APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

SUNDARESAN CHETTIAR (PLAINTIFF), APPELLANT, 1922, March 14.

v.

VISWANADA PANDARA SANNADHI AND ANOTHER, RESPONDENTS (DEFENDANTS AND SUPPLEMENTAL APPELLANT IN THE LOWER APPELLATE COURT). *

Religious endowment—Trustee of a temple borrowing for temple purposes without creating a charge—Decree charging temple funds, legality of—Civil Procedure Code (V of 1908), O. XXII, rr. 3, 10—Amendments and new pleas—Discretion of Court in allowing.

A trustee of a temple borrowed monies for purposes of the temple, promising to repay the same out of temple funds but did not create a charge thereon;

Held that in addition to a personal decree for the amount borrowed, the creditor was entitled to a decree charging the temple funds: *Lakshmindrathirtha Swamiar* v. *Raghavendra Rao*, (1920) I.L.R., 43 Mad., 795, followed. *Swaminatha Aiyar* v. *Srinivasa Aiyar*, (1916) 32 M.L.J., 259, *Strickland* v. *Symons*, (1884) 26 Ch.D., 245, and *In re Johnson. Shearman* v. *Robinson* (1880) 15 Ch.D., 548, distinguished.

In cases falling under rule 10 of Order XXII, Civil Procedure Code, the Court has a wider discretion than in cases falling under rule 3, to allow amendments and new pleas to be raised to avoid multiplicity of suits, provided the character of the suit is not thereby changed and the opposite party is not prejudiced: *Venkatarama Rao* v. *Venkatalingama Nayanim*, (1922) 15 L.W., 72, distinguished.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Tanjore, in Appeal Suit No. 232 of 1918, preferred against the decree of P. S. SESHA AYYAR, the Subordinate Judge of Māyavaram, in Original Suit No. 67 of 1915.

* Second Appeal No. 913 of 1920.

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The facts are set out in the judgment.

Plaintiff preferred this Second Appeal.

T. V. Muthukrishna Ayyar and *N. Muttuswami Ayyar* for appellant.

S. Ranganadha Ayyar for respondent.

KRISHNAN, J.

KRISHNAN, J.—This Second Appeal arises from a suit brought by the plaintiff against the late Pandara Sannadhi of Vedaranniyam Devastanam for money due on a bond executed by him to plaintiff's deceased grand-uncle. Plaintiff claimed a decree against the defendant personally and against the trust funds, as he alleged that the money was borrowed for devastanam purposes. The defendant raised several pleas which are not material now but did not set up any plea that the debt was not binding on the devastanam properties.

The Subordinate Judge decreed the suit as brought in plaintiff's favour and gave him a decree for payment by the defendant personally and out of the temple funds. The Pandara Sannadhi appealed and, besides raising objections to the findings of the trial Court, pleaded that he was not in any event personally liable. He did not specifically object to the liability cast on the temple properties. Pending this Appeal the Pandara Sannadhi was removed from office in another suit and the contesting second respondent before us was appointed Receiver of the temple properties. He was added as party appellant on his own motion, and he asked leave of the Court to file a new ground of appeal, viz., that the temple funds were in any event not liable for the bond amount. Leave was given on condition that the point was to be argued as a pure question of law, whether in the absence of an express charge on the temple property for the bond amount such property could be made liable. No

question of fact was to be raised and it was to be conceded that the borrowing was for temple necessity and within the powers of the trustee, and that by the contract of borrowing itself it was arranged that the debt was to be paid from the trust funds. These conditions were accepted and the new ground was allowed to be raised. There is no question now before us whether these conditions should have been insisted on; having accepted them, it is not open to the Receiver now to go back upon what he did, and ask for a trial on facts on the point. For the purpose of this Second Appeal, we must take the point set out above as the basis of our decision, even though it is not very clear from the terms of the bond that the repayment of the whole debt was to be made from the temple funds.

The learned District Judge has held that whatever the nature of the debt and of the contract regarding it might be, no decree could be given against the trust property because no express charge had been created on that property by the trustee, and he relies on *Swaminatha Aiyar* v. *Srinivasa Aiyar*(1) as the authority for his view. It is urged by the appellant plaintiff that this view is not right.

Before considering that point, it is necessary to consider the objection that the lower appellate Court should not have allowed the new plea to be raised in Appeal by the Receiver who had been added as the legal representative of the Pandara Sannadhi when it had not been raised in the suit or in the grounds of Appeal by the latter. In support of this contention *Venkatarama Row* v. *Venkatalingama Nayanim*(2) is relied on. That was a case under Order XXII, Rule 3, Civil Procedure Code. It was no doubt ruled there

(1) (1917) 32 M.L.J., 259. (2) (1922) 15 L.W., 72.

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that a legal representative could only ask for such amendment as the deceased, or the person whose representative he is, could have asked for. It is not necessary to express an opinion whether this rule should be strictly followed in all cases under Rule 3 or whether there is not a discretion left in the Court to allow further amendments; for it may be pointed out that the present case is one where an institution is represented at different stages of the suit by different representatives, one not claiming under the other and the rule applicable is Rule 10 of Order XXII and not Rule 3. In such a case the Court must be held to have a wider discretion to allow amendments and new pleas to avoid multiplicity of suits, provided the character of the suit is not changed and the opposite side is not prejudiced and the trial embarrassed. Such difficulties do not arise here.

But even if we assume that the rule laid down in the case cited strictly applied to the present case, the leave to raise the new plea under the conditions insisted on was not improperly given; for it was open to the Court to allow the Pandara Sannadhi himself to raise such a plea on Appeal as a pure question of law. The objection therefore fails and must be overruled.

Turning now to the main question argued, whether in the absence of an express charge on the temple properties a decree could be given against such properties or not, it seems to me the learned District Judge's view that it could not be given is not correct on the facts of this case. He has based his judgment entirely on *Swaminatha Aiyar* v. *Srinivasa Aiyar*(1) which I am inclined to think is not properly applicable here. In that case, though the debtor was a trustee and the loan was intended and utilized for the benefit of the trust the only contract between him and the lender was

(1) (1917) 32 M.L.J., 259.

contained in a promissory note pledging only his personal credit for the debt. The learned Judges say that he (the creditor) did not obtain any charge on the property but only a promise on the part of the debtor to repay the debt. In other words, no obligation had been imposed on the trust funds either by contract or by deed of charge. They do not, however, consider the position where a trustee acting within his powers of borrowing for necessary purposes of the trust has created by his contract a right of resort to the trust funds for repayment of the debt, which is the case before us. The English cases cited, *Strickland* v. *Symons*(1) and *In re Johnson. Shearman* v. *Robinson*(2), the observations in which are relied on by the learned Judges, do not seem to be in point here. The first was a case where a trustee carried on the business of a lunatic asylum when the marriage settlement which created the trust only authorized the sale of it for the benefit of the wife and children of the settlor. He had borrowed moneys for the business but the carrying on of the business itself was unauthorized. The trustee therefore could not have validly borrowed on the credit of the trust funds and had not purported to do so. In such a case, as the Lord Chancellor, the Earl of Selborne, points out,

> "There is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property."

There was in that case

> "no dedication or application of the trust property to trade purposes and no provision that the business was to be carried on by the trustee"

as the Lord Chancellor says. These observations obviously do not apply to a case like the present where the head of a temple having to carry on, in the proper

(1) (1884) 26 Ch.D., 245. (2) (1880) 15, Ch.D., 548.

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discharge of the duties of his office, the worship in the temple, finds himself without the necessary funds to do so and borrows with an express stipulation that the creditor should be repaid from the temple properties. The second case referred to by the learned Judges *In re Johnson. Shearman* v. *Robinson*(1) was one of an executor under the will of a trader, who was directed to carry on the trade employing a specific portion of the estate for the purpose. He had incurred debts in the course of that trade and for trade purposes. It was not disputed that he, the executor, was personally liable for those debts, the argument being only that as he was entitled to be indemnified from the estate of the testator ear-marked for the trade, the creditors could also have direct recourse to such assets for payment of their debts. JESSEL, M.R., held that the creditors were only entitled to stand in the place of the executor, as the debts were created on his personal responsibility, and claim payment from such assets only when the executor himself is not in default and is entitled to the indemnity. This is the principle of subrogation which obviously cannot be availed of without reference to the state of the account between the trustee and the *cestui que trust*. That case again seems to have no bearing on the case before us.

On the other hand, there is a recent decision of this Court in *Lakshmindrathirtha Swamiar* v. *Raghavendra Rao*(2) which is in point. There, as here, the debt was incurred by a Pandara Sannadhi, the head of a Mutt, who is necessarily a sanyasi, and for purposes binding on the mutt. There was no charge on the mutt properties. It was nevertheless held that those properties could be held liable for the debt. There was no evidence there that the debt was borrowed on the credit

(1) (1880) 15 Ch.D., 548. (2) (1920) I.L.R., 43 Mad., 795.

of the mutt properties as we should take it there is in the present case ; the learned Judges, however, presumed it from the fact that the trustee was a sanyasi. It is not necessary to decide whether we should follow them in raising that presumption, for here we have proof that it was arranged that the debt was to be met from the mutt funds. But it is an authority for holding that for a debt properly borrowed on the credit of mutt funds mutt properties can be made liable and to that extent I am prepared to follow it, though I should not be taken as concurring in all the observations of the learned Judges.

We have again *Srimath Dairasikamani Pandarasannadhi* v. *Noor Mahomed Routhan*(1) where a decree was given against mutt properties for the price of articles purchased by the matadhipati for the use of the mutt. There was no question raised there that the purchases were on the personal credit of the matadhipati, on the other hand I think it was assumed that the purchases were on the credit of the mutt funds. The learned Judges refused to follow the rule as to executors, and pointed out that the powers of a trustee or manager of a temple in borrowing were similar to those of a guardian of an infant heir, following the observations of the Privy Council in *Konwur Doorganath Roy* v. *Ramchander Sen*(2). A debt incurred for the purpose of carrying on the worship in the temple is clearly for a necessary purpose and is in my opinion recoverable from the temple funds. Though doubt has been thrown on the correctness of *Srimath Daivasikamani Pandarasannadhi* v. *Noor Mahomed Routhan*(1) in *Swaminatha Aiyar* v. *Srinivasa Aiyar*(3), above cited, it has been followed by SPENCER, J., in *Lakshmindra*

(1) (1908) I.L.R., 31 Mad., 47. (2) (1876) 4 I.A., 52.
(3) (1917) 32 M.L.J., 259.

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Thirtha Swamiar v. *Raghavendra Rao*(1) and I am also inclined to follow it where the debt is not incurred purely on the personal liability of the debtor.

For the above reasons I would set aside the decree of the District Judge and restore that of the Subordinate Judge with costs here and in the Court below payable out of the temple funds.

AYLING, J.—I agree.

N.R.

APPELLATE CIVIL

Before Mr. Justice Spencer and Mr. Justice Ramesam.

1922, March 1917

PANADAI PATHAN AND ANOTHER DEFENDANTS 2 AND 6), APPELLANTS,

v.

RAMASAMI CHETTI AND THREE OTHERS (PLAINTIFFS AND DEFENDANTS 7, 3 AND 4), RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss 107 and 117—"Agriculture," meaning of—Leasing land for growing casuarina, whether for agricultural purpose.

A lease of land for growing casuarina trees is a lease for an agricultural purpose within the meaning of section 117 of the Transfer of Property Act and does not therefore require a registered instrument for its creation.

"Agriculture" does not connote tilling the soil for raising food products alone but means cultivation of the soil for any useful purpose. *Murugesa Chetti* v. *Chinnathambi Goundan*, (1901) I.L.R., 24 Mad., 421, explained.

APPEAL against Order of Remand passed by C. S. MAHADEVA AYYAR, in Appeal Suit No. 31 of 1921, on the file of

(1) (1920) I.L.R., 43 Mad., 795.

* Civil Miscellaneous Appeal No. 301 of 1921.