

Having regard to the above considerations, I would hold that of the consideration money of the bond exhibit 1(b) the items of Rs. 80 and Rs. 105 were taken for necessary purposes and are binding on the estate; whereas the evidence fails to prove necessity or proper enquiry leading to presumption of necessity for the remaining items of advance. The rate of interest agreed on was a fair rate of interest.

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I would allow the appeal and give the plaintiff a decree to the extent indicated by the above findings, that is to say, allowing the entire claim on the first bond, exhibit 1, disallowing the claim on the second bond exhibit 1(a), and allowing the claim on the third bond, exhibit 1(b), so far as it refers to the item of advance of Rs. 80 and Rs. 105 with interest thereon. The portions to the claim allowed will bear interest at bond rate to the date of decree. Date of grace will be fixed six months hence. The plaintiff will get costs of both courts proportionate to his success and the defendants will bear their own costs.

FAZL ALI, J.—I agree.

*Appeal allowed in part.*

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**PRIVY COUNCIL.**

KEDAR NATH GOENKA

v.

RAM NARAIN LAL.

\* J. C.  
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June, 4.

*On Appeal from the High Court at Patna.*

*Res Judicata—Issue between co-defendants subsequently arrayed as plaintiff and defendant—Code of Civil Procedure (Act V of 1908), s. 11, expln. V—Mortgage Suit—Deed unconscionable and void—Money Decree—Right to sell property in execution, whether barred—Limitation Act (IX of 1908), art. 12—Sale nullity—Applicability of art. 12.*

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\* PRESENT: Lord Atkin, Sir John Wallis and Sir Shadi Lal.

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The appellant's father, *B*, lent money to *S*, a mahant, for expenses to be incurred in a suit against him by *M*, who claimed the office and the properties of the Mutt, on the execution by *S* of an ekrarnama giving him a lien on the properties of the Mutt and obtained a subsequent ekrarnama giving him a lease of the properties in lieu of interest. The suit between *M* and *S* was compromised on terms that they should both be mahants with equal shares in the properties of the Mutt. In a suit in 1903 by *B* against *S* and *M* on the ekrarnamas, the ekrarnamas were found to be unconscionable and void, but *B* was given a decree against *S* for the amount lent. In execution of the decree *B* brought *S*'s share in the properties of the Mutt to sale in 1908. There were several purchasers, including *B*. The sale was eventually confirmed on May 5, 1913. *M* was then the sole mahant and in possession of the Mutt properties, *S* having been removed from office in 1910. In 1918 two of the auction-purchasers instituted suits against *B* and *M* for a declaration that the sale was invalid on the ground that the judgment-debtor had no saleable interest in the properties. The suit was dismissed. *B* died during the pendency of this suit and was succeeded by his son, the appellant.

On May 5, 1925, the appellant instituted a suit against *M* for possession of the properties purchased by his father and impleaded as a defendant *B N* who had purchased these properties on July 6, 1914, in a sale for arrears of cess. *M* pleaded that the sale was invalid and that the suit was barred by limitation. The Subordinate Judge on the merits held the sale valid and gave the plaintiff a decree. On appeal the High Court dismissed the suit as barred by res judicata under the Code of Civil Procedure, 1908, s. 11, *expln.* V, on the ground that *B* in his suit of 1903 had prayed for the sale of the mortgaged properties and, if necessary, the other properties of the Mutt and this relief had been refused.

*Held*, that the validity of the sale having been decided as a necessary issue between the co-defendants *B* and *M*, in the suit of 1918, it was res judicata between *B*'s representative (the appellant) and *M* in the present suit, in which they were arrayed as plaintiff and defendant.

*Munni Bibi v. Tirloki Nath*(1) and *Maung Sein Done v. Ma Pan Nyun*(2), followed.

(1) (1931) I. L. R. 53 All. 103; L. R. 58 I. A. 158.

(2) (1932) I. L. R. 10 Rang. 322; L. R. 59 I. A. 247.

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(2) The suit was not barred as *res judicata* under the Civil Procedure Code, s. II, expln. V, as the High Court in giving the plaintiff a decree in the suit of 1903 could not have intended to deprive him of any right he might have to bring the Mutt properties to sale in execution of the decree.

(3) At the time of the sale to *B N* the title to the property was not in the judgment-debtor, *M*, but in *B*. The sale was, therefore, a nullity and art. 12 of the Limitation Act did not apply.

*Jwala Sahai v. Musiat Khan*(1), approved.

Consolidated Appeal (no. 41 of 1932) from a decree of the High Court (May 30, 1930) reversing a decree of the Subordinate Judge of Moughyr (December 6, 1926).

In a suit by Baijnath Goenka, the father of the plaintiff, on ekrarnamas giving him a lien on the properties of a Mutt and a right to a lease in lieu of interest it was found that the ekrarnamas were unconscionable and void but a simple money decree for the amount actually lent with interest to date of suit was given against the mahant who had borrowed the money, Sriram Das, and who, at the time of the decree had an equal share in the Mutt properties with Mahant Mahabir Das. In execution of the decree Baijnath Goenka brought Sriram Das's share to sale and purchased some of the properties. The sale was confirmed on May 5, 1913, but Baijnath Goenka did not obtain possession of the properties. In 1918 suits were instituted by two other purchasers in the sale against Baijnath Goenka and Mahabir Das, who had then succeeded to the whole of the mutt properties, for a declaration that the sale was invalid. In this suit the validity of the sale was upheld. On May 5, 1925, the appellant who had succeeded to his father instituted the present suit for possession of the properties purchased by his father against Mahabir Das and impleaded as defendants Ram Narain Lal, one of the respondents, who had on July 6, 1914, purchased

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(1) (1904) I. L. R. 26 All. 346.

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some of the suit properties in a sale for arrears of cess due from Mahabir Das, Dalip Narain Singh, who had leased some of the properties from Mahabir Das and others. Mahabir Das and Ram Narain Lal contested the claim on the grounds, inter alia, that the sale was invalid and the suit was barred by limitation.

The facts are more fully stated in the judgment of the Judicial Committee.

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*Dunne K. C. and Khambatta* for the appellant. Explanation V of s. 11 of the Civil Procedure Code under which the High Court dismissed the suit is not applicable to the facts of this case. The plaintiff's father obtained a money decree. If the money was not paid, he was entitled in execution to proceed against the property of the judgment-debtor. Necessity for the sale would have to be proved in execution. There was obviously necessity in this case for the loan as the mahant had no other means of obtaining money to defend the suit in which his title to the Mutt properties was attacked. The validity of the sale was a necessary issue between the plaintiff and Mahabir Das in the suit in 1918 and, having been decided, it was res judicata between them in the present suit: *Munni Bibi v. Tirloki Nath*(1) and *Maung Sein Done v. Ma Pan Nyun*(2). Article 12 of the Limitation Act is not applicable. In 1914 the title to the property was in the plaintiff and not in Mahabir Das and the sale to Ram Narain Lal was a nullity—*Jwala Sahai v. Masiat Khan*(3).

*Chinna Durai and Miss Miles* for the respondent. Rai Bahadur Dalip Narain Singh. The sale was invalid. There was no necessity for the loan. Sriram Das, in defending the suit was not acting in the best interests of the mutt. Mahabir Das did not contest the suit in 1918. If the sale was invalid, the

(1) (1931) I. L. R. 53 All. 103; L. R. 58 I. A. 158.

(2) (1932) I. L. R. 10 Rang. 322; L. R. 59 I. A. 247.

(3) (1904) I. L. R. 26 All. 346.

title was in Mahabir through whom Ram Narain Lal claims. Reference was made to *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*<sup>(1)</sup>.

The other respondents were not represented.

*Dunne K. C.* was not called upon to reply.

The judgment of their Lordships was delivered by—

SIR JOHN WALLIS.—In this case the right of a judgment creditor to bring the properties of a mutt to sale in execution of a money decree against the Mahanth of the mutt has for more than a quarter of a century been the subject of incessant litigation and a multiplicity of suits in the Courts below, and now comes before this Board for the first time. In 1898 the Mahanth of the Suja Mutt died and was succeeded by Siaram Das, the judgment-debtor in this case. A few months later in January 1899 the Mahanth of the neighbouring Serisia Mutt, as next friend of his nephew, Mahabir Das, who is said to have been six years old, instituted a suit in the Court of the Subordinate Judge of Monghyr against Siaram Das to establish the minor's right to succeed to the office of Mahanth of the Suja Mutt, and according to his own statement spent a sum far in excess of Rs. 31,000 in prosecuting the suit. One of his first steps after instituting the suit was to apply for the appointment of a receiver who on his appointment took possession of the Mutt properties with the result that the defendant Siaram Das was left without any funds wherewith to defend the suit. He then applied to a moneylender Baijnath Goenka (the father of the present plaintiff Kedar Nath Goenka) who undertook to advance him a sum of Rs. 20,000 for the purposes of the litigation in consideration of his executing an ekrarnama undertaking to pay one lakh of rupees and to give a lien for that sum on the mutt properties. Not content with this, he subsequently obtained a

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further ekrarnama giving him a zaripeshgi lease of certain mutt properties for fifteen years in lieu of interest on the above sum.

The Subordinate Judge dismissed the minor's suit on the ground that he had no title to succeed to the mutt, and also recorded a finding that the defendant was in the same case. From this decree both parties appealed to the High Court at Calcutta. While the appeals were pending, the minor plaintiff by his next friend Surajao Das, Mahanth of the Sersia Mutt, and Siaram Das the defendant presented a petition to the High Court stating that the parties had compromised the suit on the terms that they were both to be Mahanths and to be entitled to and in possession of the mutt properties in equal shares, and on the further terms that Surajao Das was to have a first charge on the mutt properties for Rs. 31,000 which he had spent in prosecuting the suit on the plaintiff's behalf, and that, as the Suja and Sersia Mutts had a common founder and the Suja Mutt had been in the habit of subsidising the Sersia Mutt, both parties were to give the Sersia Mutt a lease of the Suja Mutt properties yielding a net income of Rs. 1,500. About this compromise it is sufficient to say that on this petition the High Court passed an order sanctioning the compromise as beneficial to the minor plaintiff, and ordered and decreed that the parties should abide by it.

On the 30th November 1903 Baijnath Goenka filed in the same Court, O. S. 500 of 1903, the suit out of which the present litigation has arisen to recover Rs. 1,17,607-3 on the ekrarnamas mentioned above, impleading the two Mahanths Siaram Das and Mahabir Das as the 1st and 2nd defendants. Of this sum Rs. 87,042 was for interest, and in lieu of interest on this interest he claimed under the zaripeshgi lease possession and enjoyment of the rents and profits of the mutt properties mentioned in the second ekrarnama for fifteen years, and to be paid the principal on the expiration of the lease. The balance of

Rs. 30,565 he claimed to recover by sale of the mutt properties on which he had a lien under the first ekrarnama, and also from the person and properties of the 1st defendant.

As was only to be expected both the Subordinate Judge and the High Court on appeal held these ekrarnamas to be grossly unconscionable and void. As regards the Rs. 14,590-4-6, which the plaintiff was found to have advanced under the void ekrarnamas, both Courts held that not having intended to act gratuitously, he was entitled to repayment of that sum with reasonable compensation. The High Court reduced the rate of interest awarded by the lower Court, and the plaintiff obtained a decree for Rs. 22,073 against Siaram the 1st defendant and the suit was dismissed as regards Mahabir the 2nd defendant. In execution of this decree Baijnath Goenka the decree-holder brought to sale Siaram's eight annas share in the mutt properties, and at the Court sale held on the 18th and 21st January 1908 himself became the purchaser of the properties which are the subject of the present suit.

On the application of Siaram the judgment-debtor, the Subordinate Judge set aside the sale as not in accordance with the provisions of the Transfer of Property Act as regards the sale of mortgage property. There was an appeal to the High Court which after referring the question to a Full Bench, on the 4th February 1913 reversed the Subordinate Judge's order setting aside the Court sale, and remanded the case to the lower Court to proceed with the execution of the decree.

While this appeal to the High Court was pending Siaram, the judgment-debtor, had been removed in 1910 from the office of Mahanth and Mahabir appointed sole Mahanth by a decree in a suit instituted by three chelas of the mutt for the removal of both Mahanths, and confirmed by the High Court on appeal in 1912. The ground of removal was not personal

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misconduct but mismanagement. The relations of the two Mahanths were then friendly, and Siaram, who may not have been sorry to be relieved of office in view of his embarrassments, showed so little interest in defending the suit that the question whether the suit was collusive was considered by both Courts but was held not to be proved.

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After his removal from office Siaram continued to contest the decree-holder's appeal to the High Court against the order setting aside the Court sale; but after the order had been set aside and the case remanded, he failed to appear to the notice to attend with his witnesses on the 5th May 1913. The order sheet under that date states that the case had come back to be tried on the merits, that the judgment-debtor did not appear and that notice of service was proved. The Subordinate Judge accordingly passed the following order: "The objection of the judgment-debtor is dismissed. The sale to be confirmed, and the case to be dismissed on full satisfaction." It is on the title acquired by this confirmation that the present suit has been brought. Mahabir, the present 1st defendant, on whom Siaram's office had devolved, has been found by the Subordinate Judge in the present case to have had notice of the order of remand, but made no attempt to set aside the confirmation and revive and continue the proceedings for setting aside the Court sale on the grounds which had not been disposed of by the High Court on appeal.

Siaram Das having died, Mahabir was brought on as his legal representative in the execution proceedings. On the 28th July 1917 the judgment creditor obtained an order, confirmed on appeal on the 27th May 1918, that the other auction purchasers should redeposit the purchase monies which they had been allowed to withdraw on undertaking to return them, should the order setting aside the sale be reversed.

Two of these auction purchasers then instituted separate suits, nos. 477 and 478 of 1918, which were



tried together, against Kedar Nath, the present plaintiff as representative of the decree-holder and Mahabir, the present 1st defendant, as the Mahanth in possession of the mutt properties, for a declaration that the plaintiffs were not bound to redeposit the purchase monies on the grounds that the Court sale was invalid and the Mahanth would not allow them to take possession of the properties they had purchased. In their Lordships' opinion it was clearly necessary to decide in these suits the dispute as to the validity of the Court sale between the present plaintiff and 1st defendant, then arrayed as co-defendants, for the purpose of giving the plaintiffs appropriate relief. The Mahanth as 2nd defendant sided with the plaintiffs, and on the appeals to the High Court from the decrees in the plaintiffs' favour was represented by the same counsel as the plaintiffs.

The High Court allowed the appeals, reversed the decrees of the Subordinate Judge and directed the plaintiffs to deposit the purchase money in Court. Das, J., who delivered the judgment of the Court, held that Siaram Das when he borrowed money from the plaintiff in the suit was the Mahanth of the mutt, that he had power to sell or mortgage the mutt properties for the necessary purposes of the mutt, and that money borrowed to enable him to defend his title to the office of Mahanth was such a necessary purpose. He was entitled to sell or mortgage the mutt properties for this purpose, and, if he could do so voluntarily, the mutt properties could be brought to sale in execution of the decree against him for the borrowed money.

Ignoring this adjudication, when the plaintiff in one of the suits just mentioned took steps to obtain possession of the properties he had purchased at the Court sale, the Mahanth Mahabir Das brought another suit to contest his right to obtain delivery of possession which was compromised. Further, after Kedar Nath had applied to recover possession in execution of the properties now in suit which his father, the decree-holder, had purchased at the Court sale, the Mahanth

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Mahabir Das filed another suit to restrain him by injunction from proceeding with the execution, but allowed the suit to be dismissed for default after Kedar Nath's application had been dismissed as time barred on August 4th, 1925.

The foregoing narrative brings the history of this litigation down to the institution of the present suit O. S. 22 of 1925 in which the plaintiff Kedar Nath Goenka sued the Mahanth Mahabir on the title acquired by his father Baijnath the decree-holder as auction purchaser of the suit properties on the confirmation of the Court sale in May, 1913. The suit once more raised the issue as to the validity of the sale of the mutt properties in execution of the decree, and the 13th issue was, whether the decisions in suits nos. 477 and 478 of 1918 (the suits of two other auction purchasers) are binding on the defendant. The Subordinate Judge held that the issue as to the validity of the sale was not *res judicata* between the plaintiff who was the 1st defendant and the Mahanth who was the 2nd defendant in these suits, because the plaintiffs who were the auction purchasers of other properties at the Court sale had not sought for any relief as against the Mahanth who was the 2nd defendant, but this ruling was given before the recent decisions of this Board as to *res judicata* between co-defendants which will be referred to later.

On the merits, the Subordinate Judge held that the Court sale was valid on much the same grounds as were given by Das, J., in the judgment already mentioned, and gave the plaintiff a decree. From this decree the Mahanth the 1st defendant and the 3rd defendant who was in possession of some of the suit properties preferred appeals to the High Court at Patna. The learned Judges of the High Court allowed the appeal of the 1st defendant, reversed the judgment of the lower Court and dismissed the plaintiff's suit without going into any other question, on the short ground that the suit was barred by

*res judicata* under Explanation V of s. 11 of the Coode of Civil Procedure as in O. S. 500 of 1903 the plaintiff had prayed for the recovery of the money sued for by sale of the mortgaged properties and also, if necessary, by the sale of the other mutt properties, and the latter relief not having been granted must be deemed to have been refused. From this decree the plaintiff preferred this appeal to His Majesty in Council. The 1st and 3rd defendants who were the appellants to the High Court have remained *ex parte*, but the 2nd defendant, a transferee from the 1st defendant subsequently to the confirmation of the Court sale, has appeared in support of the judgment of the Court below.

Their Lordships are unable to concur in the reasons given by the High Court for dismissing the suit. The plaintiff's claim in O. S. 500 of 1903 and the reliefs which he sought were based solely on the ekrarnamas which were held by both Courts to be unenforceable and void. On their being found to be void by both Courts, the plaintiff was held to be entitled to recover the monies which he had advanced, and he obtained a decree against the 1st defendant, the Mahanth Siaram to whom the advances had been made.

In their Lordships' opinion there is no reason to suppose that it was intended to give the plaintiff a worthless decree against an ascetic who presumably had no property of his own and to deprive the plaintiff of any right he might have to bring the mutt properties to sale in execution of the decree. Further, the learned Judges in the High Court appear to have entertained no doubt as to the right of the Mahanth to raise money for the defence of the suit brought against him by sale or mortgage of the mutt properties, because, as showing the unconscionable nature of the ekrarnamas, they observed that the 1st defendant, the Mahanth, was not a mere beggar and that the security given by him (which consisted of mutt properties) was ample to cover the advances which the plaintiff was undertaking to make.

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Although in the judgment under appeal the learned Judges have not dealt with the issues in the case, their Lordships consider it unnecessary to remand the case to the High Court for findings on those issues, and so further prolong this ruinously protracted litigation, because in their opinion the question of the validity of the Court sale, the only serious issue in this case, was directly and substantially in issue between the plaintiff and the 1st defendant in suits nos. 477 and 478 of 1918 in which they were co-defendants. In their Lordships' opinion, as already stated, it was necessary in those suits to decide the dispute between them as to the validity of the Court sale for the purpose of giving the plaintiffs appropriate relief, and therefore this case is governed by the rule as to *res judicata* between co-defendants in *Cottingham v. The Earl of Shrewsbury*(<sup>1</sup>) which has recently been applied by this Board, in *Munni Bibi v. Tirloki Nath*(<sup>2</sup>) and *Maung Sein Done v. Ma Pan Ngun*(<sup>3</sup>).

In the latter case it was observed by their Lordships that it was immaterial whether K., one of the two defendants, had entered appearance or contested the suit, for she was a proper party and had a right to be heard if she so desired. Here, as already stated, the 2nd defendant, the Mahanth Mahabir, entered appearance and sided with the plaintiffs. In the present suit the same question as to the validity of the sale is again in issue between these same defendants, who are now ranged as plaintiff and 1st defendant, though the subject matter of this suit is different, and the decision in the former suits is binding upon them. That issue being *res judicata* in the plaintiff's favour, he is entitled to sue within the period prescribed by the law of limitation on the title he acquired when the Court sale to his father of these properties was confirmed and on confirmation became absolute.

(1) (1843) 3 Hare 627.

(2) (1931) I. L. R. 53 All. 103; L. R. 58 I. A. 158.

(3) (1932) I. L. R. 10 Rang. 322; L. R. 59 I. A. 247.

The 3rd defendant, Ram Narayan, preferred a separate appeal to the High Court claiming an independent title to some of the suit properties under a purchase at a sale for arrears of land cess on July 6th, 1914, subsequently to the Court sale. The High Court allowed the appeal on the ground that the suit was barred under Art. 12 of the Limitation Act, as the plaintiff had not sued to set aside the sale for arrears of road cess within the time prescribed. The bid-sheet A.A. shows what was sold was the property exclusively belonging to the judgment-debtor as detailed below, viz., Mahanth Mahabir Das. At the time of this sale the title to the property sold was not in that judgment-debtor but in the plaintiff, and their Lordships agree with the decision in India in *Jwala Sahai v. Masiat Khan*(<sup>1</sup>), that the sale was a nullity, and that the present suit is not barred under Art. 12 of the Limitation Act. For these reasons their Lordships will humbly advise His Majesty that the judgments of the High Court in these appeals to be reversed and the judgment of the Subordinate Judge restored. The appellant's costs in the High Court will be borne by the respondents, and the costs of the appeal to His Majesty in Council as to two-thirds by the 1st defendant and as to one-third by the 2nd defendant, who appeared to support the judgment of the High Court in the principal appeal.

*Solicitors for appellant:* Hy. S. L. Polak & Co.

*Solicitors for 2nd Respondent:* Douglas Grant & Dold.

### PRIVY COUNCIL.

COMMISSIONER OF INCOME-TAX, BIHAR AND  
ORISSA,

v.

MAHARAJADHIRAJ OF DARBHANGA.

*On Appeal from the High Court at Patna.*

*Income-tax Act (XI of 1922), ss. 2(1)(a), 4(1) and (3), and 6(iv)—Agricultural Income—Loan by money-lender on*

\* PRESENT: Lord Macmillan, Sir John Wallis and Sir Shadi Lal.

(1) (1904) I. L. R. 26 All. 346.

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