

Privy Council Appeal No. 81 of 1924.

Patna Appeal No. 17 of 1923.

Niladri Sahu - - - - - *Appellant*

v.

Mahantan Mahant Chaturbhuj Das and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1926.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD ATKINSON.

MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a decree of the High Court of Judicature at Patna, dated the 17th March, 1923, dismissing an appeal from a decree of the Subordinate Judge of Cuttack, dated the 28th February, 1922, who in a suit for sale on a mortgage had passed a money decree only against defendant No. 1, but had, in other respects, dismissed the plaintiff's claim.

The defendant, the mortgagor, is the Mahant of the Muth of a Thakur or deity of the Vaishnavites called Sri Jagannath Mahaprobhu at a place called Puri. It includes a temple with idols in it. The defendant, with, as it is alleged, the view of increasing the income of the Muth, built as an addition to it a lodging house, where Rajahs and other rich devotees visiting the Muth might obtain during their visit comfortable lodgings, and built in addition a large hall where food might be supplied to those devotees who might visit the Muth and worship at it.

The revenue of the Muth, though sufficient to meet the ordinary expenses of the worship in it, was insufficient to meet in addition the cost of the construction, maintenance and management of these new buildings. The defendant was accordingly, from the year 1891 downwards, obliged to borrow from time to time from moneylenders on notes of hand, setting forth the purpose of the loans, various sums of money, bearing interest at Rs. 2 per mensem or more. The actual sum expended on the construction of these pucca buildings, as they were styled, only amounted to Rs. 9,337, so that the outlay could not be considered to have been of an extravagant character. Owing, however, to the very high rate of interest charged by the lenders, the defendant's indebtedness to these latter amounted by November, 1906, to the large sum of Rs. 25,000. To meet this indebtedness, the defendant, the Shebait, on the 6th November, 1906, borrowed from the plaintiff the sum of Rs. 25,000, bearing interest at a rate only equal to one-half the rate he had been paying on the loans obtained from moneylenders, namely, 1 per cent. per mensem, and in order to secure the repayment of this loan and the interest accruing upon it, he gave to the plaintiff a mortgage of certain properties which were at the time, and still admittedly are, debottor properties belonging to the Muth, and not to any extent or in any respect the properties of the defendant. These properties are enumerated and described in a schedule attached to the mortgage deed.

As the defendant, on some very unconvincing excuse of illness, obstinately refused to appear as a witness at the trial of this case before the Subordinate Judge at Cuttack, or to examine any witness on his own behalf, or to produce his books, though he had been summoned to produce them, it becomes necessary to extract from the mortgage deed a lengthy extract detailing what was the defendant's real action and what were his objects in undertaking to build a pucca building of the manner described. As he executed the mortgage deed, he must be bound by this narrative, despite his embarrassing refusal to give evidence, to examine any witness in his behalf, or to produce his books, which of all things were of the most importance, as they must have shown how much of the borrowed monies was spent in building the pucca houses and how much on the ordinary service of the Muth.

The extract referred to runs as follows :—

That ere this I had borrowed money from several *mahajans* for the *amritomonohi* expenses of Shree Jagannath Mahaprabu, for the *seba* and *puja* of the *Thakur* in Barsanth Muth in my *marfaldari* situate in Markandeswar Sahi, Town Puri and to meet other necessary and legitimate expenses in connection therewith. Being unable to pay the principal and interest and being in urgent need of money to preserve Muth properties, to increase the profits accruing therefrom and to improve the condition of the said Muth, I borrowed Rs. 20,000 by a registered bond dated the 18th July, 1902, from Bhikari Misra and others, of Markandeswarsahi, Puri, in order to pay off the aforesaid legitimate debts and to build the Pucca one-storied and two-storied buildings and lodging houses, etc., of the Muth. With that amount I paid off the debts heretofore contracted for the legitimate expenses of

the Muth and the balance I spent for the Pucca buildings and Cutcha houses of the Muth and for the *amritomonohi* expenses of Shri Jagannath Mahaprabu and the *Thakurs* of the Muth. Being unable to pay regularly the interest of Rs. 300 a month due on the said sum of Rs. 20,000 and to pay off the principal and interest, though repeatedly called upon by the creditors, I requested you to lend money. As you agreed to lend me Rs. 25,000 at a low rate of interest, *i.e.*, at Rs. 1 p.c. p.m. for the *Thakurs*, I have thought of paying off the principal and interest due on the said registered unsecured bond dated 18th July, 1902. As the said amount was borrowed for the *Thakurs* and for the preservation and improvements of the properties of the *Thakurs*, I hereby mortgage to you the properties of the *Thakurs* as security for payment of the amount which I borrow from you. To pay off the said principal and interest the *Thakurs*, the Muth and I personally remain liable. On the aforesaid terms I take loan of Rs. 25,000 in cash from you and as to security for payment of the principal and interest I mortgage to you the entire Mouza Duaypur *amritomonohi lakhraj*.

It contains also a personal covenant by the defendant, in the following words, to pay the mortgage debt and the interest thereon. It will be found at p. 16, Part III, line 14, and runs thus. "I hereby execute this mortgage bond of my own free will and accord without being influenced by others, and agree that I shall p.m. pay the principal of R. 25,000 and interest thereon at 1 per cent. within one year from this date, and redeem the mortgaged property and take back this bond." The properties comprised in the mortgage are enumerated and described in great detail in the schedule annexed to this instrument. They include amongst other kinds of property the two entire Mouzas of Durgapur, 288·36 acres in extent, and include also some land rent free and some let to tenants, and also the entire Mouza Barudi, 644·17 acres in extent. They include a great number of homesteads, of houses, gardens, miscellaneous crops and some waste land, etc., etc. The plaintiff on the 23rd December, 1920, instituted in the Court of the Subordinate Judge of Cuttack the suit out of which this appeal has arisen, claiming to recover from the defendant the sum of R. 43,114-10-8 due to him for principal and interest under the mortgage deed and praying that a decree might be passed directing the defendant to pay the said sum to the plaintiff within the time prescribed by the Court.

It will be observed that this is entirely a personal claim against the defendant to pay the debt he owes and has covenanted to pay, and the remedy prayed for is a personal remedy against him, worthless most probably to the plaintiff. The plaintiff then prays for alternative relief in the following paragraphs :

(Kha) That if the defendant 1 does not pay the decretal amount, etc., within the prescribed time or deposit the same in the Court, his right to redeem the mortgaged properties be forfeited and the decree be made final and the mortgaged property be put up to sale and out of the sale consideration the plaintiff may be paid the decretal amount, etc.

(Ga) That if the sale consideration of the mortgaged property be found insufficient for the satisfaction of the decretal amount, etc., due to the plaintiff, the Court may be pleased to pass a decree awarding the balance to the plaintiff from defendant 1 and the other moveable and immoveable properties of Barasanth Math.

(Gha) That the Court may be pleased to pass a decree awarding the plaintiff such other relief as he may be deemed entitled to in the justice of the Court.

To this plaint the defendant, the Shebait, filed a long written statement signed by his agent. It begins with the assertion that the plaintiff's claim is wholly false and fraudulent. It contains many statements directly contradicted by the contents of the mortgage and other written documents to which the defendant has put his hand and by which he obtained the loan of the money sued for. It is, on the whole, a mean and mendacious production, and it is not to be wondered at that no witness was put forward, or possibly could be found, to give evidence in its support. On these pleadings several issues were raised. Of these the following five, with the answers to them, are alone relevant.

1. Is the suit bad for defect of party?

Finding, First Court: Yes.

Appellate Court: No.

2. Was the bond in suit executed for legal necessity and benefit of the Thakur (god)?

Finding of both Courts: Not for legal necessity.

3. Were the alleged debts preceding the bond in suit for legal necessity and benefit of the idol?

Finding of both Courts: Not for legal necessity.

4. Is the plaintiff entitled to a mortgage decree?

Finding of both Courts: No.

5. To what relief is the plaintiff entitled?

Finding of both Courts: Only a personal decree against the defendant.

The main defences relied upon by the defendant, as the Shebait, were that—

15. There was no legitimate and legal necessity for borrowing the amount of the bond in suit. The said bond is wholly inoperative and invalid according to law against the *amrutamonhai debottor* property and the Thakur.

23. The acts of the defendant 1 were not the acts of a prudent manager of the *debottor* property, and by his acts the *debottor* properties have been ruined and wasted and the debts have swelled. No improvement has been made of the Muth or of the *amrutamonhai* property.

Had he been examined and properly cross-examined he must have either disproved these allegations in whole or in part; or if he came into the witness box he must have admitted that these pucca buildings were wholly useless and of no benefit to the Muth, though for nine or ten years he had continued to construct them, or that they were—some of them actually within the Muth—part of the Muth and were functioning wholly to the benefit of the Muth in the way he had hoped, designed and intended they should function; and if he admitted this latter, he would then, if properly cross-examined, have been required to explain upon what principle of justice or equity, when they functioned in the way above mentioned, he refused to pay the man whose money built or helped to build them—the money had been lent him. His excuse for not coming forward as a witness in obedience to a summons

served upon him was that he was ill, of what disease he did not say. No medical evidence was given to support that excuse. But his books were not ill. They must have shown how the money borrowed by him had been applied, how much of these loans had been expended for building the pucca houses, and how much, if any, for the services of the idol and the general expenses of the temple. It certainly looks as if the design of the defendant was not to have this case decided on a full examination of all the relevant actual facts involved in it, but to keep from the knowledge of the judicial tribunals all the relevant and decisive information touching the enterprise from which the action springs. In the result, as might have been expected, not a particle of evidence was produced to prove any one of the allegations of fact contained in these defences. It would appear to their Lordships that this case proceeded as if, in some degree, all the loans discharged by the Rs. 25,000 lent on the mortgage had been spent in constructing the pucca houses. This is an entire mistake. Fortunately, in the interest of justice, the plaintiff has been able to secure several documents dealing with several of these loans. These documents, 13 in number, will be found in the Appendix, Part III, from page 2 to page 13, inclusive. Two of them, bonds dated the 28th March, 1891, and 23rd March, 1895, deal with loans expressed to be contracted to pay for the amritomonohi expenses and "my" (*i.e.* the defendant's) Muth, and both are signed by the defendant.

A bond, dated the 25th June, 1896, deals with a loan of Rs. 1,300 to meet the daily amritomonohi of the Muth and to purchase stones, wood, bamboo, and other materials. This bond and all the following are signed by the defendant. The next is dated the 28th August, 1897. Its opening sentences are worth repeating. They run thus: "Being in need of money to pay the cost of the timber and fees to the Raja of Baramba for making beams, etc., for the pucca building which I am constructing on the Sadar Danda of the Muth, I borrowed ere this from your Stridhan through your husband on the 9th June of the current year Rs. 200, on the 30th Rs. 200, on the 3rd July Rs. 82, and on the 24th July Rs. 200. Being in further need of money for current expenses, I take loan from you of Rs. 318 in cash out of your Stridhan through your husband." Another bond, dated 28th August, 1897, sets out that on the 25th June, 1897, Rs. 200 were borrowed on a registered bond, that being in further need of money to meet the cost of litigation and the daily amritomonohi expenses, the defendant borrows an additional sum of Rs. 1,000 at interest at Rs. 2 per cent. per mensem. On the 19th September the defendant executed a bond borrowing Rs. 3,000, being in need of money to construct pucca buildings of the Muth, and to meet amritomonohi expenses. On the 9th November, 1900, the defendant borrows Rs. 900 at 3 per cent. per mensem, "being in need of money to construct pucca, etc., of "my" (*sic*), Muth and to carry on the Bhog, etc., of Shree Jagannath Mahaprobhu."

On the 3rd December, 1900, the defendant borrows Rs. 2,500 on note of hand for expenses the same as those last mentioned, and on the 28th of the same month the defendant executes a bond for the loan of Rs. 470 for amritomonohi expenses of his (*sic*) Muth and the construction of pucca buildings. On the 26th January, 1901, he borrowed on bond Rs. 200 for the necessary expenses "of my (*sic*) Muth." On the 18th July, 1902, the defendant signs a document enumerating the sums he had borrowed up to Rs. 4,900 for the purpose of carrying on the amritomonohi expenses of Shree Jagannath Mahaprobhu, and for the construction of the pucca building and the kachha dilapidated houses of the Muth, as well as other legitimate expenses, and then takes a loan of Rs. 8,808 which, together with the enumerated sums, brings up his indebtedness to Rs. 20,000, for which he signs a bond.

These details are in agreement with the statements of the defendant, contained in the mortgage deed of the 6th November, 1906. As to the various sums secured by bond for which he admits he was indebted, the plaintiff was examined on his own behalf and cross-examined at considerable length. Three additional witnesses were also examined on his behalf. The plaintiff proved that the defendant borrowed the sum of Rs. 29,000 from him, Rs. 25,000 of which was secured by the mortgage bond and Rs. 4,000 by a single bond. This sum of Rs. 29,000 was, he said, paid over to Bhikary Misra, a former creditor of the defendant; that he, the plaintiff, made inquiries about these loans, which his money satisfied, and learned that the money borrowed was used to pay for the pucca buildings and for the expenses of amritomonohi or Jagannath Jee's services, and that the pucca buildings were situated ten Bakhray towards the southern side of the Muth. The Baisnabs are fed there, he said, on the festal occasions of Jagannath and Markanda; that one of the stone houses was built near the temple of the Thakur; another house, the Kachha house, was built inside the Muth, where the Baisnabs and pilgrims stayed. The pucca two-storied house, he said, was built for the Raja disciples of the Muth. The Baisnabs, he says, stay there during Dol and Gundicha occasions of Jaganna Deo. Barakhendi and Bavamba Rajas, he says, lived in the two-storied house, that he saw them there, that he lived there for fourteen or fifteen years, and lives at present in a house only 200 cubits off the Muth, that he asked the defendant to produce the papers. He says he lived near the Muth from his childhood. He says he inspected the jama kharach books from 1891 or 1892 to 1902 or 1903. They contained, he said, the income and expenditure of the Muth from all sources, including borrowings. He said the borrowings were entered, and the previous tahabil was almost nil, and he saw the expenses of the several necessities day by day. Afterwards 10 Bakhras houses, he said, were built in 1892 or 1893, the two-storied house in 1895 or 1896, the kachha house in 1898 or 1899. He says that before these years Baisnabs came and lived and were fed in houses that got broken in the meanwhile. He states positively that the

defendant, the Shebait, said that Maharajas and Rajas gave properties to himself and to the Muth. The evidence of the other witnesses corroborates this, and is consistent with that of the plaintiff.

Nothing of importance was elicited from these witnesses on cross-examination. It appears to their Lordships that the fair inference to be drawn from this uncontradicted evidence, coupled with the mortgage and the bonds already referred to, is that the building project which the defendant promoted has been successfully effected by the use of a portion of the monies borrowed by the defendant; that it has been completed in great part if not entirely; that it is functioning as contemplated by its author; that the Muth is to a great extent benefited by it, in that worshippers are more numerous and of a richer class than theretofore—visited the Muth for devotional purposes, attracted presumably by the increased and more civilised accommodation the new buildings afford.

Their Lordships think that this evidence completely refutes the statements of fact upon which the main defence put forward by the defendant rests.

A partition suit was instituted between the plaintiff and his brothers, and the brothers were consequently made formal defendants in this suit, the real defendant who contracted the loan being styled defendant No. 1; but the Sub-Judge, quite properly, put the claim for partition aside, and the Shebait was therefore referred to as the defendant No. 1. This learned Judge, in delivering judgment, said: "When it is clear that the properties (*i.e.*, the properties mortgaged) do not belong to the defendant No. 1, but to the Thakurs, and when the bond in suit was not executed by the defendant No. 1 in his capacity as *marfatdar* of the Thakurs, and if when the decree is to be passed against these properties it is only necessary that Thakurs should have been parties to the suit and should have one opportunity of refuting the allegations of circumstances made by the defendant No. 1 personally, which made the bond to all intents and purposes obligatory upon them. Thus the Thakurs are necessary parties to this case." He said he thought the objection fatal to the suit, and decided that it should stand dismissed.

The Sub-Judge then proceeded to say that after this finding he was not called upon to decide upon the other issues raised in the case, and then proceeded to express himself thus:—

But as I have recorded evidence I think it would not be amiss if I make findings on them. The necessities alleged are building expenses of the Muth, *amrutamunahi* expenses and feeding of Sadhus. Pucca buildings were made where there were Kacha sheds and a two-storied building added to the Muth for Moharaja and Raja disciples. There is no evidence that Kacha sheds would not have done for old dilapidated sheds of that nature.

There is no evidence also that Moharaja and Raja disciples of the Math refused contributions to the Math without a two-storied building. In fact, in my opinion these were not necessities at all but were raised to show to people that the Math is a rich and big Math. In these circumstances these buildings cannot be regarded as necessities of the Math. Then as regards

Amritamonohi expenses, the defendant No. 1 fell short of his fund for *Amritamonohi* purposes as all the money of the Math cannot be absorbed in the *pucca* buildings erected, which was done to satisfy either his own vanity or for speculative purposes. The shortage of *amritamonohi* expenses therefore cannot come under the head of legal necessity at all. Besides there is no evidence to fix the amount of the *amritamonohi* expenses borrowed. As for expenses for feeding Sadhus for the same reason cannot come in the category of legal necessity. There is also no evidence to fix the exact amount of it.

It did not occur to the learned Judge that but for the convenient illness of defendant all the information he desired could have been supplied to him by the opportune invalid. He then proceeds to add that after making the order he consulted the pleaders, and was convinced by them of what would be apparent to the merest tyro in the profession—that a personal decree should be made against the defendant for money only.

The High Court point out that the Sub-Judge had decided in favour of the plaintiff that the suit was not barred by limitation, and that this finding was not challenged before them, but that he did decide questions 1, 2, 3, 4 against the plaintiff on the ground that the Thakurs were necessary parties, and not having been impleaded, the suit was defective; that there was no legal necessity for the loan to the Thakurs so as to entitle the defendant No. 1 to mortgage the properties in question; and that the loan did not in any way benefit the Thakurs. The learned Judges in the High Court held that it was obvious that defendant No. 1 was sued in his representative capacity, and that therefore the deity was not a necessary party, and that the Subordinate Judge's decision on that point was erroneous.

These learned Judges, after referring to the several debts mentioned in the mortgage bond, which the borrowed money, Rs. 25,000, was applied to liquidate, set forth the grounds of their decision in the following passages of their judgment. Referring to the plaintiff's evidence, they say :

“The most important of these necessities is said to be the construction of *pucca* buildings. It is said by the plaintiff that the *pucca* two-storied buildings were required for the Raja-disciples of the Math, such as Raja of Baramba and Barakhemdi and during the *dol jatra* and *Rath Jatra* occasions these buildings are used for the putting up of Vaishnavas. One two-storied building, the plaintiff says, was built as the temple of the Thakur. One *kuccha* house was also built inside the Math where Vaishnavas and pilgrims stay. In cross examination he says that he heard from defendant No. 1 that the Maharajas and Rajas gave properties to himself and to the Math. From this it is argued that the aforesaid buildings were necessary for the comfort and convenience of the disciples of position of the Math and possibly that might increase the offerings made to the deity and thus the buildings were calculated to increase the income of the property. The learned Subordinate Judge says that there is no evidence that the Maharaja and Raja disciples of the Math refused contributions to the Math without a two-storied building and that these buildings were not necessities at all but were raised to show to people that the Math was a rich and a big Math. It may have been desirable or even commendable on the part of the Mohant to construct such luxurious buildings for the comfort and convenience of the Raja-disciples if

this could be done out of the savings of the income of the Math properties. But the construction of such buildings cannot be considered to be such pressing necessities as to justify the construction of them by raising loans. The actual loan taken from 1891 up to 1906 to meet the necessary *Amrut-monohi* expenses and the construction of the *pucca* buildings amounted to about Rs. 9337 and the interest even after payment from time to time swelled the amount of the loan to Rs. 25,000, for which the bond in suit was executed. In the previous loans the exorbitant rate of interest such as Rs. 3-2, Rs. 2/- was stipulated for. Where was the necessity for borrowing at such high rate of interest? The considerations for the loan look very much like speculations, and howsoever advantageous it may be the Mohant was not entitled to launch into such speculations by borrowing money at high rates of interest. Therefore the construction of buildings in question was not a pressing necessity for which the Shebait, defendant No. 1, could mortgage the properties of the Thakur at high rates of interest. The daily expenses of the Math as well as the *Amrutmonohi* may have been necessary, but in order to show whether there was necessity to meet these expenses by borrowing, it was incumbent upon the plaintiffs to show that the income of the Math was not sufficient to meet these necessary expenses. The plaintiffs no doubt summoned the defendant to produce accounts of the income and expenditure of the Math, but they ultimately failed in this attempt. No doubt inference adverse to the defendant may be drawn from this fact, but the plaintiff's witnesses pose themselves to be acquainted with the ins and outs of the Math; some of them live very close and say that they saw the *Jam Kharach Bahis* and also satisfied themselves as to the necessity of the loan. It is, however, strange that none of them can give any idea of what the income of the properties was.

* * * *

The failure of the defendant No. 1 to produce the account books does not very much affect the issues in hand inasmuch as it is not denied, and in fact it has been proved that the money was taken for the purpose of constructing the Pucca structures for the Raja disciple and for the Sadhus. The question is not solved by the establishment of that fact alone. It has further to be proved that they were the dire necessities of the time and could not be postponed and that loan must necessarily have been taken to meet them. I therefore agree with the learned Subordinate Judge that there was no legal necessity for incurring the loans in question.

I also agree with the learned Subordinate Judge when he says that the buildings were constructed only to satisfy either the vanity of the defendant or for speculative purposes.

Their Lordships cannot, in the evidence, find a single particle to support this latter allegation. It has been already demonstrated that the money borrowed by the defendant was not used solely for the purpose of building pucca houses. Had the defendant given evidence as a witness or produced his books, it would probably have been possible to have ascertained what was the amount of the portions of the loan devoted to building purposes and what to the requisite services of the Muth, and that the plaintiff might reasonably be paid in respect of these latter, but that is not the nature of the defence of the defendant. He first shuts up all avenues through which information could be obtained, and then, because the plaintiff does not make the decision the defendant has made it impossible for him to make, the plaintiff is to be paid nothing. There is another matter. Pucca buildings are situated in part in the Muth; they are used by the Muth authorities as their own; they are functioning as they were intended to. The

defendants and the worshippers use, occupy and enjoy them, but will not pay for them. One could understand razing them to the ground because they were worthless and then refusing to pay for them, but to refuse to pay and yet keep them and use them is a gross injustice and a most unworthy act.

The learned Judges of the High Court appear to their Lordships to be rather of opinion that the procurement of a loan of money on easy terms for the purpose of paying off antecedent loans obtained on very oppressive terms can never, in a case of this character, be held to be a necessary proceeding unless the obtaining of the oppressive loan was, at the time it was obtained, a matter of necessity also.

If these learned Judges held that view, their Lordships cannot agree with them. The case of *Prosunno Kumari Debya v. Golab Chand* (2 I.A. 145) was decided by a Committee of the Privy Council, composed of Sir James Colvile, Sir Barnes Peacock, Sir Montagu Smith and Sir Robert Collier. The respondent obtained two decrees against the former Shebait of an idol upon the latter's bonds for the repayment of moneys alleged and found to have been borrowed for the service of the idol and the expense of the temple. Both decrees directed that the debt should be paid by the Shebait personally, or else realised from the profits of the debottor lands.

The appellants were the two succeeding Shebaites of the idol. They instituted a suit to set aside these decrees and to have the debottor property released from the attachment issued in execution of the decrees. It was held that the decrees, being untainted by fraud or collusion, as they were held to be, and having been passed after the necessary and proper issues had been raised and determined, were entitled to the force due to judgment of competent Courts, and were binding on the succeeding Shebaites who were continuing representatives of the idol's property. Sir Montagu Smith, in giving judgment, first pointed out that the case did not come before the Council by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside. He then stated the facts of the case. This Raja Baboo, the appellant, the former Shebait, was, he said, a man of profligate habits, and having spent the income of the debottor property on his own pleasure, borrowed Rs. 4,000 from the respondent to repay the expenses of the idol and of repairing the temple. As security for this advance, he gave a bond to the respondent, and also a vahinama, by which he pledged the debottor property for the payment of the money. In both securities it was stated that the money was needed for the services of the idol and the expenses of the temple. The Judge of the Zillah Court of Dacca gave a decree for the respondent, having found that the money had been borrowed and expended for these purposes, but that the specific pledge of the property could not be enforced, that a decree founded on the bond for the money lent might be given, to be realised out of the debottor lands, and he framed the decree. Their Lordships held that they were only sitting to determine the

operation and effect of the two decrees as they stood, not whether they were right or wrong on questions of law or fact, and approved a decree in the form suggested. But the learned Judge did not lay down this proposition: that though property devoted to a religious purpose is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the Shebait of property dedicated to the worship of an idol, in his capacity as Shebait and manager of the estate, to incur debts and borrow money for the purposes of expenses in keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur debts must be measured by an existing necessity for incurring them.

The importance of this case in its application to the present consists in this, that it was the immediate, not the remote, cause, the *causa causans*, of the borrowing which has to be considered. The immediate cause of the borrowing was the Muth's need of money to carry on and pay for its services. The remote cause of the Muth's need was due to the profligate expenditure of the Shebait. It would have been no answer to the creditor's suit to say, "Oh, your money was only borrowed because the income of the Muth was spent, by a profligate Shebait, and there was no money available to carry on the services of the Muth." So in the present case. Even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which, by the way, has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which these earlier loans were made imposed upon him. It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case of *Prosunno Kumari Debya v. Golab Chand* (*supra*) applies to this case. They therefore think the appeal succeeds, that the judgment appealed from was erroneous and should be set aside, and that a decree should be pronounced in the form adopted in this latter case, declaring that the debt should be paid by the Shebait personally or else realised from the profits of the debottor property.

The case should be remitted to the High Court with the following direction, viz. :—

That the High Court should make a personal decree against the defendant for the payment of the debt within a specified time, and on his failure to pay, to direct an enquiry to be held by the Court of the Subordinate Judge as to the sums legitimately attributable to the endowment under the Hindu law, and a Receiver should be appointed to realise the rents and profits of the debottor estate, and the Shebait's share, after payment of a maintenance allowance to be fixed by the Court, should be allocated for the payment of the plaintiff's debt.

Their Lordships will humbly advise His Majesty accordingly. The first respondent will pay the costs of the appeal.

In the Privy Council.

NILADRI SAHU

v.

MAHANTAN MAHANT CHATURBHUJ DAS AND
OTHERS.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.
1926.
