. The defences of these defendants so far as they are material for the purposes of the present appeal are: (1) that the disputed properties were not made absolute debutter (EX. 5); (2) Title Suit No. 196 of 1933 having been dismissed under Order 9, R. 8, Civil P.C, the present suit is barred under Order 9, Rule 9 of the Code. The trial Judge has overruled both these defences and has decreed the suit. Hence these two appeals - one (F.A. No. 180 of 1938) by defendant 15 the mortgagee and the other (F.A. No. 152 of 1938) by the sub-mortgagees (defendants 16 and 17). Only two grounds were urged on behalf of the appellants in these two appeals: (1) That the properties in suit were not absolutely dedicated to the family idol but they were charged only with the expenses of debsheba (the worship of the idol). (2) That the suit is barred under Order 9, Rule 9, Civil P.C, in view of the admitted fact that Title Suit No. 196 of 1933 which was instituted by the plaintiff idol was dismissed under Order 9, R. 8 of the Code.

9. First ground.--The plaint properties are three in number. Exhibit 5 covers the first property. Exhibit 7 covers the other two properties. These two documents clearly show that the properties in suit were dedicated absolutely to the plaintiff idol. There is therefore no substance in this ground.

10. Second ground. -- The reasons given by the Subordinate Judge in support of his finding that the Order 9, Rule 9 of the Code is not a bar to the present suit are: (a) Plaintiff idol is a perpetual minor and is entitled to the protection given by law to the minors against the negligent actings of their guardian, (b)

Anupama was guilty of gross negligence in the conduct of the previous suit. The plaintiff deity is, therefore, entitled to re-open in the present suit the questions raised in the previous suit. Mr. Gupta's contention on behalf of the appellants is that a Hindu idol is a juristic person like any other juristic person under the English system and not a minor or a perpetual minor. In *Rambhadracharya Chatterjee Vs. Kedar Nath Banerjee and Others*, Mukherji J. said:

We need not describe here in detail the normal type of continued worship of a consecrated image- the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy : the vivified image is regaled with the necessities and luxuries of life in due succession even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest.

11. These observations were approved by the Judicial Committee in *Pramatha Nath Mullick v. Pradyumnakumar Mullick* . In view of the religious customs of the Hindus which have been recognized by Courts of law a Hindu idol like a juristic person under the English system has been vested with the capacity of holding properties and with the powers of suing or being sued (*Ibid*). A juristic person under the English system has no body or soul. It has no rights except those which are attributed to it on behalf of some human beings. The lump of metal, Stone, wood or clay forming the image of a Hindu idol is not a mere moveable chattel. It is conceived by the Hindus as a living being having its own interests apart from the interests of its worshippers. It is a juristic person of a peculiar type.

12. The points of similarity between a minor and a Hindu idol are : (1) Both have the capacity of owning property. (2) Both are incapable of managing their properties and protecting their own interests, (a) The properties of both are managed and protected by another human being. The manager of a minor is his legal guardian and the manager of an idol is its shebait. (4) The powers of their managers are similar. (5) Both have got the right to sue. (6) The bar of Section 11 and Order 9, Rule 9, Civil P.C, applies to both of them.

13. The points of difference between the two are : (1) A Hindu idol is a juristic or artificial person but a minor is a natural person. (2) A Hindu idol exists for its own interest as well as for the interests of its worshippers but a minor does not exist for the interests of anybody else. (3) The Contract Act (Substantive law) has taken away the legal capacity of a minor to contract but the legal capacity of a Hindu idol to contract has not been affected by this Act or by any other statute. (4) The Limitation Act (an adjective law) has exempted a minor from the operation of the bar of limitation but this protection has not been extended to a Hindu idol.

14. From the above it is clear that there is some analogy between a minor and a Hindu idol but the latter is neither a minor nor a perpetual minor. Although in law an idol has the power of suing it has no physical capacity to sue. This absence of physical capacity is perhaps referred to by the Judicial Committee when they said in *Jagadindra Nath Roy v. Hemanta Kumari Debi* ("04) 32 Cal. 129 that the right of suit is not vested in the idol. Who is then entitled to exercise the idol's power of suing ? This is a matter of substantive law:

Its (idol's) interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would in such circumstances on analogy be given to the manager of the estate of an infant heir : *Pramatha Nath Mullick v. Pradyumnakumar Mullick* .

15. "The manager of the estate of an infant heir" apparently means the legal guardian of an infant. The powers of the legal guardian of an infant include the power to sue on behalf of the infant. The shebait of a Hindu idol is its manager in law. On the analogy of the power of the legal guardian of an infant the shebait of a Hindu idol has the right to sue on behalf of the idol, for the protection of its interests. In this sense it may be said as was said by the Judicial Committee in *Jagadindra Nath Roy v. Hemanta Kumari Debi* ("04) 32 Cal. 129 that the right of suit vests in the shebait. It has been Held by this Court that a suit for a declaration that illegal alienations of private debutter properties by a shebait are invalid is maintainable at the instance of a prospective shebait, *Giris Chandra Saw and Another Vs. Upendra Nath Giridas and Others*, , or any member of the founder's family who is entitled to worship the idol: (*Sree Sree Banku Behary Thakur and Shalgram Shila Thakur by their Paricharak and Shebait*) *Panchkari Roy Vs. Amode Lal Barman and Others*, , *Sashi Kumari Devi Roy Vs. Dharendra Kishore Roy and Others*, and *Nirmal Chandra Banerjee and Another Vs. Jyoti Prosad Bandopadhyaya and Others*, .

16. A Hindu idol as has been already stated is a juristic person having its own interests apart from the interests of its worshippers. *Jagadindra Nath Roy v. Hemanta Kumari Debi* ("04) 32 Cal. 129 and *Pramatha Nath Mullick v. Pradyumnakumar Mullick* are authorities for the proposition that its power of suing for protecting its own interests is to be exercised by it through its de jure or de facto shebait. The worshippers of the idol are interested in the idol and as such are interested in the property dedicated to it for its maintenance. Their right to sue for the protection of the idol's property is founded upon their own interest viz., the right of worship apart from and independent of the idol's right to sue for the protection of its own interests and properties. They have no right to exercise the idol's power of suing. *Anupama* was not a shebait de jure or de facto. She was not a prospective shebait. She had only the right of worshipping the idol. She brought the previous suit in her capacity as a person interested in the idol's property. She had no legal capacity to exercise the idol's power of suing on its behalf. If she did, the idol is not bound by the results of the exercise of such powers. The previous suit instituted by her as next friend of the idol was not,

therefore, the idol's suit. Order 9, Rule 9, Civil P.C, is not, therefore, a bar to the present suit.

The dismissal of a suit in terms of Section 102 (Order 9, R. 8, Civil P.C.), was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however, when read along with Section 103 (Order 9 Rule 9 of the Code) a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now, the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. (Per Lord Watson in *Mt. Chand Koer v. Partab Singh* ("89) 16 Cal. 98.)

17. The real cause of action in the previous suit was the attempt of the appellants to sell the debutter properties in execution case No. 109 of 1933. This execution case, however, was dismissed for non-prosecution after the institution of the previous suit. The cause of action of the present suit is a fresh attempt by the appellants to sell the debutter properties by starting another execution case, namely, 107 of 1935. It cannot be said, therefore, that the cause of action in the present suit is identical with the cause of action in the previous suit. In this view of the matter, Order 9, Rule 9 is not a bar to the present suit. When a suit is dismissed under Order 9, R. 8 of the Code the suit can be restored under Order 9, Rule 9 if there was sufficient cause for the non-appearance of the plaintiff. Where the suit is dismissed under R. 8 for default of the plaintiff owing to gross want of care and diligence on his part the suit cannot be restored under Rule 9. In view of the decision of the Judicial Committee in *Chajju Ram v. Neki* ("22) 9 AIR 1922 P.C. 112, it is doubtful whether the order of dismissal can be set aside by an application for review under Order 47, Rule 1, Civil P.C.

18. There is a divergence of opinion among the Judges of High Courts in India as regards the substantive right of a minor to bring a separate suit for setting aside the decree passed against a minor owing to the negligence of the next friend or guardian ad litem of the minor in the conduct of the suit. The reasons given by the Judges who are in favour of the view that such a suit is maintainable by a minor are these : (1) Under the English common law such a suit is maintainable. (2) In India there is no statute prohibiting such a suit. (3) There is no reason why this protection given to the minors in England should not be extended to minors in India on grounds of justice, equity and good conscience. (4) The real basis of the binding character of the decree against a minor is the effect of his having been duly represented by a proper person. If the guardian of a minor is grossly negligent of his duties he ceases to represent the minor properly and effectively and the result is the same as if no guardian had been in existence. The wilful and wanton negligence on the part of a guardian disqualifies him --Per Sulaiman J., (as he then was), *Mt. Siraj Fatima and Others Vs. Mahmood Ali and*

Others .

19. The reasons given by the Judges who have taken the opposite view are these : (1) An infant in England has no such right. (2) There is no just and equitable ground for conferring such a right on a minor in as much as (a) the person who has obtained the decree against the minor is not in a position to see that the next friend or the guardian of the minor carries out his duties properly, (b) if the next friend or guardian ad litem fails in his duty it is difficult to see why he should be deprived of the fruits of the decree in his favour if he has proceeded in good faith in accordance with the rules of the Code. The peculiar anxiety of Courts to protect an infant who cannot protect himself at the expense of the finality of suits against infants will cause injustice to the innocent person who has got a decree in his favour against the infant--Per Beaumont C.J., Krishnadas Padmanabhrao Chandavarkar Vs. Vithoba Annappa Shetti, .

20. The preponderance of authority however is in favour of the view that a decree passed against a minor owing to the gross negligence of his guardian is not binding on the minor and that such a decree can be set aside or declared to be not binding on the minor in a separate suit brought by the minor. Under Order 32, Rule 9, Civil P.C, the Court may remove the next friend of a minor if the interest of the next friend is adverse to that of the minor or he does not do his duty. The effect of the decision of the Judicial Committee in Mt. Basid-un-Nisa v. Maham mad Ismail Khan ("09) 31 All. 572 is that when the interest of the guardian ad litem is adverse to that of the minor the decree is not binding on the minor.

21. The power of the shebait of a Hindu idol to institute a suit on behalf of the idol is analogous to the power of the legal guardian of an infant to institute a suit on behalf of the minor. Anupama was not the shebait of the idol. Her power to bring the suit on behalf of the idol cannot be higher than that of the shebait of the idol. The idol therefore cannot be in a worse position than it would have been if the suit had been brought by the shebait. Analogy is a source of judicial principles and can be lawfully followed only as a guide to the rules of natural justice in the absence of any statutory prohibition. If the view taken by the majority of the Judges of the High Courts in India namely that Order 9, Rule 9, Civil P.C., is no bar to a fresh suit by a minor when" the previous suit by his next friend was dismissed for default owing to the negligence of the next friend in the conduct of the previous suit is correct there is no reason why this protection should not be extended to a Hindu idol in this country as I am aware of no statutory law in this country prohibiting the extension of such protection.

22. The Subordinate Judge has found that Anupama who was the next friend of the plaintiff idol in the previous suit was guilty of negligence in the conduct of this suit. This finding of the Judge is justified by the facts and circumstances disclosed by the evidence in this case. The properties in suit are undoubtedly debutter properties. If Anupama had simply produced the registered deeds of dedication, there would have been an end of the defence in that suit. Mr. Gupta

appearing on behalf of the appellants did not assail the finding of the trial Judge that she was grossly negligent in the conduct of the previous suit. The allegation of the plaintiff idol in the plaint of the present suit that Anupama was guilty of gross negligence in the conduct of the previous suit was not specifically denied in the written statement of the appellants.

23. In the plaint of the present suit there is no express prayer for setting aside the order of dismissal in the previous suit or for a declaration that it is not binding on the plaintiff idol. There is however no dispute about the material facts on which the Court can give such relief. There is nothing in the law which disentitles the plaintiff idol to get these reliefs in the present suit. I therefore see no reason why the order of dismissal in the previous suit should not be set aside or declared to be not binding on the plaintiff idol. For the reasons given above I hold that the present suit is not barred by Order 9, Rule 9, Civil P.C, that the properties in suit are absolute debutter properties and that municipal premises Nos. 9 and 10 Karim Bux Lane, are not liable to be sold in execution of the mortgage decrees obtained by defendants 15, 16 and 17. The appeals are accordingly dismissed with costs to plaintiff-respondent.

Pal, J.

24. This is an appeal by defendants 16 and 17 in a suit for declaration that the properties described in Schedule A of the plaint constitute the absolute debutter properties of the plaintiff deity and that the same is not liable to sale in the Execution Case No. 107 of 1935 of the second Court of the Subordinate Judge at Alipore nor in execution of the mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932. The following genealogical table will be helpful in understanding the facts of the case:

G-F | _____ | _____ | | F F | | Bhagwan _____ Ch.
 Basu | | Biswa Nath Nilmoni Dasi Basu (d. 1881)= (d. 1898) Thakurani Dasi |
 _____ | | Bhuban Mohini Patit Pabani (d. 8-4-1914) (1913)
 | Jogesh Chandra Chandra (d. 27-6-1935) | _____ | |
 Sons Daughters Defendants 1-3 Defendants 5-9 Next friend | | Anupama
 Krishna Chandra 25. The plaintiff in the present suit is Sri Sri Iswar Sredhar
 Salagram Sila Thakur. It was the ancestral family deity of Bhagavan Chandra and
 Biswa Nath. The property in suit originally belonged to Bhagavan Chandra Basu
 and Biswa Nath Basu. They dedicated the same to the deity on 6th October
 1869. By the deed of dedication the following scheme for the shebaitship of the
 deity was made. Biswa Nath Basu was to be the first shebait. After his death his
 full-sister, Nilmani Dasi, and his wife, Thakurdasi Dasi, would be the joint
 shebaits. After their death his two daughters, Bhuban Mohini and Patit Pabani,
 would be the joint she- baits. After their death their heirs should be appointed
 shebaits. On 20th August 1925, Jogesh Chandra Chandra, the then shebait, and
 father of the present next friend of the deity, instituted the Title Suit No. 172
 of 1925 in the Court of the 2nd Subordinate Judge District 24-Parganas, making his
 wife, adult son, minor sons and daughters, son's wife and son's minor children

parties defendants. Jogesh Chandra had three more daughters, viz., the present defendants 7 to 9. They were not made parties to this suit, perhaps because, being married, they ceased to be members of his family. The suit was for a declaration that the properties described in the schedules to the plaint were secular in character and were the absolute properties of Jogesh Chandra.

26. Schedule (Ka) plots (a) and (b) and Schedule (Kha) of that suit are the properties in plot Nos. 1, 2 and 3 respectively of the present suit. In this suit of 1925 the defendants appeared, filed a written statement on 12th November 1925, and prayed that the suit may be decreed but with costs to the defendants. On 14th November 1925, the suit was decreed with the consent of the defendants declaring the properties in the suit to be secular in character and also to be the absolute property of Jogesh Chandra Chandra. On 9th June 1927, Jogesh Chandra Chandra borrow-ed Rs. 15,000 and gave in mortgage the property No. 1 of the present plaint to one Sailen Chandra Dutta. On 23rd July 1930, the mortgagee Sailen Chandra Dutta sub-mortgaged the property to Eai Tarit Bhusan Roy and Pulin Krishna Roy to secure a loan of Rs. 8500. Thereafter Sailen Chandra instituted Title Suit No. 209 of 1930 on the said mortgage and obtained a final decree in it.

27. On 30th July 1932, Rai Tarit Bhusan Roy and Pulin Krishna Roy instituted Title Suit No. 189 of 1932 in the Court of the 2nd Subordinate Judge at Alipore on the sub-mort- gage, making their mortgagor as also Jogesh Chandra Chandra parties defendants. They also obtained a final decree in this suit. In 1933 Sailen Chandra proceeded to execute his decree in Execution Case No. 109 of 1933; the property was advertised for sale in execution of the decree, the date of sale being fixed on 25th October 1933. Thereupon on 23rd October 1933, the Title Suit No. 196 of 1933 was instituted in the Court of the 2nd Subordinate Judge, Alipore, purporting to be by the Idol Sri Sri Iswar Sridhar Salgram Sila Thakur by its next friend Sreematy Anupama Dasi, (1) for a declaration (a) that the properties in suit were the absolute debutter properties of the plaintiff deity, (b) that the mortgages and the mortgage decrees were not binding on the deity; and (2) for a permanent injunction restraining the decree-holders from executing the decrees against the property. The next friend in this suit, Anupama Dasi, was one of the three married daughters of Jogesh Chandra who were not made parties in his suit of 1925. It may be noticed here that according to the terms of the deed of dedication and in the events that have happened Anupama was not and can never be a shebait. Her only probable interest was that of a worshipper. In fact in para. 12 of her plaint the only interest claimed by her was that of a worshipper of the deity.

28. This suit was instituted when Jogesh was still alive. He was made defendant 1 in the suit. His children, wife, son's wife and son's children were all made defendants in this suit. They were defendants 2 to 14. The mortgagee and the sub-mortgagees were made defendants 16 and 17 and 18 respectively. It may be mentioned here that defendants 16, 17 and 18 were interested only in item 1 of

the properties mentioned in the plaint. An application for a temporary injunction for restraining defendant 16 from selling the property in item 1 in Execution Case No. 109 of 1933 was made in that suit. On 22nd November 1933, the Court refused the prayer for injunction, being of opinion that " the intended sale will not by itself prejudice the rights, if any, of the plaintiff." He, however, directed that the property should be sold subject to a declaration that it was the subject-matter of a suit in that Court and the doctrine of dependent would apply and that the purchaser would purchase the right, title and interest of the judgment-debtor Jogesh Chandra subject to the said lis. After several adjournments the suit was fixed for hearing on 14th November 1934. On this date the next friend prayed for an adjournment and the Court made the following order:

Heard both sides. Srimati Anupama Dasi prays for adjournment on the ground that her husband being ill, steps could not be taken on her behalf. She had prayed for too many adjournments and all necessary papers ought to have been produced long ago. The husband is also present in Court to-day. I grant adjournment only up to 19th November 1934. The suit will be heard positively on that date. Plaintiff to pay adjournment cost of Rs. 4 to each of defendants 16 and 17 as a condition precedent to hearing of the suit.

29. On 19th November 1934, she again prayed for an adjournment. The Court made the following order:

The lawyer for the plaintiff prays for further adjournment. The grounds put forth by him are that the plaintiff and defendants 17 and 18 have come to terms regarding this suit and that the plaintiff has already approached the Solicitor for defendant 16 for amicable settlement and that there is a reasonable chance of a compromise being arrived at. Defendant 16 is present in Court and from his attitude it is clear that he is not agreeable to any compromise. The suit was definitely fixed for hearing to-day and nobody can be held responsible if the plaintiff has not come prepared for the hearing. Adjournment is refused and case ordered to be proceeded with. The lawyer for the plaintiff has no further instruction and no witness for the plaintiff are (sic) present. Suit is dismissed with costs.

30. Thereafter an application under Order 9, Rule 9, Civil P.C, was filed purporting to be on behalf of the plaintiff deity by the same next friend and the Miscellaneous case No. 2 of 1934 was started. During the pendency of this miscellaneous case, Jogesh died on 27th April 1936. The miscellaneous case was heard and dismissed on 31st August 1935, it being held that there was no sufficient cause for default. It appears that Execution Case No. 109 of 1933 was allowed to be dismissed for non-prosecution during the pendency of the Title Suit No. 196 of 1933 (plaint para. 25). At any rate the property in question was not sold in that execution proceeding and the said execution case was allowed to be dismissed for non-prosecution. A fresh Execution Case No. 107 of 1935 for the execution of the decree in Title Suit No. 209 of 1930 was started after the dismissal of the aforesaid Title suit No. 196 of 1933.

31. On 13th June 1936, the present suit was instituted by the deity, this time by its next friend, Krishna Chandra Chandra, a son of Jogesh Chandra. This next friend was defendant 6 (minor) represented by his mother as guardian in his father's suit of 1925, where he supported his father's claim. He was defendant 5 (major) in the previous suit of 1933 (Title suit No. 196 of 1933). By the terms of the deed of dedication, he is one of the present shebaites of the deity, the other shebaites being defendants 1 to 3. The idol in the present suit through its present next friend alleges that the previous suit was dismissed by the gross negligence of the then next friend. Various questions of law and fact were raised in this case in the Court of first instance. The learned Subordinate Judge found: (1) that the arpannama (the deed of dedication) and the other deeds referred to in the plaint were genuine and bona fide and that they were intended to be given effect to and were given effect to and that there was an absolute grant in favour of the deity; (2) that the plaintiff deity was duly installed as claimed in the plaint and had been in existence even before the time of the dedication; (3) that the predecessors-in-title of Jogesh Chandra Chandra possessed and managed the property as shebaites of the plaintiff deity and that there was no doubt that from 1869 up till 1925 the properties were managed by successive shebaites as the properties of the plaintiff deity; (i) that the properties were, and were always treated as the absolute debutter properties of the deity and were not the secular properties of the judgment-debtor Jogesh Chandra; (5) that the decree in Title suit No. 172 of 1925 was not binding on the plaintiff deity; (6) that the mortgages in favour of defendants 15, 16 and 17 were not binding on the plaintiff deity; (7) that the decrees passed in Title Suits Nos. 209 of 1930 and 189 of 1932 were not binding on the plaintiff; and (8) that Jogesh Chandra having accepted the shebaitship could not claim adverse possession against the deity from 1925.

32. On these findings and being of opinion that the present suit of the plaintiff was not barred by Order 9, Rule 9, Civil P.C, the learned Subordinate Judge decreed the suit in full. Defendants 16 and 17 have preferred the present appeal and defendant 15 has preferred the analogous appeal (F.A. No. 180 of 1938). As has been noticed above, the appellants are interested only in item 1 of the properties involved in the suit, and the learned advocates appearing for the appellants confined the appeals to this item of the property only. It is faintly contended in this appeal that the dedication as evidenced by the arpan-nama (EX. 5) of 6th October 1869, was not an absolute one and that the property did not become an absolute debutter property by that dedication. In support of this contention reliance was placed on *Surendro Keshub Roy v. Doorga Sundari* ("92) 19 Cal. 513, *Har Narayan v. Surja Kunwari* ("21) 8 AIR 1921 P.C. 20 and AIR 1937 185 (Privy Council) . In the first of the cases cited above, there were certain directions as regards the income of the property and these did not exhaust the same. Lord Hobhouse observed:

There is no indication that the testator intended any extension of the worship of the family Thakurs. He does not, as is sometimes done, admit others to the

benefit of the worship. He does not direct any additional ceremonies. He shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, viz., to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakurs whom he venerates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property.

33. There the property was of such a magnitude that after meeting all the charges directed by the will there would still be a very large surplus. In fact the testator directed that out of the surplus each adopted son would receive Rs. 1000 monthly. But of the residue after that he said nothing. The dedication was by will. The testator began by saying:

I do while of sound mind dedicate and give to Sree Sree Isshur Annapoorna Thakooranee...all the ancestral and self acquired movable and immovable properties, zamindaries, and putnee...to which I am entitled and of which I am in possession.

34. Later on he proceeded to give directions regarding the disposal of the income of the same property. The testator said:

Out of the income of the property dedicated to the Deb Sheba etc., after performing the sheba of the above named Annapoorna Thakooranee...after performing the daily and fixed rites and ceremonies as they are now performed and made, out of the profits which shall remain each adopted son shall receive at the rate of Rs. 1000 monthly.

35. Of these adopted sons the Judicial Committee observed:

It would require very strong and clear expressions indeed to show that a Hindu gentleman contemplated introducing as shebait of his family Thakur persons unknown to himself and strangers to his family. There is not a trace in this will to show-any such intention....

36. The monthly allowance for the adopted sons was therefore not a gift sub modo to the idol. Consequently, though in one part of the will, the property purported to be given absolutely to the deity, in another part the income of the property was directed to be disposed of in a manner showing that the property was not to be the absolute property of the deity. These circumstances gave rise to an occasion for construing the will and for finding out the real intention of the testator. Similar was the case in AIR 1937 185 (Privy Council) . In that case also, the property was found to be such that its income was more than sufficient for the worship and there was an ultimate direction for the building of houses for the residence of the heirs with the surplus. This was held not to be a gift sub modo to the idol. Thus the facts in those cases were very different from those in the present. In the present case however the dedication is by a transfer inter vivos. The deed on the face of it makes absolute dedication to the deity. The donor

absolutely divests himself of the property and the property is given over to the sebaits in praesenti giving full effect to the words of conveyance contained in the deed. There is nothing in any part of the deed which would in any way affect the import conveyed by the words of absolute dedication used in the dedication. Where the question is whether property conveyed by a deed of dedication is an absolute gift to the idol or whether it is truly reserved to the donor's own heirs subject to a charge of maintaining the idol and meeting all its suitable expenses, no fixed and absolute rule can be set up. The question can be settled only by a conspectus of the entire provisions of the document. In the present case the deed of dedication on the face of it purports to convey the whole property absolutely to the deity and no circumstances have been established which would entitle us to apply the principles laid down in the above cases to the facts of the present case.

37. The only other substantial point urged in the appeal is that the present suit is precluded by Order 9, Rule 9, Civil P.C., in view of the order of dismissal under Order 9, Rule 9, Civil P.C, made in the previous suit No. 196 of 1933. The learned Subordinate Judge overruled this contention for the reasons that may be summarised thus : (1) Under the Hindu law the idol is a juridical person, in perpetual minority and capable of holding property through his manager (shebait). The general principles of law which are applicable to suits by minors through next friend are applicable to the case of such an idol. (2) It is the duty of the Court, as far as possible to prevent the minor being injured by fraud, laches or negligence of his next friend or guardian for the suit. Though a minor be properly represented by a next friend and though there be no fraud or collusion on the part of the next friend if the next friend be guilty of gross negligence a minor is not bound by a decree or order made in a suit or proceeding to which he is a party. This rule applies not only to decrees made after a judicial adjudication on the question in issue, but also to cases where an act or omission operates as a statutory bar to the institution of a new suit. (3) There are generally two courses open to a minor who seeks to set aside a decree or other orders on the ground of fraud or negligence. He may either apply by way of review to the Court which makes the decree or order, or he may. bring a suit to set aside the decree or order. He might also apparently bring a fresh suit on the same cause of action. (4) The above rule of law is based mainly on the decision in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8. It was held in that case that:

Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in Section 103, Civil P.C, to the institution of a fresh suit by such person when the disability has ceased.

(5) This principle of law is deducible not from Section 44, Evidence Act, but from the English law on the point, as being the law of equity and good conscience applicable in India in the absence of any statutory provision as has been found by Trevelyan J., in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8. (6)

The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. (7) The law as laid down in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ('95) 22 Cal. 8, remains good law even after AIR 1937 1 (Privy Council) , as a protection, not of the ordinary litigants, but, of the minors who had suffered loss on account of the negligence of their next friends in the previous litigation. This rule is based on principles of equity and good conscience, and can be invoked by the minors alone not u/s 44, Evidence Act, but under the case laws which introduced the special protection for persons under disability. The appellants assail these reasons as untenable. Order 9, R. 8, Civil P.C, lays down:

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted shall dismiss the suit so far as it relates to the remainder.

38. It may be noticed here that in the previous suit No. 196 of 1933 the then defendants 4 to 14 (the present next friend and defendants 3 to 8 and 10 to 13 of the present suit) filed their written statement on 3rd May 1934 and this was accepted by the Court on 7th May 1934. It is, however, not in evidence in the present case what was their defence in that suit and whether they admitted the claim of the plaintiff deity. The other contesting defendants 16, 17 and 18 (present defendants 15, 16 and 17) were concerned only with one item of property in that suit, viz., item (a) of Schedule Ka of that suit which is item 1 of the present suit. Order 9, Rule 9, Civil P.C., runs as follows:

Where a suit is wholly or partly dismissed under R. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for the non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal. . . .

39. Assuming that the suit No. 196 of 1933 was a suit by the present plaintiff, it was wholly dismissed under R. 8 of Order 9, Civil P.C, on 19th November 1935. The present plaintiff, by its then next friend did apply for an order to set the dismissal aside under Order 9, Rule 9, Civil P.C. The dismissal was not set aside. So the plaintiff is prima facie precluded from bringing a fresh suit in respect of the same cause of action by the provisions of Order 9, Rule 9, Civil P.C. In order to invoke the aid of this bar the defendants must show (1) that the prior suit was instituted by the present plaintiff, (2) that the present suit is in respect of the same cause of action in respect of which the prior suit was instituted, (3) that

the prior suit was dismissed under Order 9, R. 8, Civil P.C.

40. The order made in the previous suit will be relevant u/s 40, Evidence Act. In the present case the existence of the order is admitted by the plaintiff in the plaint itself (Plaint, paras. 22, 23 and 24). In paras. 21 and 24 of the present plaint all the facts relevant for the purpose of determining whether or not the prior suit was instituted by the present plaintiff, the idol, are given. Assuming for the present that the Suit No. 196 of 1933 was a suit instituted by the present plaintiff, if the sameness of the cause of action is established then prima facie the previous order of dismissal under Order 9, R. 8, Civil P.C, will prevent the Court from taking cognizance of the present suit under the provisions contained in Order 9, Rule 9, Civil P.C. Assuming that the cause of action in respect of which the present suit is instituted is the same as in the previous suit one obvious way of removing this bar is contained in Section 44, Evidence Act, which lays down that

any party to a suit...may show that any judgment, order or decree which is relevant u/s 40...and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

41. It is not alleged in the present case that the order was obtained by any fraud or collusion. The only allegation is that the order was the result of gross negligence on the part of the then next friend of the idol. The question therefore is (1) whether this negligence of the next friend affected the jurisdiction of the Court so as to render it "a Court not competent to deliver the order" within the meaning of Section 44, Evidence Act; (2) whether apart from the provisions of Section 44, Evidence Act, there is any principle of law by which gross negligence on the part of the next friend would affect the consequent order of dismissal so as to render it inoperative as a bar to a fresh suit under Order 9, Rule 9, Civil P.C.

42. In my judgment, however, the cause of action in respect of which the present suit has been brought is not the same as that in respect of which the previous suit was instituted. As has been stated above, the present appellants confined their appeals to item 1 of the properties in suit. So far as this item is concerned, in the previous suit (1) the title of the plaintiff deity was based on the registered arpannamah or deed of dedication dated 21st Aswin 1276 B.S. (corresponding to 6th October 1869) by Bhagwan Chandra Basu and Biswa-nath Basu; (2) the Suit No. 172 of 1925 was characterized as collusive and as not affecting the title of the deity; (3) (a) the mortgage dated 9th June 1927, by Jogesh Chandra Chandra to defendant 15, (b) sub-mortgage by defendant 15 to defendants 16 and 17 dated 23rd July 1930, (c) the final mortgage decree for sale against Jogesh Chandra in Title Suit No. 209 of 1930 on the basis of the mortgage dated 9th June 1927, (d) the final mortgage decree in Title Suit No. 186 of 1932 on the sub-mortgage, and (e) the execution case No. 109 of 1933 in execution of that decree were all impeached as not binding on the deity and not available against the property. The cause of action was stated to be (1) the starting of the execution proceeding in Execution case No. 109 of 1933 and (2) the existence of

(a) of the decree in Title Suit No. 172 of 1925, (b) the deeds of mortgage and the sub-mortgage and (c) the mortgage decrees. The relief claimed in that suit were (1) declaration on a proper construction of the deeds of dedication, that the properties constituted the absolute debutter properties of the plaintiff deity; (2) declaration that the mortgage and the sub-mortgage, the mortgage decrees in Title Suit No. 209 of 1930 and in Title Suit No. 189 of 1932 and the execution proceedings in Execution Case No. 109 of 1933 were void, inoperative and not binding in any way upon the deity; (3) permanent injunction against the then defendant 16 (present defendant 15) prohibiting and restraining him from executing the said mortgage decree in Title Suit No. 209 of 1930 by the sale of the property (item 1); and (4) permanent injunction against the then defendants 17 and 18 (present 16 and 17) prohibiting and restraining them from executing their mortgage decree in Title Suit No. 189 of 1932 by the sale of the property (item 1). There were also prayers for the removal of defendant 1 from the position of a shebait and for making a scheme of management and proper worship of the deity. In the present suit, all the above allegations and assertions are repeated, the title of the plaintiff is founded on the same basis and the same infringements are alleged. In para. 21 of the plaint it is stated why the previous suit No. 196 of 1933 was instituted by the plaintiff "through defendant 9 Sm. Anupama Dasi as the next friend" and in para. 24 it is stated how the said suit was dismissed for default under Order 9, R. 8, Civil P.C, through the gross negligence of the then next friend. Then in para. 25 the fresh occasion for the present suit is given and it is stated thus:

That, though defendant 15 got the said Execution Case No. 109 of 1933 referred to in paras. 18 and 21 above dismissed for non-prosecution since and after the institution of the said Title Suit No. 196 of 1933 on behalf of the plaintiff Deity, the plaintiff has come to learn through its next friend that the said defendant 15 has again put his said mortgage decree in Title Suit No. 209 of 1930 in execution, in Execution Case No. 107 of 1935 in the second Court of the Subordinate Judge at Alipur and is about to sell wrongfully the property described in item 1, Schedule "A" below which constitutes one of the absolute debutter properties of the plaintiff deity and which cannot be lawfully sold in the said execution case and that 15th day of January next is fixed for auction sale of the same.

That the plaintiff deity is therefore compelled to bring this fresh suit to protect its right, title and interest in the properties in suit and is entitled to a declaration that the properties in suit described in the Schedule "A" below constitute the absolute de-butter properties of the plaintiff deity and as such the said property described in item 1 of the said Schedule is not liable to be sold in the said execution case No. 107 of 1935 pending in the local second Court of the Subordinate Judge at Alipore, or in execution of the said mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932 referred to above and respectively obtained by defendant 15 and defendants 16 and 17 against the said Jogesh Chandra Chandra since deceased.

43. The relief claimed in the suit is a declaration, (1) that the properties...constitute absolute debutter property of the plaintiff deity and (2) that item 1 of the said properties is not liable to sale, (a) in the Execution Case No. 107 of 1935...nor (b) in execution of the mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932. "The cause of action", in the language of their Lordships of the Judicial Committee, has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. *Mt. Chand Koer v. Pratap Singh* ("89) 16 Cal. 98.

44. It is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. There is no doubt that the two suits are based on certain common allegations. The suit of 1925, the mortgage of 1927 and 1930, the mortgage decrees of 1930 and 1982 are the common impeachable facts assailed in both the suits. In none of these transactions however the idol was a party and consequently these were not such invasion of the idol's right as would render it incumbent upon it to take the help of the Court. The mortgages were all simple mortgages and none of these transactions was accompanied or followed by any overt act interfering with the possession and enjoyment of the idol. The fact that the idol has all along been in undisputed possession and enjoyment of the properties has been established in this case and is not in dispute in this appeal. The idol's right was more effectively invaded when execution against the property was taken out in 1933. This execution being ultimately abortive, the threat, if any, to the idol's right was also gone. Then, again, when the present execution was taken out against what the idol claims to be its property a fresh invasion of its right took place giving rise to a fresh cause of action for it to come and seek the help of the Court. No doubt, though not necessary, the idol came to Court as a matter of fact on the occasion of the previous invasion of its right. Had there been any adjudication in respect of any matter in issue there that fact might affect it in the subsequent suit. But till barred by any such adjudication it is entitled to seek the help of the Court upon each successive invasion of its right. Each such invasion will give rise to a fresh cause of action and a suit in respect of such an invasion will be a suit in respect of a fresh cause of action and not "in respect of the same cause of action" within the meaning of Order 9, Rule 9 Civil P.C. 45. In *Ananta Razu Garu v. Narayana Bazu Garu* ("13) 36 Mad. 383, the Madras High Court held that though attachment of a person's land, as if it belonged to another, gives the owner a cause of action, on which he could have brought a suit, but did not, yet the sale of the same at a later date is a fresh and greater invasion of his right and gives him a fresh cause of action. It may be added that if the owner in such a case brought a suit on the occasion of attachment and allowed that suit to be dismissed under Order 9, R. 8, Civil P.C. his suit on the occasion of the subsequent sale would not have been affected by the provisions of Order 9, Rule

9, Civil P.C, the latter suit being in respect of a fresh cause of action. The principle underlying the decision of the Calcutta High Court in *Najimunnessa Bibi Vs. Nacharaddin Sardar*, also supports the same view.

45. The suit of 1925, the mortgages of 1927 and 1930 and the mortgage decrees of 1930 and 1932 no doubt might supply sufficient cause of action without anything more to the idol for a declaratory relief. If a previous suit founded on such cause of action were allowed to be dismissed for default under Order 9, R. 8, Civil P.C, another suit on that cause of action alone would have been barred by Order 9, Rule 9, Civil P.C. But that is not the position here. The prior suit was founded not on these facts alone but on another additional fact, viz., that an execution was taken out against the property. This last named fact was really the clear and unequivocal threat to the idol's right and supplied the cause of action on which the suit of 1933 was founded. The suit was no doubt dismissed under Order 9, R. 8, Civil P.C. But the threat was also removed by the inaction of the invader. The execution case was also dismissed for non-prosecution. After this it was not incumbent upon the idol to do anything. A fresh invasion of its rights was made by taking out a fresh execution. This was a fresh attempt to cast a cloud on the idol's title and created a new cause of action in its favour. No doubt the reluctance or prolonged failure of the plaintiff to assert his claim in the civil Courts imposes on the Courts the clear and imperative duty of cautious reserve before accepting the plaintiff's contentions. But the plaintiff had in this case successfully discharged this heavy burden of proof to the satisfaction of the Court below and this could not be assailed in this appeal.

46. In my judgment the cause of action in respect of which the present suit has been brought is not the same on which the previous suit by the idol was founded and consequently the rule of bar laid down in Order 9, R. 8, Civil P.C, is not at all applicable to it. In this view, no other consideration does really arise in this case. The other questions would arise for consideration only if the present suit could be said to be in respect of the same cause of action as in the suit of 1933--only if the bar imposed by Order 9, R. 8, Civil P.C, was otherwise available to the defence. Though in the plaint itself the plaintiff states that the suit of 1933 was its own suit, all the relevant facts for the purpose of determining how and by whom that suit was instituted and in what right the then next friend purported to act as the next friend of the idol have been given in the plaint. There is no dispute about these facts, and, in my judgment, in view of them the then next friend had no right to represent and cannot be said to have represented the idol at all.

47. Before proceeding further, it would be advisable to keep in mind that as the rule of law now stands there are several distinct rights of suit in respect of the endowed property, viz., (1) the idol itself as a juristic person has the right of suit like all other owners ; (2) the shebait, the recognized human agency through which the idol must, from its very nature, act, has a distinct right, distinct from, and, in normal cases, in supersession of the idol's right of suit *Jagindindra Nath*

Roy v. Hemanta Kumari Debi ("4) 32 Cal. 129; (3) the prospective shebait as persons interested in the endowment have a right of suit; (4) worshippers and members of the family have right of suit. The question before us is not who else can sue in his own right but who else, other than a shebait, can represent the idol when the suit is in enforcement of the idol's right of suit. Ordinarily the shebait alone will have the right to represent the idol. In special cases the Court may appoint some one to represent it. The rules of law that can be gathered from the decided cases in this respect appear to be--(1) that normally a shebait alone can represent an idol in a suit or proceeding; (a) that where there are several shebait, the entire body of them will represent the idol; (b) that under some special circumstances even a co-shebait can represent the idol; Nirmal Chandra Banerjee and Another Vs. Jyoti Prosad Bandopadhyaya and Others, that it is only under some special circumstance that the idol may be represented by (a) a prospective shebait; (b) a worshipper or any person interested in the endowment; (3) that when persons other than the shebait come to represent the idol, they can represent the idol only by an appointment by the Court.

48. Anupama Dasi, the then next friend, had no greater interest than that of being a possible worshipper. As such a worshipper she had the right of suit in herself. She could bring a suit for declaration that an alienation by the shebait was not valid. No doubt she could not have sued for possession on the ground that the alienation by the shebait was invalid. The circumstances that she was a devotee of the idol and was a worshipper of it were sufficient to entitle her to bring a suit complaining of a breach of trust with reference to the property belonging to the idol. In Brojomohun Das v. Hurrolall Doss ("80) 5 Cal 700 Sir Richard Garth C.J. and Pontifex J. held that as there was no public officer in this country endowed with the power of enforcing the due administration of charitable or religious trusts by information at the relation of some private individual, as is possessed by the Attorney-General in England, and as it would lead to great abuse in trusts of this nature unless some person was able to bring them under the control of the Court, the representatives of a testator, who had created such a trust, were the persons who would be entitled, if a proper case were made out, to institute proceedings for the purpose of having abuses in the trust rectified. In Bimal Krishna Ghose and Others Vs. Shebait of Sree Sree Iswar Radha Ballav Jiu and Others, (M.C. Ghosh and Mukherjea JJ.) it was observed:

In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebait who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or maladministration of the deity's estate and to have a proper scheme of management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted or ruined. This principle was reiterated in Rabindra Nath Mandal and Others Vs. Chandi Charan Mandal and Others, , The Privy Council itself directed the framing of a scheme in the case of a private debutter in Pramatha Nath Mullick v. Pradyumnakumar Mullick and the case was remanded to the trial Court expressly for that purpose. The same

directions were given by this Court in *Prasaddas Pal Vs. Jagannath Pal and Others*, which was also a case of private debutter....

See also *Radha Bai v. Chimnaji* ("78) 3 Bom. 27. See also, in this connexion, *Monindra Mohan Banerjee and Others Vs. Shamnagar Jute Factory Co. Ltd. and Another*, and *Abdur Rahim v. Abu Md. Barkat Ali* ("28) 15 AIR 1928 P.C. 16. Persons having individual rights under such endowments can bring suits to enforce such individual rights by an ordinary suit in their own name without being obliged to bring a suit in the name of the idol. This right reserved to the worshippers sufficiently safeguards the interest of the worshippers or other persons interested in the debutter. At the same time it obviates the risk of jeopardising the interest of the idol by allowing it to be affected by the intermeddling of persons whose fitness has never been inquired into and adjudicated upon, No doubt in the case of the minors the CPC lays down that

any person who is of sound mind and has attained majority may act as next friend of a minor....Provided that the interests of such person is not adverse to that of the minor.

49. Such a next friend, it seems, need not have any interest in the minor's interest. There is however no such statutory provision applicable to the case of an idol and I do not think that this rule involves any such principles of justice, practical experience and common sense as would entitle us to extend it to the case of an idol by analogy. Analogy may indeed often serve a very useful purpose and perhaps helps the stability of the norms for decisions. This stability receives a special respect when the norms are extended not merely to like or similar cases but also to the cases that are only approximately similar. But this projection of norms to new cases on the ground that these are approximately similar is not without its danger. The case of an idol is similar to that of an infant only to this extent that both must act through some agents. But the analogy does not seem to extend beyond this. An idol from its very nature is a perpetual dependent and its incapacity in this respect is perpetual. It would therefore be reasonable to expect that the law which recognised its personality must have made some provision for supplementing this perpetual incapacity. As has been pointed out above, the law recognises the shebait for this purpose and appoints them, as it were, to be the persons who are to represent the idol for all juridical purposes. In fact, though the idol is recognised as the owner, it is owner only in an ideal sense. The right of suit is really in the shebait.

50. As has recently been observed by the Judicial Committee in AIR 1940 116 (Privy Council) , the procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait. No doubt an idol is recognized as a, juridical person capable of having interests demanding legal protection. But this is so only in an ideal sense. Strictly speaking, the law of the present age at least does not concern itself with anything outside human interest and all the recognitions and protections accorded to the idol must have been thought necessary because of the existence of some ultimate human interests.

In the recent case in (Sree Sree Banku Behary Thakur and Shalgram Shila Thakur by their Paricharak and Shebait) Panchkari Roy Vs. Amode Lal Barman and Others, y learned brother Mukherjea J. is said to have held that any member of the family in case of a family endowment or any person interested in the endowment may represent the idol in a suit as a next friend. As I read the judgment, he said nothing of the kind and in the particular case had no occasion for saying that. In his own language:

When the shebait himself is negligent or alienates debutter property in breach of trust, not only a prospective shebait under the terms of the grant but any member of the family in case of a family endowment may maintain the suit on behalf of the deities to recover that property from a trespasser : vide *Giris Chandra Saw and Another Vs. Upendra Nath Giridas and Others*, .

51. In support of his proposition he refers to a passage in Gour's Hindu Code and says:

Dr. Gour in his Hindu Code lays down the law as follows : "Any person interested in the endowment may sue to set aside an improper alienation of its property by the manager.

52. After this he says:

The question, therefore, is as to whether Bhakatram and Panchkari could be said to be persons interested in the debutter.

53. Now, it appears from the judgment that Bhakatram instituted the suit not as next friend of the idol, but in his own name and in enforcement of his own right (1) as the rightful shebait, (2) at least as the de facto shebait having the custody of the idol and (3) at any rate, as being interested as a worshipper. It seems abundantly clear that my learned brother Mukherjea J. was considering the question whether such persons could sue in their own name and right and not whether they could represent the deity in a suit. My learned brother cited as an authority in support of the position the decision of the Judicial Committee in *Jagadindra Nath Roy v. Hemanta Kumari Debi* ('04) 32 Cal. 129, and quoted a passage from the judgment of the Judicial Committee to emphasise this right of suit of such persons as distinct from the right of suit of the idol itself. The passage from Gour's Hindu Code is also relevant only for this purpose. No doubt he used the expression "on behalf of the deities." As I read the judgment, thereby he was not thinking of the frame of the suit but of the ultimate beneficial result of it. Though not in form, in substance, such a suit will be on behalf of the deity, as the deity will be, as the juristic owner of the property, the person benefited by it. The authority in *Giris Chandra Saw and Another Vs. Upendra Nath Giridas and Others*, cited in support of the proposition also points to the same thing. That also was a case where the persons interested instituted the suit not on behalf of the idol in form but in their own name though the interest claimed was the benefit of the idol.

54. In my judgment there is a very substantial distinction between a suit by certain interested persons as such in their own name, and, at least in form, on their own behalf, and a suit by a person in the name of the idol and as its next friend. In the former case the consequences of the suit will be binding only on the persons suing or on the persons whom they represented in form (Order 1, R. 8, Civil P.C). In the latter case the idol itself will be affected as a juristic person and it is therefore a question fraught with grave consequences demanding serious consideration as to who should be allowed to represent the idol in such a suit. No doubt now under Order 32, Civil P.C, very wide scope is afforded in this respect to the case of an infant. Rule 4 of Order 32, Civil P.C, lays down:

Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit : Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

55. This wide rule makes possible much officious meddling with the infant's interest. In my judgment such a rule of representation should not be allowed to be extended by analogy to the case of an idol. As yet there is no well defined rule of procedure in this respect. An idol is represented by its shebait. On the exceptional unfortunate occasion of the shebait turning hostile to the idol, the other persons interested are given the right of suit in their own name. They may come singly or in a representative group. But let them come in their own name and right. An idol is not an infant in the Hindu conception. It has not been treated as an infant by our Legislature and by the highest judiciary in many respects. I do not see any necessity for or advantage in allowing it to be treated as an infant for the procedural purposes beyond the extent to which the Judicial Committee has already done so. When in the case of a fight between its shebait it is necessary that the idol should be brought on the record, let it be brought as represented by a person by the special appointment of the Court. In *Sharatchandra Shee Vs. Dwarkanath Shee and Others*, Lort-Williams J. held that in the case of a private religious trust, with regard to the mismanagement of which the members of the public cannot intervene, and it cannot be expected that the shebait will bring a suit against himself, it is necessary and desirable that the idol should file a suit by a disinterested next friend appointed by the Court.

56. The suit was for the removal of the defendant from the position of the shebait of the deity and it was found in the case that there was nobody left out of the members of the family who under the deed of endowment had any interest in the trust estate. The founder's living relatives other than Dwarka's line were excluded by the terms of the deed itself. In these circumstances Lort-Williams J., held that the idol itself could bring a suit for the purpose and that it was for the Court to appoint a next friend for the idol on such an occasion. In *Sri Sri Kalimata Debi and Another Vs. Nagendra Nath Chuckerbutty and Others*, Chotzner J. held that a right of suit is vested in the shebait and not in the idol. In

the absence of refusal by the shebait to institute a suit for the protection of the property of an idol, neither a worshipper nor an idol is competent to maintain a suit. The suit in question was for a declaration that a certain deed of revocation of the dedication and mortgage of the dedicated property by the settlor was not binding on the idol. The suit was instituted by a worshipper in her own name as also in the name of the idol represented by herself as its next friend. The dedication in question was made by one Suresh Chandra Chakrabarty in 1922 whereby he appointed himself and his brother Nagendra to be the shebait of the deity. On 6th June 1923, Suresh and Nagendra executed the deed of revocation in question. Thereafter on 20th June 1923 Suresh executed the mortgage in question.

57. Nagendra and other members of the founder's family were made defendants in this suit. The mortgagee defendants contested the claim. Their defence inter alia was that the suit was not maintainable at the instance of the present plaintiffs. Nagendra was the only surviving shebait of the deity at the date of this suit. He as also the other members of the family who were made defendants in the suit appeared and supported the case of the plaintiffs by filing a written statement. According to Chotzner J., the proper person to have instituted the suit was the shebait and nobody else. Had the position been that Nagendra in his capacity of shebait had definitely declined to institute the suit, it might perhaps have been open to worshipper as the next friend of the idol to have taken the place of the shebait. In the absence of any such refusal by the shebait neither the worshipper ;nor the idol was competent to sue. The suit was held: to be bad. In *Surendrakrishna Roy Vs. Shree Shree Ishwar Bhubaneshwari Thakurani*, , Rankin C;J., observed:

The doctrine that an idol is a perpetual minor is, in my judgment, an extravagant doctrine contrary to the decision of the Judicial Committee in such cases as *Damodar Das v. Lakhan Das* ("10) 37 Cal 885.

58. He then pointed out:

It is open to shebait or any person interested in an endowment to bring a suit to recover the idol's property for debuttar purposes.

59. Further on at p. 77 he observed :

I am not prepared to hold, as a matter of construction of the Limitation Act, that an idol is a perpetual minor as was suggested in *Rama Reddy Vs. Ranga Dasan and Others*,

60. While considering whether the possession of two joint shebait became adverse to the idol when they openly claimed to divide the property between them, Sir George Rankin observed that "until the shebait was removed or controlled by the Court, he alone could act for the idol." This case is also an authority for saying that at least in the Limitation Act the provisions in the Act as to lunatics and minors were not intended to be extended to idols. In (*Sri Sri*)

Gopal Sridhar Mahadeb and Others Vs. Sashi Bhusan Sarkar and Others, the analogy of minority of deities was declared to be a pure fiction for which no authority was to be found in Hindu law, and it was held that there was no conceivable principle on which on such analogy a contract otherwise good and valid could be taken out of the class of contract of which specific performance might be granted under the law. The position may be summed up as follows: (1) (a) The idol is a juristic person and as such it may sue and be sued; (b) from its very nature it must act through some human agency--shebait is such agency. Until the shebait is removed or controlled by the Court he alone can act for the idol. (2) Apart from the idol's right of suit, a shebait as such has a right of suit and may be sued. Normally he is the human agency through which the idol holds, enjoys, and manages the property and the right of suit vests in him and not in the idol: Jagadindra Nath Roy v. Hemanta Kumari Debi ('04) 32 Cal. 129. (3) Worshippers and members of the family have interest in the debuttar and a right of suit is given to them also to protect the interest of the debutter. (a) This does not mean that these persons can as of right represent the deity in a legal proceeding, (b) They can sue in their own name and on their own behalf for the benefit of the debutter. (4) In exceptional circumstances, a deity can be represented in a legal proceeding by a person other than a shebait only by the special appointment of the Court: Pramatha Nath Mullick v. Pradyumnakumar Mullick; AIR 1933 198 (Privy Council) . (a) In such a case such person may be under the control of the Court in the manner in which and to the extent to which a next friend or a guardian of a minor is under such control under the provisions of Order 32, Civil P.C. In my judgment the Suit No. 196 of 1933 was not a suit of the idol. The person who purported to represent the idol as its next friend was not the person entitled in law so to represent the idol, and she was never appointed by the Court so to represent the idol. At best it was a suit by Anupama in her own right as a worshipper and as such its result would not in the least affect the present suit.

61. Assuming that the previous suit was the suit of the same plaintiff and was founded on the same cause of action, Order 9, R. 8, Civil P.C, would prima facie preclude the plaintiff from bringing this present suit. The contention of the plaintiff respondent is : (i) that the position of an idol is analogous to that of an infant for the present purposes; (ii) that the position of an infant in this respect is : (a) that gross negligence on the part of a next friend in the conduct of a suit brought on behalf of the infant prevents the effect of the bar contained in Section 103 (now Order 9, Rule 9), Civil P.C: Lalla Sheo Churn Lal v. Ramnandan Dobey ('95) 22 Cal. 8; (b) that in the absence of any statutory provision the English rule of law in this respect applies here as principles of equity, justice and good conscience, English rule of law as enunciated by Malins V.C. in *In re Hoghton*; *Hoghton v. Fiddey* (1874) 18 Eq. 573 at p. 576; (e) that as soon as the next friend becomes negligent in the conduct of the suit, he becomes removable by the Court as such next friend and that he ceases to be the next friend though not removed by the Court by any express order, the minor is thus unrepresented

from that moment: *Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others* . There is no direct authority in this respect so far as the position of an idol is concerned.

62. As regards infants the authorities are to a certain extent conflicting. The points that will require consideration are: 1. What is the exact position of an infant in this respect? 2. Whether the rule of law applicable to an infant should be extended to the case of an idol by analogy. As regards infants an examination of the various decisions of the several High Courts in India will disclose a clear conflict of opinion. The views of the Calcutta High Court will appear from the following cases: *Kylash Chunder Sirkar v. Gooroo Churn Sirkar* ("65) 3 W.R. 43 (Jackson and Glover JJ.); *Eshan Chunder Safooi v. Nundamoni Dasi* ("84) 10 Cal. 357 (Sir Richard Garth, C.J., and Cunningham, J.); *Raghubar Dyal v. Bhikya Lal* ("86) 12 Cal. 69 (Field and O' Kinley, JJ.); *Lalla Sheo Churn Lal v. Ram-nandan Dobey* ("95) 22 Cal. 8 (Treve-lyan and Ameer Ali, JJ.); *Ram Sarup Lal v. Shah Latafat Hossein* ("02) 29 Cal. 735 (Pratt and Mitra, JJ.); *A Shaik Abdul Karim Vs. Thakurdas Thakur and Others*, (Rankin C.J. and C. C. Ghosh J.); *Mahesh Chandra Bayan Vs. Manindra Nath Das and Others*, (Mukher-jea J). The following opinions showing a certain amount of conflict can be gathered from these cases:

1. The bar imposed by Section 7 of Act 8 of 1859 (corresponding to Section 48 of Act 14 of 1882 and Order 2 Rule 2 of the present Civil Procedure Code) was not available against a minor when the omission in the previous suit was due to the negligence of his next friend.

There is no law which prevents a minor, when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. *Kylash Chunder Sirkar v. Gooroo Churn Sirkar* ("65) 3 W.R. 43 at p. 46.

2. Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, the result of that suit would have precisely the same effect as that of the suit by a person of full age: *Eshan Chunder Safooi v. Nundamoni Dasi* ("84) 10 Cal. 357; *Raghubar Dyal v. Bhikya Lal* ("86) 12 Cal. 69. (a) Where a decree has been made against an infant duly represented by his guardian and the infant on attaining majority seeks to set that decree aside by a separate suit, he can Succeed only on proof of fraud or collusion on the part of his guardian. *Raghubar Dyal v. Bhikya Lal* ("86) 12 Cal. 69. If the infant desires to have the decree set aside because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an ex parte one, the procedure adopted should be that given in the CPC for setting aside ex parte decrees: *Raghubar Dyal v. Bhikya Lal* ("86) 12 Cal. 69; *Ram Sarup Lal v. Shah Latafat Hossein* ("02) 29 Cal. 735.

3. Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of an infant prevents the effect of the bar contained in Section 103,

Civil P.C, 1882, (Order 9, R. 8 of the present Civil P.C), to the institution of a fresh suit in respect of the same cause of action by the minor on attaining majority. Fraud and negligence are on the same footing in this respect: *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8 and *Mahesh Chandra Bayan Vs. Manindra Nath Das and Others*, . The Calcutta High Court in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8 took the view that according to the law as administered in England the gross negligence of his next friend would entitle an infant (1) to obtain avoidance of proceedings taken on behalf, as also, (2) to institute a fresh suit in respect of the same cause of action. The rule of English law was applied here as principles of justice and equity. The Bombay High Court has recently taken a contrary view in *Krishnadas Padmanabhrao Chandavarkar Vs. Vithoba Annappa Shetti*, . The Full Bench now holds that gross negligence apart from fraud or collusion on the part of the next friend or guardian ad litem cannot be made the basis of a suit to set aside a decree obtained against him. In this case Beaumont C. J., doubted if the English rule of law in this respect was correctly appreciated by the Calcutta High Court in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8. The views of the Madras High Court will appear from the following cases : *Subbanna v. Narasamma* ("15) 2 AIR 1915 Mad. 384 (*Sankaran Nair and Spencer JJ.*), *Chunduru Punneyah v. Rajam Viranna* ("22) 9 AIR 1922 Mad. 273, *Kari Bapanna v. Yerramma* ("23) 10 AIR 1923 Mad. 718, *S. Ananda Rao and Others Vs. Venkatadri Appa Rao*, and *Haji Muhammad Shadak Koyi Sahib Vs. Burra Venkata Komaraju and Others*, The Madras High Court has taken the same view as in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8. The Allahabad High Court also has taken the same view as in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8 in *Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others* . In an earlier case in *Daulat Singh v. Raghubir Singh* ("94) 1894 A.W.N. 141 the Court observed:

But short of fraud being established and fraud not only on one side but on both, i.e., on the part of the then plaintiff and on the part of the present plaintiff's then guardian, we know of no right which the present plaintiff can now have to dispute the validity of the decree which became final... Even if that guardian was negligent and through her negligence did not properly protect the interests of the minor in the previous suit, the minor is still bound by the decree, so long as the guardian did not act fraudulently and in collusion with the minor's then opponent. If the law was otherwise no person could be certain of the finality of any decree obtained against a minor, whether the minor had been a plaintiff or defendant in the suit.

63. The Patna High Court also has taken the same view as in *Lalla Sheo Churn Lal v. Ramnandan Dobey* ("95) 22 Cal. 8 and has further extended the rule to the case of a ward of Court in *Mathura Singh and Others Vs. Rama Rudra Prashad Sinha and Others*, . The Lahore High Court also has taken the same view and has refused to follow the Full Bench decision of the Bombay High Court: see *Punnun Mal v. Bishambar Dayal* ("40) 27 AIR 1940 Lah. 205. Keeping ourselves confined to the J bar imposed by Order 9, Rule 9, Civil P.C, we may proceed to examine

the legal position of the infant with reference to the following cases, (1) When the minor institutes a fresh suit in respect of the same cause of action; (2) when the minor institutes a suit for setting aside the adverse decision in the previous suit; (3) when the minor makes an application in the previous suit (a) for a review of the adverse decision, (b) for otherwise setting aside the adverse decision. So far as the first case is concerned, it must now be taken to be the settled law that the provisions of Section 44, Evidence Act, cannot be extended to cases of gross negligence: AIR 1937 1 (Privy Council) . Assuming therefore that in the previous suit the minor was properly represented and that that suit was dismissed for default under Order 9 R. 8, Civil P.C, it seems difficult to maintain the position that a fresh suit in respect of the same cause of action would be maintainable by the minor on the ground that the previous order under Order 9, R. 8 was due to the negligence of the next friend. The bar is a statutory one and it does not make any exception in favour of an infant.

64. The only way in which such a fresh suit can be urged to be maintainable in spite of the barring provision contained in Order 9, R. 8, Civil P.C, is by holding (1) that as soon as the next friend or guardian ad litem of a minor in a suit becomes negligent, or, in the language of the statute, "does not do his duty" (O. 32, Rule 9 and Rule 11, Civil P.C.,) and thus becomes removable by the Court under Order 12, Rule 9 or Rule 11, Civil P.C, he ceases to represent the minor in that suit, though an order removing him is not actually made; (2) that, at any rate, as soon as by failing to do his duty a next friend or a guardian ad litem renders himself liable to be removed it becomes the duty of the Court to proceed in a particular manner in that suit and the Court is not competent to proceed in any other way in that suit and therefore any order made thereafter without removing the next friend or guardian ad litem is an order "delivered by a Court not competent to deliver it" within the meaning of Section 44, Evidence Act.

65. Sulaiman J. in Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others seems to have taken the view that the next friend or the guardian ad litem ceases to represent the minor as soon as he renders himself removable by his negligence or failure to do his duty. In my opinion, this is taking an extreme view of the case and, if introduced is likely to create an appalling confusion. This may be a very good ground for reopening any decision or order consequent upon the negligence of the guardian or next friend by an application in that very suit. But I am not prepared to say that when a minor is once properly represented he will cease to be represented thus without an order from the Court. The case, Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others , is rather an authority in support of the view I am taking. There a minor and his mother were sued and they were described as Sudhamayee Debi, widow of late Ramlal Thakur, and Thakurdas Thakur, a minor by his mother and certificated guardian, the said defendant 1, No one was formally appointed by the Court as guardian ad litem for the minor. A pleader appeared on behalf of the defendants for taking adjournments for filing written statements. There was a substantial defence to the suit, but that defence was never raised. The suit was ultimately decreed ex

parte. It was held that the minor was not properly represented and the decree was a nullity. In this ease Sir George Rankin laid stress on the fact that the lady was not at all appointed by the Court as a guardian ad litem as was required by Order 32, Rule 3, Civil P.C.

66. The decision of the Judicial Committee in *Mt. Rasid-un-nisa v. Mahammad Ismail Khan* ('9) 31 All. 572 is not authority for the extreme view taken by Sulaiman J. in *Gauri Shankar Prasad Vs. Sita Ram Sah and Others*. There in one case, the guardian-ad. litem, being a married woman, was disqualified by Section 457, Civil P.C. of 1882 from being appointed a guardian ad litem and in another case the proposed guardian was disqualified, having an interest adverse to that of the minor. I am also not prepared to accept the contention that the Court becomes incompetent to make the order of dismissal as soon as the next friend ceases to do his duty. As regards the second case, namely when the minor seeks to assail the previous order or decision and brings a suit for the purpose of setting aside that order, obviously Order 9, Rule 9, Civil P.C, is no bar to such a suit. It is not a suit in respect of the same cause of action. It is the previous order itself which supplies the cause of action for the present suit. In my opinion the law that has developed in India in allowing a minor to assail by a suit the order or decision in bar on the ground of the negligence of the next friend should not be disturbed. Even if it be held that the remedy in this respect is not by a suit but by an application in the previous suit, the suit may be treated as such an application. As regards the third ease, namely when the infant applies in the previous suit itself for a review of the adverse decision, I am inclined to the view that negligence of the next friend should afford a good ground for the purpose.

67. A reading of the relevant Indian decisions above referred to will show that they are ultimately based on the pronouncement of Sir R. Malins, V.C. in *In re Hoghton; Hoghton v. Fiddey* (1867) 18 Eq. 573. In that very case it was observed that an infant can be guilty of no negligence and cannot be answerable for the negligence of his next friend. No negligence can be imputed to an infant. It might very well be said that when a suit by a minor by his next friend is dismissed for default of the next friend due to the negligence of such next friend, the minor will always have a sufficient cause for non-appearance and will thus be entitled to have the order of dismissal set aside. The next question is to what extent this should be extended to the case of an idol which as a juristic person is from its very nature under perpetual incapacity to look after its own interests, if any. It is now well settled that an idol is recognized as a juristic person capable of being the subject of legal right and duty. But this is only in an ideal sense. In *Pramatha Nath Mullick v. Pradyumnakumar Mullick*, Lord Shaw in delivering the judgment of the Judicial Committee observed that:

A Hindu idol is according to long established authority, founded upon the religious customs of the Hindus and the recognition thereof by Courts of law, a juristic entity. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who

is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir.

68. His Lordship characterized this doctrine as firmly established. In this case their Lordships likened the deity to a human being. Their Lordships observed that:

The duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolizing the divinity, has in the eye of the law a status as a separate persona. The position and the rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the shebait custodian of the idol and manager of its estate.

69. Their Lordships quoted with approval what their Lordships termed "a useful narrative of the concrete realities of the position" from the judgment of Sir Asutosh Mookerjee J., in *Rambrama Chatterjee Vs. Kedar Nath Banerjee and Others*, , which in short shows that the deity is conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. Though the deity is likened to a human being, it is not clear whether the idol gets recognition as a possible subject of rights in its own interest or whether it is recognized because of the existence of some ultimate human interest of those benefited directly or indirectly by the debutter. The idol is recognized as a juridical entity, but its juridical personality is only the technical means of developing the juristic relations between the several human beings differently interested in the institution. The idol is the owner only in an ideal sense. Its enjoyment is an ideal enjoyment. The real material enjoyment and interest must ultimately be with some human being; otherwise it is difficult to see why law should concern itself with the matter. In *Jagadindra Nath Roy v. Hemanta Kumari Debi* ('04) 32 Cal. 129, their Lordships observed:

There is no doubt that an idol may be regarded as a juridical person capable as such of holding property though it is only in an ideal sense that property is so held....The possession and management of the dedicated properties belong to the shebait and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol.

70. It may be noticed that in this case the suit was not by the idol represented by its shebait but by the shebait himself as shebait in enforcement of his right as shebait. The right to sue accrued, to the plaintiff when he was under age and this saved the limitation. In AIR 1940 116 (Privy Council) their Lordships of the Judicial Committee observed that the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu law as essential thereto, e.g., that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait: *Nath*

Roy v. Hemanta Kumari Debi ("04) 32 Cal. 129. In Prosunno Kumari Debya v. Golap Chand Babu ("74) 2 I.A. 145 it was observed:

It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them.

71. Though an idol is thus recognised as a juristic person capable of suing and being sued, strictly speaking, it has no material interest of its own. The efficient subject of the rights ascribed to an idol must ultimately be some human beings. It must be they who enjoy such rights and if law protects such rights it is because of the existence of such ultimate human concern. The idol as the juridical person only affords the technical means of developing the juristic relations between those ultimately interested in the endowed property and the strangers. The so-called interest of the idol is merely an ideal interest very different from the interest which an infant has in his property. The introduction of the idol and its recognition as a juristic person are more a matter for the procedure and the procedure in India recognises the idol as having a locus standi in judicio: AIR 1940 116 (Privy Council) . The real material interest and enjoyment lie with some human beings. It is the concern of these interested persons to see how best they will protect and preserve their interests and in this respect when the properly represented idol is brought before a Court of law that proceeding is more analogous to the one brought by a few persons representing a multitude under Order 1, Rule 8, Civil P.C, than the suit by a next friend in the name of an infant, for the protection of that infant's own interest. Negligence of the person or persons representing the idol (or more correctly, the interest of the ultimate multitude having interest in the endowment) should not be available for the purpose of avoiding the result of that litigation: AIR 1937 1 (Privy Council) .

72. As I have held that the present suit is not in respect of the same cause of action as the Title Suit No. 196 of 1933 and that the idol was not properly represented in that suit, Order 9, Rule 9, Civil P.C. is no bar to the present suit. The appeals, therefore, fail on this ground and I agree that they should be dismissed.