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come forward, and, if the appellant be allowed to prosecute the suit, the defendants will be deprived of their costs. Assuming, however, that it was open to the learned Subordinate Judge to allow the appellant to prosecute the suit, the circumstances of this case were such in which the discretion ought not to have been exercised.

I see no ground for interference. The appeal is dismissed with costs and the civil revision petition is rejected. No separate costs will be taxed for the revision application.

SAUNDERS, J.—I agree.

Appeal dismissed.

Rule discharged.

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August, 1, 2, 5, 6, 7. September, 23.

Before Courtney Terrell C.J. and Varma, J.

MAHABIR PRASAD MARWARI

v.

SYED SHAH MOHAMMAD YEHIA.*

Muhammadan Law—wakf—sajjadanashin—mutawalli, how far can incur debts and bind the trust estate—sanction of Kazi, whether necessary—carrying out of the objects of trust, whether is a valid purpose for incurring debts—position of mutawalli, whether different from that of mahanth of Hindu math.

Where a trustee has incurred a debt the creditor cannot recover against the trust property unless the trustee, if he had paid the debt, could have claimed indemnity out of the trust property. In other words, the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee against the trust property and his rights are no greater than those of the trustee.

*Appeal from Original Decree no. 140 of 1932, from a decision of Maulavi Abdul Aziz, Subordinate Judge of Monghyr, dated the 8th August, 1932.

In the matter of his power to bind the trust funds to pay debts incurred by him, a sajjadanashin is in no better position than that of any other mutawalli. In his capacity as a mutawalli he may borrow money and incur debts for the preservation of the trust property but even then only with the sanction of the *Kazi* (whose modern representative is the District Judge) who can authorize him to create an incumbrance upon the wakf property.

The carrying out of the objects of the trust is not a purpose for which a mutawalli may bind the wakf property.

In the matter of the limitation upon his powers he is in a position different from that of a mahant of a Hindu math who has the power of pledging the credit of the math not merely to preserve it from loss or destruction but for the carrying on of the daily ordinary objects for which the math was founded.

Sailendra Nath Pallit v. *Syed Hade Kaza Mane*(1), followed.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

G. P. Das (with him *P. Misra*, *G. Das* and *Chowdhury Mathura Prasad*), for the appellant.

Khurshed Husnain and *Yasin Yunus*, for the respondent.

COURTNEY TERRELL, C.J.—The following are the reasons for our order dated the 7th August 1935, dismissing this appeal with costs.

This is an appeal by the plaintiff, who is a merchant, shopkeeper and money-lender, from the dismissal of his suit to recover from defendant no. 2 (a trustee) a sum of Rs. 14,000 in respect of money lent and goods supplied to defendant no. 1 the trustee-predecessor of defendant no. 2 on the allegation that the money lent and the goods supplied were lent and supplied for the benefit of the trust and were so in

(1) (1931) 36 Cal. W. N. 193 (206).

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fact applied by defendant no. 1. It is now admitted that the money and goods were in fact supplied to defendant no. 1 and a judgment has been given against defendant no. 1 but defendant no. 2 and the trust property have been held free from liability.

It was contended that in fact the money and goods supplied to defendant no. 1 were applied by him to the services of the trust. It was held that the plaintiff had failed to establish this.

Now where a trustee has incurred debt the creditor cannot recover against the trust property unless the trustee, if he had paid the debt, could have claimed indemnity out of the trust property. In other words, the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee as against the trust property and his rights are no greater than those of the trustee. This is the law in India as well as in England.

The right of a trustee to be indemnified out of the trust property for expenses incurred by him is a matter of the particular trust concerned and of the rules applicable to a trust of the class to which it belongs. In this case the trust is of the class known as "waqf" and of the variety founded for the perpetuation of a religious establishment based on the personality of some deceased saint. In this kind of waqf the duty of the mutwalli extends to the performance of religious observances and he is also the religious superior of the establishment. Such a mutwalli is called a *sajjada-nashin*. "*Sajjada* is the carpet on which prayers are offered and *nashin* is the person seated thereon. The *Sajjadanashin* is not only a mutwalli but also a spiritual preceptor. He is the curator of the *dargah* where his ancestor lies buried, and in him is supposed to continue the spiritual line (*silsila*). These *dargahs* are the tombs of celebrated *dervishes*, who, in their lifetime, were regarded as saints".(*See* Ameer Ali's Muhammadan Law, 4th edition, Volume I, page 443). There is no dispute that the trust is of this character.

Defendant no. 1 at the date of the transactions in question was the *sajjadanashin* of this trust or "*khankah*". Subsequently to the transactions with the plaintiff he was, on petition, removed from the office of mutwalli by order of the District Judge on account of extravagance and mismanagement of the trust funds. He was allowed to continue in the purely religious capacity of *sajjadanashin* of the *khankah* but the defendant no. 1 was appointed mutwalli and assumed the temporal functions of the trusteeship and the control of the trust property.

We have now to consider the position of a mutwalli in the matter of his power to bind the trust funds to pay debts incurred by him. The fact that in this case the mutwalli is a *sajjadanashin* is of little, if any, importance. Having regard to the nature and object of the trust to perpetuate the memory of a particular saint, the *sajjadanashin* can only be chosen from among the saint's descendants and he is under an obligation, in addition to his duties as mutwalli (i.e. managing the trust property and paying out of it any allowances reserved by the trust deed to specified persons or classes of persons) to carry out religious ceremonial. But in the matter of the trust funds he is in no better position than that of any other mutwalli. In this capacity he may borrow money and incur debts for the preservation of the trust property, but even then only with the sanction of the *Kazi* (whose modern representative is the District Judge) and the *Kazi* may authorize him to create an incumbrance upon the waqf property. If the income from the property should decline he must cut down the payments to beneficiaries. He may not pay dividends out of capital and in no case may he mortgage the capital to pay off loans without the consent of the *Kazi*. The learned authorities cited by Mr. Ameer Ali at pages 470 and 471 of the work referred to establish this limitation upon the power of the mutwalli, and the history and nature of this particular waqf is fully described in the judgment of

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this Court in *Syed Shah Md. Kazim* v. *Abi Saghir*(1). In the matter of the limitation upon his powers he is in a position other than that of a Mahant of a Hindu math who appears to have the power of pledging the credit of the math not merely to preserve it from loss or destruction but for the carrying on of the daily ordinary objects for which the math was founded.

Under the trust deed, the duty of the *sajjadanashin* in his capacity as mutwalli was to collect the revenues of the property, to distribute therefrom the allowances to certain descendants or, as they have been termed in the course of this case, "co-sharers" who were collateral descendants of the family to which the saint belonged, to pay for the religious observances and the salaries of the drummers who are employed on ceremonial occasions and out of the surplus, if any, to maintain himself and his family. It would appear that about the time of the transactions when the debts were incurred there was some difficulty in collecting the rents of the property on account of the litigation which was going on with a view to the removal of the *sajjadanashin*. It is said that it was on this account that the *sajjadanashin* was obliged to borrow the money. The revenues which were actually collected were insufficient to pay the allowances and salaries contemplated by the trust and were insufficient to leave an adequate balance to provide for the *sajjadanashin's* family. The collections were also insufficient to pay Government revenues and the moneys borrowed, in particular the specific loan of Rs. 5,000, were borrowed for the purpose of discharging these obligations. It is further said that the plaintiff lent the money and supplied the goods to defendant no. 1 in his capacity as *sajjadanashin* and not to him as an individual. If this were a material factor, and in my opinion it is not, it might be material to decide whether the credit was given to the trust fund or to the borrower personally and further to decide whether the money

(1) (1933) I. L. R. 11 Pat. 288.

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and goods actually supplied by the plaintiff were in fact applied to the benefit of the trust fund. The attention of the learned Subordinate Judge was not directed to the real point of the case and he thought that these other questions were material: even so he decided in fact against the plaintiff on both of these issues and in any case, in my opinion, his finding of fact was correct. It is true that the plaintiff must have been well aware that defendant no. 1 derived such income as he had wholly from the trust estate and it is true that in the plaintiff's books defendant no. 1 is described by his religious title but this is only by way of identification of the defendant as an individual. There is no evidence at all that credit was given to the trust fund in the sense that it might have been given to the agent of a disclosed principal. I see no reason whatever to doubt the *bona fides* of the plaintiff. He lent money to a person whom he thought was in a position to repay and without any thought of taking advantage of the extravagance of the borrower to the detriment of the trust fund. The sympathy of the Court must be with him, but this is no reason why injustice should be done to defendant no. 2 or the fund of which he is a trustee. The plaintiff has certainly shown that almost immediately after the borrowing of the money the land revenues and other expenses which should fall upon the trust fund were in fact discharged but this is quite consistent with the borrower having by his extravagance and mismanagement failed to discharge these obligations notwithstanding adequate resources and having been driven to borrow for those purposes. It does not follow that there was in fact a necessity for the borrowing. A part of the indebtedness is due to goods supplied and it is said that these were for the necessities of persons of the class for whose relief the trust fund was established and also for the necessities of the *sajjadanashin's* own family whose support was one of the objects of the trust fund. But there is no evidence that either the money or the goods were necessary for the purpose

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of saving the trust property from extinction. They were, as admtited by Mr. Das in his able argument on behalf of the plaintiff, required for the carrying out of the ordinary objects for which the trust was founded. This may well be so, but, as I have said, the carrying out of the objects of the trust is not a purpose for which a mutwalli may bind the waqf property though it may be that a Mahanth of a Hindu math might have this power. Moreover in no case was the consent of the *Kazi* or the District Judge obtained for the purpose.

It has been argued that there is no reason why the creditor of a Mahanth should be in a position better than that of the creditor of a *sajjadanashin*. But it should be realised that although in so far as the creditors of all kinds of trustees are concerned, they stand in the same position by virtue of the doctrine of subrogation, nevertheless the trustees of the two kinds of trusts into whose shoes the respective creditors are called have widely different powers with respect to the trust fund.

The two principles are clearly enunciated by the judgment in the leading case of *Sailendra Nath Palit* v. *Syed Hade Kaza Mane*(1) where the learned Judges say—

"The analogy contended for on behalf of the plaintiff, in our judgment, is neither supported by precedent nor founded on principle, and is by no means perfect. As a general rule of Hindu law property dedicated to religious uses is inalienable, but the *shebait* or *mahant* may, in a case of need or for the benefit of the institution, sell or mortgage *debutter* property or grant a permanent lease thereof. A mutwalli on the other hand has no power, without the permission of the Court, to mortgage, sell or exchange wakf property, unless he is expressly authorised by the deed of *wakf* to do so; and his power to grant leases is much more restricted, so that he may not grant leases for more than three years in case

(1) (1931) 36 Cal. W. N. 193 (206, 207).

of agricultural lands or for more than a year in the case of non-agricultural lands unless he is expressly authorised to do so by the deed of *wakf* or unless he has obtained the leave of the Court for the purpose. To introduce the doctrine of protection of a *bona fide* lender would be to infringe upon these limitations of the *mutwalli's* powers. Where an executor borrows money in his capacity as executor (the Will of the testator not expressly authorizing him to do so) without creating a charge on the property and the estate under his management is enriched or benefited by the money so borrowed, the right that the creditor may claim as against the estate is a right to be indemnified out of the estate to the necessary extent and unless the right of the executor to the indemnity is established the creditor has none against the estate".

Even if these differences between the position of a mutwalli and a mahanth had not existed and they do not seem to have been indicated to the learned Subordinate Judge I agree with his findings that the plaintiff has failed to establish that the borrowings and the goods were in fact applied to the objects of the *waqf* or that there was "necessity" in any sense for the incurring of the debts.

For these reasons the appeal was dismissed with costs.

VARMA, J.—I agree. There was one other point with which I should like to deal. Mr. G. P. Das urged that the appellant was seriously prejudiced in the trial of the case inasmuch as certain account-books alleged to be in possession of the receiver were not produced in spite of the request of the appellant. It appears that on the 12th August, 1931, a petition was filed by the plaintiff for the production of a jamakharach bahi. On the next date for hearing, viz., the 16th September, 1931, another petition was filed for the production of certain papers by the receiver. On the 21st December, 1931, the court ordered certain papers to be filed according to the plaintiff's petition and affidavit filed on that date;

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but the papers do not seem to have been filed. The case was actually taken up for hearing on the 13th June, 1932, and the judgment was delivered on the 8th August, 1932. No steps seem to have been taken under Order XI, rule 21, of the Civil Procedure Code. It seems that the plaintiff after filing the petitions mentioned above did not press the matter any further, nor did he seek the assistance of the court in getting those documents produced. Therefore, this point also fails.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

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September, 20, 23, 24.

REKHA THAKUR

v.

RAMNANDAN RAI*.

Code of Civil Procedure, 1908 (Act V of 1908), Order XLI, rules 11 and 12—appellate court admitting an appeal, whether competent to restrict the appeal to a specific ground—whole appeal, whether open to discussion— court hearing appeal under rule 11, whether competent to make a note of point abandoned.

It is not competent to a court of appeal under Order XLI, rule 12, of the Code of Civil Procedure, 1908, to restrict an appeal to a specific ground and, therefore, when the appeal is admitted the whole appeal, and not only the selected ground upon which it is admitted, is open to discussion.

Lukhi Narain Serowji v. *Sri Ram Chandra*(1) and *Janaki Nath Hore* v. *Prabhasini Dasee*(2), followed.

If, however, at the time when the appeal is heard under Order XLI, rule 11, the appellate Court is informed that the appeal will be confined to certain specified grounds only and

*Appeal from Appellate Decree no. 1192 of 1932, from a decision of Babu Ananta Nath Banarji, Additional Subordinate Judge of Saran, dated the 27th May 1930, reversing a decision of Babu Nirmal Chandra Munsif of Chapra, dated the 7th April, 1931.

(1) (1911) 15 Cal W. N. 921.

(2) (1915) I. L. R. 43 Cal. 178.