Privy Council Appeal No. 10 *of* 1942
Allahabad Appeal No. 33 *of* 1938

Lala Man Mohan Das – – – – – – – *Appellant*

v.

Janki Prasad and others – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1944

Present at the Hearing:
LORD PORTER
LORD GODDARD
SIR MADHAVAN NAIR
[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Allahabad dated 16th September, 1938, which reversed a decree of the Court of the Subordinate Judge at Allahabad dated 18th August, 1934, and dismissed the plaintiff's suit with costs.

The plaintiff—the appellant before the Board—is a money lender, and the appeal arises out of a suit instituted by him as a mortgagee of the suit property on a mortgage dated 4th December, 1926, executed by defendants Nos. 1 to 3—respondents Nos. 1 to 3 in this appeal. These defendants did not contest the suit.

In the plaint, Janki Prasad, defendant No. 1, was described as " for self and as the ' Mutwalli ', manager and ' Karkun ' of Thakurdwara Sri Behariji Mahraj, installed in the temple situate in Mohalla Sarai Mir Khan, City Allahabad ". As this description did not say whether the Deity, Sri Behariji Mahraj—hereinafter referred to as the deity or the idol—was or was not a party to the suit, and whether the plaintiff wanted a decree against Sri Behariji Mahraj, defendant No. 4, now respondent No. 4, Sri Behariji was made a party through the receiver appointed by the District Judge in suit No. 14 of 1932, a suit which had been filed by the plaintiffs in Suit No. 85 of 1927, under section 92 of the Code of Civil Procedure to have Janki Prasad (respondent No. 1) and Gopi Nath removed from the Mutwalliship of the idol. Attention will be drawn in the course of this judgment to these two suits.

The original plaint was subsequently amended by the addition of paragraph (7) (A) which is as follows:—

> (7) (A) " That Janki Prasad, defendant No. 1, did not in the mortgage deed sued on, write himself as the ' mutwalli ', manager and ' karkun ' of the Thakurdwara of Sri Behariji Mahraj installed in the temple situate in Mohalla Sarai Mir Khan, even then as the amount of consideration of the mortgage deed was paid for the protection of the property of Sri Behariji Mahraj, defendant No. 4, and as defendant No. 1 is the ' mutwalli ', manager ' karkun ' of Sri Behariji Mahraj it is also binding of the Thakurdwara of Sri Behariji Mahraj installed in the temple situate in Mohalla Sarai Mir Khan, city Allahabad, Sri Behariji Mahraj has been made a party to the suit ".

Later, on 22nd February, 1934, the plaint was further amended alleging that defendants Nos. 1 to 3 (respondents Nos. 1 to 3) were the owners of the property in suit.

A written statement was filed by the receiver on behalf of the idol. Therein it was stated that Janki Prasad (respondent No. 1) could not and did not properly safeguard the interests " of the idol; that the mortgage is not binding on the idol as it was executed by Janki Prasad as the owner of the property; that assuming there was a debt binding on the idol, Janki Prasad and other trustees were bound to pay it out of the income of the trust property which was sufficient to pay for the debt "; and that the property of the idol was not in danger of being sold nor could it be sold in execution.

The main question in this appeal is, whether on the facts herein set forth the appellant is entitled to a mortgage decree which will be binding on the idol, respondent No. 4.

The facts giving rise to this litigation may be summarised as follows: In 1865, one Jagannath died childless leaving his widow Lalti Bibi and two items of properties, referred to in the suit as Nos. 14 and 15. Property No. 14 is the subject matter of the suit mortgage. It consisted of four shops in Chowk Allahabad. In 1894, Lalti Bibi applied to the Allahabad Municipality for permission to reconstruct item No. 15 as a temple. The permission was granted. On 15th July, 1895, she mortgaged property No. 14 for Rs.3,000 to reconstruct the temple.

On 7th July, 1903, Lalti Bibi executed a " will " by which she dedicated certain properties including property No. 14 to the idol, Sri Behariji Mahraj, and appointed executors and trustees for the purpose of carrying out the objects mentioned in the " will ". The " will " recited that she had been empowered by her husband to make the dedication of the properties. On 4th March, 1907, she executed another " will " similar in terms to the first, but appointing different executors and trustees, namely Janki Prasad (respondent No. 1), Gopi Nath, and Jugal Kishore. Janki Prasad was appointed managing trustee. The " will " stated that she had received the properties by right of inheritance from her husband, that she had constituted the idol the owner of the properties after her death, and that none of the managers should deal with the properties for their own purpose or benefit.

On 11th July, 1907, Lalti Bibi mortgaged the property No. 14 for Rs.4,000 to another idol, Sri Thakurji through its managers, including one Kishan Lal and Janki Prasad, and paid off the mortgage of 15th July, 1895.

On 25th November, 1908, Lalti Bibi died.

On 19th July, 1913, the Secretary of State for India instituted suit No. 95 of 1913, in the Court of the Subordinate Judge at Allahabad against Mukandi Lal, the father of Janki Prasad, and Janki Prasad, claiming the properties left by Jagannath on the ground that he had left no heirs, and that on the death of his widow, the properties were escheat to the Crown. In that suit, Janki Prasad filed a written statement claiming that he is " the Mutwalli, manager and supervisor " of the property in dispute which comprised Nos. 14 and 15, and that the idol is the " owner " of the properties. Mukandi Lal denied the plaintiff's claim; he stated that his grandmother was the " daughter of the uncle " of Jagannath, that other relations were alive, and that he was not liable to mesne profits. The Trial Court passed on 22nd March, 1915, a decree in favour of the plaintiff, but that decree was set aside by the High Court on appeal, on 28th January, 1919, on the ground that the Secretary of State had failed to prove that there were no heirs.

On 11th July, 1919, Sri Thakurji instituted suit No. 141 of 1919, in the Court of the Subordinate Judge at Allahabad against the idol, respondent No. 4, through its managers Janki Prasad (respondent No. 1), Gopi Nath and Jugal Kishore claiming Rs.8,033.6.6 as due on the mortgage dated 11th July, 1907, and sale of the property on failure to pay the money. It is noticeable that though Janki Prasad was sued as representing the idol, he stated that his father Mukandi Lal was the owner of the property; he also stated that the mortgage is not binding on the idol under any circumstance.

On 30th June, 1920, the Subordinate Judge passed a preliminary decree for sale. On 30th May, 1923, the High Court in appeal No. 41 of 1921, upheld the decision of the Subordinate Judge observing in the course of the judgment that " it is somewhat difficult to understand the position taken by the first defendant in this case, that is to say, it is not at all clear under what title the first defendant is laying claim to the property which was mortgaged ". The grounds of the High Court's decision were as follows:—

> " There is no proof of any ' will ' executed by Jagannath in favour of the defendants (appellants) and it follows, therefore, that the only title which they can show to the property now sought to be rendered liable for the mortgage debt is the ' will ' executed by Lalta Bibi. That being so, they are bound to discharge the mortgage ".

On 8th May, 1924, a final decree for sale was passed for Rs.12,043.10.0 by the Subordinate Judge.

During the pendency of the suit, Jugal Kishore had died, and by the time of the final decree Gopi Nath, the other trustee, had apparently ceased to act.

During the pendency of the appeal, both Mukandi Lal and Janki Prasad carried on litigations in one case up to the High Court, against a tenant of the property for arrears of rent; for the purposes of this appeal, it is sufficient to say that the claim of Janki Prasad was ultimately disallowed while that of Mukandi Lal was upheld on the grounds that Lalta Bibi had no right to make a " will " and that Mukandi Lal was Jagannath's heir.

On or about 1st January, 1926, Mukandi Lal died, and on 30th March, 1926, his sons, Janki Prasad and his brother, Brij Mohan, instituted suit No. 54 of 1926 in the Court of the Subordinate Judge at Allahabad against Sri Thakurji for a declaration that the decree in suit No. 141 of 1919 was null and void as against their right of ownership of the four shops and that the property in dispute was not saleable in execution of the decree passed in the said suit. The suit was dismissed on 20th August, 1926.

On 1st November, 1926, a proclamation in suit No. 141 of 1919 was passed for the sale of the four shops on 9th December, 1926.

Then, on 4th December, 1926, Janki Prasad approached the appellant for a loan on a mortgage of the suit property to pay off the decretal amount. The parties to the deed were Janki Prasad, his brother Brij Mohan, and the latter's minor son—respondents 1 to 3 in the present appeal: the security consisted of the four shops (the suit property): the consideration was Rs.14,500 of which Rs.13,958.13.6 were left with the appellant for payment to the decree-holder; the balance was accounted for by the cost of the stamp, certain payments for house tax and repairs and a sum of Rs.168.9.6 paid to the mortgagors in cash. Payment to the decree-holder was duly made, the actual amount being Rs.13,949.14.7 of which Rs.402.8.0 was refunded. The appellant advanced the money under the deed after taking legal advice.

The deed recited the death of Lalta Bibi in 1908 and then proceeded as follows:—

> " After her death Mukandi Lal our father remained in possession by right of inheritance. After the death of Lala Mukandi Lal, we, the executants, have been in proprietary possession and occupation of the house property aforesaid. The debt aforesaid in satisfaction of which the above mentioned house has been advertised for sale was incurred under a mortgage deed executed by Musammat Lalta Bibi aforesaid and the amount of the mortgage deed had been held to have been borrowed for lawful and valid expenses by the Hon'ble High Court at Allahabad in first appeal No. 41 of 1921. The liability of the debt aforesaid has been laid on the house sought to be sold by auction. It is, therefore, very necessary to pay this amount in order to safeguard the property which is likely to prove beneficial to the family and to the minor."

Clauses 2, 5 and 8 of the deed were as follows:—

> " (2) We shall repay in full the entire amount of this mortgage-deed, the principal along with interest in five years."

" (5) For the satisfaction of the creditor and in order to secure payment of the amount of this mortgage-deed, the principal along with interest, we have mortgaged without possession house No. 14 aforesaid, comprising four shops specified as given below, without the exception or omission of any right or thing together with its site and all the rights and interests appertaining to the house aforesaid, held by us at present or which we might acquire in future, which does not stand hypothecated or pledged to anyone other than under the decree mentioned above in satisfaction of which it has been advertised for sale and which is free from all sorts of charges and claims of others. We shall not mortgage or transfer in any other manner the mortgaged property noted below to anyone till payment in full of the amount of this mortgage-deed. If we do so, it shall be invalid in face of this document."

" (8) The creditor shall have and shall continue to have all powers and rights of sale by auction which the decree-holder in suit No. 41 of 1921 aforesaid has in satisfaction of which the property has been advertised for sale."

" Suit No. 41 of 1921 " in clause 8 is a slip for appeal No. 41 of 1921 that being the appeal against the decree in suit No. 141 of 1919.

On 27th July, 1927, Kishan Lal and others as " worshippers of the Temple " of the idol instituted suit No. 85 of 1927 in the Court of the Subordinate Judge at Allahabad against respondent No. 1 and Gopi Nath, the surviving trustees of the idol and its properties, for a declaration that properties Nos. 14 and 15 be declared a *wakf* property belonging to respondent No. 4 (the idol) and that the defendants are trustees. In paragraph 11 of the plaint it was set out that respondent No. 1 now claimed the property and denied it to be *wakf* property belonging to respondent No. 4. Respondent No. 1 filed a written statement in which he stated, amongst other pleas, that he was not in possession of the properties under any trust, nor was the property *wakf*. He said this was so, as a result of the decision in suit No. 95 of 1913, the suit by the Secretary of State for India—and of the litigations carried on by his father against tenants by which the *wakf* created by Lalta Bibi became infructuous, and the whole property went into the possession of Mukandi Lal on whose death he and his brother succeeded to it. The Subordinate Judge held that it was not shown that Jagannath had given authority to his wife to create a trust and that therefore the property was not trust property. On 11th May, 1932, the High Court on appeal held that Lalta Bibi had made the *wakf* on the authority of her husband, that the property was validly dedicated by her to the idol as a public endowment and that respondent No. 1 and Gopi Nath had become validly appointed trustees. The decree of the Subordinate Judge was accordingly set aside. Against this decree an appeal was filed in the Privy Council and on 5th March, 1936, was dismissed for want of prosecution.

Meanwhile, on 16th July, 1932, the appellant, the mortgagee, filed the suit (O.S. No. 47 of 1932) which has given rise to this appeal. Evidently, when the High Court gave its judgment on 11th May, 1932, holding that the dedication of the property was valid, he must have considered it was high time to file a suit to recover his money.

To complete the narrative, their Lordships must refer to two more litigations.

On 8th December, 1932, Brij Mohan (respondent No. 2, brother of respondent No. 1) instituted suit No. 83 of 1932 in the Court of the Subordinate Judge at Allahabad against Kishan Lal and three others—plaintiffs in suit No. 85 of 1927—for a declaration that the property in suit Nos. 14 and 15 was his personal property; respondent No. 1 was added as the 5th defendant. It is enough to state that on 13th February, 1934, the Subordinate Judge dismissed the suit, holding that Lalti Bibi had the necessary authority of her husband to make the " will " of 1903. On 19th April, 1938, the appeal filed by Brij Mohan against the decree was dismissed by the High Court.

On 12th October, 1932, Lal Kishan Lal already mentioned and others brought suit No. 14 of 1932 under section 92 C.P.C. for the removal of respondent No. 1 and Gopi Nath from the office of trustees. Gopi Nath

died during the pendency of the suit. On 23rd August, the District Judge decreed the suit and ordered respondent No. 1 to be removed from the office of trustee. It was in the course of this suit that Mr. R. N. Basu was appointed receiver of the properties by order of the Court dated 9th December, 1932. As stated already, when the respondents 1 to 3 failed to contest the present suit, the idol, respondent No.4, was made a party to it through the receiver.

The Trial Court framed 9 issues of which the following are material for the purposes of this appeal:—

> " 1. Whether the property mortgaged belonged to the defendants Nos. 1-3 or to defendant No. 4, on the date of the mortgage in suit?
>
> 2. Whether Janki Prasad, Brij Mohan Das and Mannu Lal executed the mortgage in suit? Is the mortgage in suit binding on defendant No. 4?
>
> 4. Whether the property in suit is liable to sale under the mortgage in suit?
>
> 6. Whether the mortgage bond in suit was executed by a person competent to mortgage the property of the defendant No. 4?
>
> 9. Whether the mortgage in suit was executed in the interest of the defendant No. 4? If so, how does it affect the suit? "

On the above issues and other relevant matters the Subordinate Judge found that the property in suit belonged to the idol and not to respondents 1-3; that the deed was executed by respondents 1-3; that the decree in suit No. 141 of 1919 was a valid charge on the trust property; that the idol was benefited from the consideration of the mortgage to the extent of Rs.13,547.6.6, the amount payable under the decree; that respondent No. 1 alone was the *de facto* manager and trustee and was entitled to act in an emergency and save the property from destruction and preserve it for the benefit of the idol; and that respondents 2 and 3 had no title to the property and that " their joining in the suit would not affect in any way ". He further held that clause 5 of the mortgage deed which he described as an " all estate clause " conveyed not only the title of respondent No. 1 expressly mentioned in the bond but his title to the property as a trustee and manager of the idol. He stated: " I agree with the contentions of the plaintiff's learned Counsel that in the case of transfer all the rights and title of the transferee whether patent or latent is transferred ".

In the result, the appellant was given a decree for Rs.13,547.6.6 together with interest amounting to Rs.18,873.5.9 with proportionate costs against defendant No. 4.

Shortly stated, it is clear from what has been said above that the Subordinate Judge came to the conclusion that though the property mortgaged under the deed belonged to the idol and not to the mortgagors it could be proceeded against under the suit mortgage because (1) the appellant by discharging the mortgage debt by his loan had subrogated himself to the rights of the decree-holder in suit No. 141 of 1919 in which he had obtained a decree for the sale of the suit property; and (2) under clause 5 read presumably with his finding that respondent No. 1 was the *de facto* manager, the rights of the idol in the property had been validly mortgaged by him by mortgaging all rights and interest which he held, which would include the title to the property vested in him as trustee of the idol also. In support of ground No. 1, the learned Subordinate Judge relied on the equitable doctrine of subrogation enunciated in the well-known decision of *Butler* v. *Rice* [1910] 2 Ch. 277. In passing, he also referred to sections 91 and 92 of the Transfer of Property Act.

On appeal, the learned Judges of the High Court held that the appellant is not entitled to the rights of subrogation under section 92 of the Transfer of Property Act which they held applied to the case, as the money was advanced to respondent No. 1 and his relatives, and not as required by the section, to the " mortgagor ", the idol, " whom respondent No. 1 was not representing ". They also added that having regard to the circumstances of the case the Trial Court was " incorrect in finding that at the

time of the mortgage deed in 1926 Janki Prasad was *de facto* manager and Mutwalli " of the idol and that he could not by himself represent its interests, and that the deed was not binding on the idol as it was not executed by all the trustees. They agreed with the Subordinate Judge on his other findings. In the result, the decree of the Trial Court in favour of the appellant was set aside.

In this appeal, Sir Thomas Strangman argued that " in the circumstances of the case the appellant was entitled to be subrogated to the rights of the decree-holder in suit No. 141 of 1919 " and further, he supported the judgment of the Subordinate Judge for the reasons therein given.

As the question for decision is whether the mortgage deed is binding on the idol, their Lordships will first examine the terms of the deed to which they have already drawn attention. After reciting the death of Lalta Bibi in 1908, the document states that since her death Mukandi Lal, father of the executants, had been in possession of the suit property by right of inheritance and since his death the executants had been in " proprietory possession " thereof. Then it states that it is necessary to pay the mortgage debt on the property which had been created by Lalta Bibi for valid reasons as found by the High Court in A.S. 41 of 1921, that the property is sought to be sold in auction and that it is necessary to pay the debt to safeguard the property " which is likely to prove beneficial to the family and to the minor ". Then it says in clauses 5 and 8 that all the rights and interests appertaining to the house held by the executants " at present, or we (the executants) might acquire in future " are pledged for the loan and that " the creditor shall have all powers and rights of sale by auction which the decree-holder in appeal No. 41 of 1921 has in satisfaction of which the property has been advertised for sale ". It is clear to their Lordships that respondent No. 1 purported to execute the deed along with his brother and his son, claiming the property as their own family property. In the whole of the document from beginning to end there is no mention whatever that the idol has any rights in the property. It is no doubt true that the necessity for the loan was said to be the impending sale of the property and the execution of the decree against the idol, but the property is to be safeguarded as it is likely to prove beneficial to the family and the minor, and not to the idol. In their Lordships' opinion the document by its terms does not purport to mortgage the interests which the idol has in the property. This is the opinion of the High Court as well as of the Trial Court also; if so, it is difficult to see how under the express terms of the document any interest which the idol has in the property can be proceeded against.

The Subordinate Judge, however, thinks its interests in the property have been mortgaged because of clause 5 of the deed, read in the light of his finding that at the time of the deed respondent No. 1 " alone " was the *de facto* manager and trustee of the idol and was entitled to act in emergency. Shortly put, the reasoning is that clause 5 of the deed by mortgaging all his rights in the property has mortgaged his rights as a trustee of the idol also and as he " alone " was, as the result of his finding, the *de facto* trustee, the entire interest of the idol has been validly mortgaged under the document.

Assuming that the Subordinate Judge's interpretation of clause 5 is right, to support his finding it is still necessary to show that at the time respondent No. 1 " alone " was the *de facto* manager and trustee of the idol entitled to act in emergency. On this point the learned Judges of the High Court have come to the conclusion that in the circumstances of the case " Janki Prasad neither purported to represent Sri Thakurji (the idol) nor would he have been a proper person to represent Sri Thakurji in any transaction ". Their Lordships are in accord with this opinion. As they read the " will " of Lalta Bibi, though some powers are given to the trustees to act singly in para. 12, the document, as pointed out by the High Court, does not give to a single mutwalli any power to execute a deed of transfer—nor is such a power given to him by law. In the suit by the Secretary of State for India (suit No. 95 of 1913) respondent No. 1 set up the title of the idol to the suit property. His view seems to have

undergone a change as a result of that suit. In subsequent litigations, first somewhat vaguely and then definitely he pressed his family's claim to the property though in fact during all that time he continued to be one of the trustees of the idol. He might have had some justification for doing so as a result of the decision in the rent suits, and of the order for the mutation of names in the municipal registers with respect to the property made on 1st July, 1926, in favour of himself and his brother Brij Mohan. On 30th March, 1926, however, these two brought the suit No. 54 of 1926 to set aside the decree in suit No. 141 of 1919 in which it is said that on the death of Lalta Bibi, Mukandi Lal became the owner of the property and was in possession through his life time, and the plaintiffs are described as heirs of Mukandi Lal. The suit was dismissed as an attempted compromise fell through and the suit property was brought to sale by the decree-holder in execution of his decree. It was then, and not till then, that the mortgage deed was executed and the money borrowed by the executants to save the property from sale; and consistently with the claim which they had been urging they stated in the deed that the property belonged to them. These facts stated here in bare outline, and the evidence in the case, all of which have been examined by the learned Judges, support their conclusion that at the time of the mortgage respondent No. 1 was not competent by himself alone to represent the idol nor did he as a matter of fact purport to represent it. It is true that the final decree in the mortgage suit, No. 141 of 1919, was granted against the idol " through " respondent No. 1 alone and that the decree and sale proclamation also mentioned his name only, but the suit was brought against all the three trustees and the mere statements in the decree and proclamation do not amount to any valid declaration that respondent No. 1 was the sole trustee entitled to act on behalf of the idol. In this connection attention may be drawn to the fact that though in September, 1927, Gopi Nath made an application in suit No. 85 of 1927 that he be exempted from the case, yet the High Court held that the property belonged to the idol and that the 1st respondent and Gopi Nath had validly been appointed trustees under the " will ".

The position in 1926 with regard to the trustees was this:—Lalta Bibi had under her " will " of 1907 appointed three trustees, respondent No. 1, Gopi Nath and Jugal Kishore to manage the affairs of the idol. Of these, Jugal Kishore had died during the pendency of suit No. 141 of 1919, and Gopi Nath had " apparently ceased to act "—as mentioned by the High Court—though he remained a trustee. Thus, only respondent No. 1 continued to interest himself in the suit property in 1926. So far, their Lordships have been testing with reference to the evidence the correctness of the High Court's finding that he did not represent the trustees in the suit transaction and was acting only for himself. This finding if correct would show that he cannot by his execution of the document convey the property of the idol to the appellant.

Even if their Lordships accept the finding of the Subordinate Judge that respondent No. 1 was the *de facto* manager and trustee entitled as such to act in emergency, still in law, the execution by him alone of the deed would be ineffective in conveying a valid claim to the suit property. In this connection attention may be drawn to the following statement of the law from Lewin on Trusts, 14th edition, p. 196:—

> " In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee, but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If any one refuse or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved."

Their Lordships consider this to be a correct statement of the law applicable in England and that the same doctrine applies in India also (*see Abdul*

Gofur Mandal v. *Umkanta Pandit* (1914-1915) 19 *Cal.* W.N. 260). For these reasons, the mortgage deed is not binding on the trust estate.

Their Lordships will now proceed to consider whether the appellant is entitled to be subrogated to the rights of the decree-holder in suit No. 141 of 1919, on the broad ground that the debt binding on the suit property having been paid off with his money, it became liable for the said amount. The doctrine of subrogation is in essence a simple matter. It means the substitution of one creditor for another. The law of subrogation in India is contained in section 92 of the Transfer of Property Act. This section is new and was inserted by section 47 of Act XX of 1929. By section 39 of the amending Act, sections 74 and 75 of the Transfer of Property Act which contained only in an imperfect form the law of subrogation were repealed. The new section deals with the rights of subrogation of two different classes of persons.

The first paragraph, which deals with the rights of persons who have an existing interest in the property, states that:—

> " Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."

The third paragraph with reference to which the case of the appellant was argued deals with the rights of strangers who acquire an interest in the property. It runs as follows:—

> " A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated."

The right mentioned above referred to usually as " conventional or contractual " subrogation is founded upon the principle of an agreement between a borrower and a lender, that the lender shall be subrogated to the rights of the original creditor.

As section 92 was not in force at the time of the suit mortgage, viz., December, 1926, the question was raised whether or not it has retrospective operation. On this point the opinions of the High Courts in India are divided. The case was also argued with reference to the law as it stood prior to the amendment. Their Lordships, however, do not think it is necessary to decide the question whether the section has or has not retrospective effect as in their opinion the appellant is not entitled to the right of subrogation whether the case is governed by section 92 or by the previous law.

Under the statute, the question to be decided is whether on the findings arrived at by the High Court, which their Lordships endorse, the appellant's case for subrogation would fall within the language of paragraph three of section 92. The facts have established that the appellant has loaned money to respondent No. 1, and with the money so obtained the decree debt in A.S. 41 of 1919 was discharged by him and in consequence the idol was benefited, the trust estate having been freed from the burden imposed on it by the decree. But the appellant in order to succeed must prove that the money was advanced by him to the mortgagor. In the present case, that has not been proved as the money was advanced, not to the idol through its trustees, but to respondent No. 1 personally who could not by himself represent the idol; nor is any registered instrument executed by both trustees forthcoming; the only document is that signed by respondent No. 1 alone. For the same reason, the agreement in clause 8 of the deed also does not advance the case of the appellant as, at best, it is only an agreement by a single trustee. The defect which has proved fatal to the appellant's claim under the document has proved equally fatal to his claim based on the statute also.

Turning now to the law as it was in 1926, Sir Thomas Strangman rested his case upon the equitable doctrine of subrogation enunciated in *Butler* v. *Rice* (*supra*). In that case, a husband obtained money on the property of his wife to pay off a mortgage debt binding on her property without

her knowledge and authority, and relief was given to the creditor, a mere stranger, who had no interest in the property, on the principle of subrogation. This decision would seem to support the view that a mere volunteer who discharges a mortgage debt binding on the property, as in the present case, could claim to be subrogated to the rights of the creditor on the mortgaged property for the amount paid by him. Whatever force such a doctrine may possess in England, the Board has negatived such a plea as regards India—see *Ramtuhul Singh* v. *Biseswar Lalsahoo* [1874-75] 2 Ind. App. 131. Even before the amendment of the Act, to support a claim to subrogation by one who has lent money to a mortgagor to redeem a mortgage, an agreement express or implied that the lender shall be subrogated to the rights of the creditor was necessary to be proved. In this connection reference may be made to the Board's decision in *Raja Janaki Nath Roy* v. *Raja Pramanath Malia* [1939] 67 Ind. App. p. 82 at 88, where in considering what was the law as to " partial subrogation " before the Act was amended by Act XX of 1929, Lord Romer who delivered the judgment of the Board observed as follows:—

> " Taking the law as it stood in December, 1927, it has been no where better expressed than it was by Mookerjee J. in *Gurdeo Singh* v. *Chandrika Singh* [1907] 36 Calc. 193. That learned Judge said this: ' It may be said in general that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt, or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or must stand in such a relation to the mortgaged premises that his interest cannot otherwise be protected.' "

The rest of the observations are not relevant as they deal with the immediate question which the Board was then considering.

It is clear from the above statement of the previous state of the law that the appellant being a mere stranger—neither being a surety of the debt, nor being otherwise interested in the property—has in order to succeed on the equitable doctrine of subrogation to prove that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security. As he has not been able to prove such an agreement his appeal fails even under the previous state of the law.

After the amendment of the Act the right of subrogation can be claimed by the lender only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. The right can no longer be claimed or granted as before, on very slight evidence or what may be described as the semblance of an agreement. In the present case, in their Lordships' view, there is no such evidence or semblance of an agreement between the appellant and the idol, or the creditor. The mere fact that money borrowed from him was used for paying off a previous charge does not entitle the appellant to the benefit of the discharged security.

Lastly, it was argued forcibly, that if the appellant fails in the present suit the idol gets the property freed from liability with the aid of the appellant's money; and that therefore relief should be given to him on general principles of justice and equity; but as observed by their Lordships in *Ramtuhul Singh* v. *Biseswar Lalsahoo* (*supra*) at p. 143:—

> " . . . It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt . . . "

After giving full weight to every argument urged by the learned Counsel on behalf of the appellant, their Lordships are unable to hold that the decision of the learned Judges of the High Court is wrong. They will humbly advise His Majesty that this appeal should be dismissed with the costs of the contesting respondent.

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In the Privy Council

LALA MAN MOHAN DAS

v.

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