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Such a view of the rights and duties of managers of the *savasthan* is, it is plain, quite inconsistent with the *devasthan* character of the property with which it is endowed, and it is hopeless, therefore, to expect that either the interests of the sacred shrines in question and of the Brahmins and others entitled to share in the *annachhatra* annexed to them can be properly safeguarded by persons who place their own interests on an equality with those of the sacred shrines entrusted to their charge ; or that the endowments—which, it cannot be doubted, are at present charged with debts, some of which at least ought never to have been thrown on them—should be freed from such burdens and restored in their integrity to the sacred and charitable purposes for which they were intended, whilst the task of doing so rests with those who entertain such erroneous ideas as to the nature of their duties. We think, therefore, that the District Judge was right in his conclusion that the interests of these important sacred places, with their attendant charities, imperatively required that the first and second defendants should be removed from their management. This necessarily requires that the second defendant should also account in such manner as the Court may think proper under the circumstances for all sums received by him from the income of the *savasthan* property since he was put into possession, with all just allowances. It will, therefore, be necessary to send the case back to the District Judge to take the above accounts and also to report as to the best mode of providing, in the future, for the management, both secular and spiritual, of the several shrines and their endowments, after giving notices to the parties to the suit and also to the residents of the several villages where the shrines are situated in such manner as the Court may think advisable with the view to their offering suggestions to the Court in framing the necessary scheme. This Court also reserves to the defendants the [625] rights, in execution of this decree, to show that certain of the lands mentioned in the plaint as belonging to the *savasthan* were not included in the property appropriated to the *savasthan* by the Peshwa's award or in subsequent grants. The parties to have liberty to file objections in this Court to the said accounts and scheme when framed. The accounts to be taken, and scheme framed and transmitted to this Court, within six months.

Decree confirmed and case remanded.

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Before S[illegible] Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

SHRI G[illegible]SH DHARNIDHAR MAHARAJDEV (*Original Defendant No. 1*), *Appel[illegible]*, v. KESHAVRAV GOVIND KULGAVKAR (*Original Plaintiff*), *Respondent.** [1st May, 1890.]

Sanad—*Co[illegible]uction of* sanad—*Trust—Religious and charitable trust—Mortgage of trust p[illegible]rty—Estoppel—Right of a trustee to impeach the acts of his predecessor in offic[illegible] [illegible]ortgage—Interest—Rule of* damdupat—*Its application to mortgage transactio[illegible]*

A [illegible]d, after reciting that certain villages had been held by C. as *inam* "on acco[illegible] of the worship, jubilees, and feeding of Brahmins in honour of the Shri-

* Cross Appeals, Nos. 41 and 42 of 1886.

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(or the deity)," proceeded to "confirm the *inam* as before," directing that "it be continued to C. and his sons and grandsons from generation to generation as it had been continued to the Shri from former times."

Held, that this was a grant to the religious foundation, and not to C. and his descendants for their own benefit.

Property granted for religious and charitable purposes is inalienable, except under special circumstances.

No person, other than the duly authorized trustee, can alienate by sale or mortgage the property of a religious trust.

When a trustee does any act in breach or repudiation of the trust, such act is not binding on his successor in the trust.

A mortgagee is entitled to have interest added to the principal at the rate stipulated in the mortgage-deed, and to appropriate the rents and profits received by him in or towards satisfaction of such interest, but after such appropriation, if the amount of interest due on foot of the mortgage exceeds the amount of principal, then, according to the rule of *damdupat*, the mortgagee's claim must be limited to double the principal amount.

Nathubhai Panachand v. *Mulchand Hirachand* (1) explained.

[626] Where a mortgage-deed provided that the costs of any proceedings necessitated by the default of tenants in payment of rents should be deducted from the revenues, and there was no express promise by the mortgagor to personally pay those expenses.

Held, that the mortgagee was not entitled to a decree for such costs against the mortgagor personally.

On the death of D., the hereditary trustee of a *devasthan* (or religious endowment), disputes arose between Ganesh and Chinto as to the succession. Ganesh claimed to succeed as D.'s adopted son. Chinto denied the adoption and claimed as D.'s heir and nearest kinsman. Chinto obtained a decree against the widow of D. for possession of the *savasthan* property and took possession in 1874. Ganesh in the same year obtained a decree against D.'s widow, awarding him possession and management of the property. He sought to execute this decree, but was successfully resisted by Chinto, who had already got possession under his decree.

Pending this litigation the widow of D., the deceased trustee, who was *de facto* manager, mortgaged two villages forming part of the *devasthan* property. To pay off this mortgage Ganesh mortgaged the villages to the plaintiff in 1875. The mortgagee sought to take possession of the villages, but he was resisted by Chinto. Thereupon Ganesh filed a suit, *in forma pauperis*, against Chinto to recover possession and management of the whole *devasthan* property. Pending the inquiry into Ganesh's pauperism, both Ganesh and Chinto referred their disputes to arbitration, and an award was made in 1881, by which the mortgaged villages and some other property belonging to the *devasthan* were assigned to Ganesh and his heirs in perpetuity.

In 1884 the plaintiff sued to enforce his mortgage lien by sale of the mortgaged villages.

Held, that the villages being trust property, it lay upon the mortga[gee] to prove circumstances justifying a charge on such property.

Held, also, that, even assuming that the mortgage money was act[uall]y applied to the purposes of endowment, the mortgage could not be enforced [ag]ainst the property, as the mortgagor was not a duly authorised trustee.

Held, also, that the award made between Chinto and Ganesh was [no]t binding on Chinto's successor in the trust, as Chinto professed to act in the [l]atter, not as a trustee, but as full owner of the *devasthan* property and in re[pu]diation of the trust.

[Overr., 20 B. 721 (724); F., 18 Ind. Cas. 11; R., 20 B. 250 (253); 20 B. 611 (614); 22 B. 475 (479); 23 B. 237 (242); 24 B. 114 (118); L.B.R. (189[?]-1900) 645; 15 M.C.C.R. 227 (228); 23 Ind. Cas. 456; 25 Ind. Cas. 271.]

CROSS appeals from the decree of Rao Bahadur Chunila[l M]aneklal, First Class Subordinate Judge of Thana, in suit No. 279 of 18[..]

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(1) 5 B. H. C. R. A. C. J. 196.

This was a suit brought by a mortgagee to enforce his mortgage lien by sale of the mortgaged property.

[627] The property consisted of two *inam* villages, Khar Narangi and Chinchouli, granted to the manager or trustee of the Chinchvad *savasthan* by the Raja of Satara under a *sanad* which was in the following terms:—

"*Shri*
Chintaman Dev.
Dharnidhar Dev.

"Peace! Prosperity. In the year 1741 A.C., Raja Shahu Chatrapati, the illustrious lord, the chief ornament of the Kshatriya race, commanded the present and future *deshadhikaris* and *lekhaks* (provincial officers and writers) of the prant Chaul as follows:—

"From former times certain villages out of the prant aforesaid have been held as *inam* by Shri (Chintaman Dev) residing at mauje Chinchvad *on account of the worship*, jubilees, and feeding of Brahmins in honour of the Shri.

"The villages out of the tappa Pashur are as follows:—

1 mauje Khar Narangi ... Agar wadi in kasbe Chaul.
2 mauje Chinchouli ... ... Near Khar Narangi.

"In all the two villages exclusive of the *hakdars* and *inamdars*, together with the wadi aforesaid, were granted as *inam*. Now that pious man is dead. There is his son Shri (Dharnidhar Dev) to whom the *inam* is confirmed as before. You are, therefore, to continue the *inam* to him and to his sons and grandsons from generation to generation as it has been continued to the Shri from former times. Do not insist upon a new letter being produced every year. Do you take a copy of this letter and return this original as a title-deed for enjoyment. Be this known."

In 1744 A. D. the Peshwa made a *tahanama*, or award, by which he assigned one moiety of the *savasthan* property to the manager and his *bhaubands* as a provision for their temporal wants, and reserved the other moiety exclusively for the maintenance of the religious endowment. (See *supra*, p. 612.)

The moiety so set apart for the endowment included the two villages in question, *viz.*, Khar Narangi and Chinchouli.

In 1852, Shri Dharnidhar Dev, the manager of the *savasthan* mentioned in the above *sanad*, died, leaving three childless widows.

On his death disputes arose regarding the management of the *savasthan*. There were two claimants to the management. (1) Ganesh Dev, (defendant No. 1), who alleged himself to be the adopted son of the deceased Shri Dharnidhar Dev; and (2) Bajaji Govind, father of Chinto, (defendant No. 2), who disputed the [628] adoption of Ganesh, and claimed to succeed as the nearest kinsman and heir of the deceased.

In 1862 the Government of Bombay refused to recognize the adoption of Ganesh, and ordered the name of Bajaji Govind to be entered in the revenue records as the successor of Shri Dharnidhar, deceased.

In 1863 Bajaji filed a suit against Laxumibai, one of the widows of Shri Dharnidhar, to recover possession of the *savasthan* property. Some time after the institution of the suit Bajaji died. His son Chinto continued the suit, and obtained a decree against Laxumibai on 31st July

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1874. In execution of this decree Chinto took possession of the *savasthan* property and entered upon the management of the *savasthan* as Shri Dharnidhar's successor in office, in August 1874.

In 1869, during the pendency of this suit between Bajaji and Laxumibai the latter mortgaged the said two villages of Khar Narangi and Chinchouli to one Baburao Paranjpay.

In 1871 Ganesh filed a suit against Chinto to have it declared that he was the adopted son of Shri Dharnidhar. This suit was withdrawn, without the Court's permission to file a fresh suit. The order for the withdrawal was passed on 21st July 1874.

In 1873 Ganesh sued Laxumibai, and obtained a consent-decree in January 1874, awarding him possession and management of the *savasthan* property. Ganesh sought to execute this decree, but he was successfully resisted by Chinto, who, as above stated, had already assumed the management of the *savasthan* under his decree against Laxumibai.

On 6th November 1875 Ganesh executed in favour of Keshavrao Govind (the plaintiff), a mortgage-bond by which the villages of Khar Narangi and Chinchouli were mortgaged to secure the repayment of a loan of Rs. 6,171. Out of this sum Rs. 4,671 was borrowed for the purpose of paying off the debt due to Baburao Paranjpay, to whom the villages had been previously mortgaged by Laxumibai in 1869, as above mentioned.

The plaintiff as mortgagee attempted to take possession of the mortgaged villages, but his attempts were frustrated by Chinto. The revenue authorities declined to assist him in recovering rents [629] from the tenants. He had, therefore, to file several rent suits against the tenants, in some of which he obtained consent-decrees.

Chinto thereupon obtained an order of injunction from the Mamlatdar's Court on 10th June, 1879, restraining the mortgagee (plaintiff) from disturbing his possession and enjoyment.

Ganesh then filed a suit, *in forma pauperis*, against Chinto to recover possession and management of the whole *savasthan* property. Ganesh's application for leave to sue as a pauper was rejected by the Court of first instance. Against this order of rejection Ganesh applied to the High Court under its revisional jurisdiction.

While this application was pending in the High Court, both Chinto and Ganesh referred the matter in dispute between them to arbitration. In July, 1881, the arbitrators made their award, which recited the *rajinama* appointing arbitrators as follows :—

"We the parties giving (this) *rajinama* in writing (namely) Shri Ganesh Dharnidhar Dev and Shri Chintaman Bajaji Dev, of the village of Chandvad, taluka Haveli, district Poona, give this (*rajinama*) in writing as follows :—

"One of us, Shri Chintaman Bajaji Dev, is in possession of almost the whole of the moveable and immoveable and other estate of the deity Mangal Murti at the *savasthan* of Chandvad. Ganesh Dev alleges that he is the adopted son of Shri Dharnidhar Dev, and he, as such, has up to this day taken and has been still taking steps for taking the said estate into his possession; while Shri Chintaman Bajaji contends that Shri Dharnidhar Dev did not adopt the said Ganesh Dev, and that he (Shri Dharnidhar Dev) died without issue, and that he (Shri Chintaman Bajaji) therefore, is the heir of Shri Dharnidhar Maharaj Dev, and that he being

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the owner of the *savasthan* by right of inheritance, the possession of estate is in his hands."

The award divided the property between the two claimants, and the villages of Khar Narangi and Chinchouli were (*inter alia*) alloted to Ganesh, (defendant No. 1). Under this award, Ganesh took possession of the property assigned to him, including the said two villages.

In 1884 the plaintiff, Keshavrao Govind, filed the present suit against both Ganesh and Chinto to recover Rs. 18,969-7-8, being the amount due to him under his mortgage-bond of the 6th November, 1875.

[630] The particulars of his claim were as follows :—

Rs.	A.	P.	
6,171	0	0	Principal amount due on the mortgage-bond.
1,570	7	0	*Nazrana* and *judi* for 1875-76.
2,885	9	8	Expenses incurred by plaintiff in suits filed against tenants.
9,931	5	4	Interest.
20,558	6	0	Total.
1,588	14	4	Amount received.
18,969	7	8	Balance due.

Ganesh (defendant No. 1) contended (*inter alia*) that the mortgage-debt had been more than paid off out of the rents and profits of the property mortgaged, and that he was not liable for the sum of Rs. 2,885-9-8 claimed by the plaintiff on account of the costs of litigation.

Chinto (defendant No. 2) pleaded that the villages in dispute formed part of a religious endowment called the Chinchvad *savasthan*, of which he was the manager and trustee ; that defendant No. 1 had no right to mortgage the villages ; and that the mortgage was invalid both according to Hindu law and Bombay Act II of 1863, s. 8, cl. 3.

The Subordinate Judge held that the property in dispute was not a religious endowment ; that the plaintiff was not entitled to claim Rs. 2885-9-8 for expenses of litigation ; that the said expenses were not properly incurred, and that the mortgage-debt was not paid off. On taking accounts he found that there was a balance of Rs. 10,410-14-0 due to the mortgagee. He, therefore, passed a decree directing the defendant No. 1 to pay the amount with interest at 6 per cent. per annum within six months from the date of decree. In default the plaintiff was at liberty to recover the amount by sale of the mortgaged villages. The suit as against defendant No. 2 was dismissed.

Against this decision both mortgagor (Ganesh) and mortgagee (plaintiff) preferred cross appeals to the High Court.

Chinto, defendant No. 2, having been removed from the management of the Chinchvad *savasthan*, the trustee appointed by the Court as his successor in office was made a respondent in the mortgagee's appeal.

[631] Rav Saheb *Vasudev Jagannath Kirtikar*, for the mortgagee appellant (the plaintiff) :—The mortgage-debt was contracted for the benefit of the Chinchvad *savasthan*. The debt was contracted to pay off prior charges on the property, which were properly incurred for the purpose of the *savasthan*. The *savasthan* property is, therefore, liable

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for the debt so incurred—*Narayan* v. *Chintaman* (1). We seek to enforce our mortgage lien by sale of the property mortgaged.

[SARGENT, C. J.—If the property is a religious endowment, how can you sell the *corpus* ?]

I rely on the case cited to support the charge created in my client's favour.

[SARGENT, C. J.—What right had the mortgagor to charge *savasthan* property? He was not a manager or trustee.]

As adopted son, Ganesh, the mortgagor, was the rightful heir and successor of Shri Dharnidhar. His adoptive mother, Laxumibai, was in possession and management of *savasthan* during his minority. She was *de facto* manager, and as such had authority to charge *savasthan* property for necessary purposes. Our mortgage is, however, ratified by Chinto in the award of 1881. Under that award the mortgaged villages were assigned to Ganesh as his absolute property. Whatever defect there might be in his title at the date of the mortgage, was cured by the subsequent arrangement embodied in the award. That award is binding on Chinto and his successors. They are, therefore, estopped from disputing the validity of our mortgage. Under the mortgage we are entitled to recover (1) expenses incurred with the consent and at the instance of the mortgagor in defending his title; (2) payments made on account of *judi*; (3) costs of litigation with tenants to recover the rents. Our accounts show what charges we have incurred in respect of each of those items. The correspondence between the parties also throws light on these points. As regards interest, the rule of *damdupat* does not apply to a case like this, where the mortgagee has to keep an account of the **[632]** rents and profits on the one hand and of the principal and interest on the other. See *Balambhat* v. *Sitaram* (2); *Narso* v. *Gopalji* (3); *Krishnaji Raghunath Kathawle* v. *Lalsha*(4).

Ganpat Sadashiv Rao (with *Pandurang Balibhadra*), for the trustee respondent.—The villages in dispute are *devasthan* property. They were granted by the Satara Raja for the maintenance of the shrine at Chinchvad. The *sanad* creates an express trust for the benefit of the deity Shri Mangal Murti—*Sayad Mahamad Asadulla* v. *Venkaji Subrao Sholapur* (5). The Peshwa's award sets apart these villages, among others, for the exclusive use of the *savasthan*. The decision of this Court in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (6) conclusively shows that the property in dispute is burdened with a public religious trust. That decision was passed in a suit to which the Advocate-General, as representing the public at large, is a party. It is, therefore, binding not only on the actual parties to that suit, but also on the whole world. At any rate it is a strong piece of evidence under s. 42 of the Indian Evidence Act (I of 1872). Both mortgagor and mortgagee admit that the property is *savasthan* property. The mortgagor had no title to the property, nor was he in possession at the date of the mortgage. He was not a manager of the *savasthan*. He had, therefore, no authority to deal with property. Assuming he had, there is no proof of legal necessity for the debt. The award between Chinto and Ganesh was illegal and invalid. Chinto could not, as a trustee, assign any portion of the trust property to a stranger. The assignment was clearly *ultra vires*. It dismembered the *savasthan*.

(1) 5 B. 393 (396). (2) P. J. for 1883, p. 312. (3) P. J. for 1882, 337.
(4) P. J. for 1883, p. 45. (5) P. J. for 1885, p. 75. (6) 15 B. 612.

property which had been applied in its entirety to religious and charitable purposes ever since the date of the Peshwa's decision. Bombay Act II, s. 8, cl. 3, forbids such an alienation—*Prosunno Kumari Debya* v. *Golabchand Baboo* (1).

Jardine (with him *Shamrao Vithal* and *Mahadeo Bhaskar Chaubal*), for Ganesh, the mortgagor appellant.—The original of the [633] Peshwa's award is not forthcoming. The copy that is produced in this case is inadmissible. It is a copy of a copy. It is taken from the Inam Committee's record. The endorsement on the back of the copy clearly shows that you cannot vouch for its correctness. It is, therefore, not safe to act upon it. The present trustee, who has been appointed by the Court, is bound by the acts of his predecessor. He cannot impeach the validity of the award of 1881—*Maniklal* v. *Manchershi* (2); *Narayan Khandu Kulkarni* v. *Kalgaunda Bihrar Patel* (3); *Rupa Jugshet* v. *Krishnaji Govind* (4); *Gulzar Ali* v. *Fida Ali* (5). Apart from the award of 1881, I do not say that Ganesh had title to the property. The mortgagee is entitled to be recouped the costs of suits filed by him against the tenants for arrears of rent. He was in possession of the mortgaged property till the date of the award, when the mortgagor came in. The mortgage-debt has been paid off out of the rents and profits of the property. The rents recovered in execution of decrees against tenants alone amount to over Rs. 9,900.

Rav Saheb *Vasudev Jagannath Kirtikar*, in reply.—Chinto prevented us from recovering any rents. The Mamlatdar issued an injunction at his instance, restraining us from collecting the rents. The decrees we obtained against the tenants were mostly for the year 1881. We have given credit for what we have realized under these decrees.

C. A. V.

JUDGMENT.

TELANG, J.—The first question which arises on this appeal is whether the plaintiff is entitled to a decree declaring his mortgage-debt to be well and validly charged upon the two villages of Chinchouli and Khar Narangi. The trustee of the Chinchvad *devasthan*, who is a respondent in this appeal, contends that no such declaration ought to be made, because as far back as 1744 it was decided by the Peshwa's Government that these villages must be devoted solely to the proper expenses of the Chinchvad *devasthan*, and were, therefore, inalienable. In [634] support of this contention, he relies upon an alleged copy of the Peshwa's award, which appears to have been recorded in the office of the Inam Commission at the time of the investigation by that Commission of the grant of these villages. If that alleged copy is admissible in evidence, the contention of the trustee must be taken to be fully made out, upon the grounds set forth in the judgment of this Court in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (6).

Counsel, however, for the first respondent has objected to the reception in evidence of that document, on the ground that it is not shown to be a copy of any award of the Peshwa. And, no doubt, there is no evidence to show that the document is such a copy. It appears, however, that the document in question was considered by the Government of Bombay, which under Act XI of 1843 was the tribunal appointed

(1) 2 I. A. 145. (2) 1 B. 269. (3) 14 B. 404.
(4) 9 B. 169. (5) 6 A. 24. (6) 15 B. 612.

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to hear appeals from the Inam Commission; and that the villages in question were ordered to be continued to the Chinchvad *devasthan* in pursuance of the provisions contained in that document. It may well be, that under such circumstances the document on the records of the Inam Commission ought to be treated as itself a fresh origin of title, without proof of its being a copy of a document deriving its authority from the Peshwa's Government. Some of the observations contained in the judgment of West, J., in *Vasudev Pandit* v. *The Collector of Poona* (1) would seem to afford considerable support to such a view. It is not, however, necessary to absolutely decide this point. The original *sanad* under which the villages were granted, is Ex. No. 148 in appeal No. 71 of 1886 in this Court. That document, after reciting that certain villages, of which Chinchouli and Khar Narangi are two, "have been held as *inam* by Shri Chintaman Dev on account of the worship, jubilees, and feeding of Brahmans in honour of the Shri," proceeds to "confirm the *inam* as before," and to "direct that it be continued to him and to his sons and grandsons from generation to generation as it has been continued to the Shri from former times." It seems to us, that, on the true construction of that document, the grant may fairly be taken to have been made primarily as a grant to the religious foundation, and not to the particular **[635]** individuals named for their own benefit. And it ought now to be so taken, when we have regard to the documents to which our attention has been called, *viz.*, Exs. 58, 156, 261, 263, and 325, in which the plaintiff and the first defendant, the mortgagor and mortgagee, both refer to the villages in question as property of the *savasthan.*

It was, doubtless, argued that the documents referred to do not admit that the villages were public charitable property. Upon the point now before us, however, it is not material to consider whether the *savasthan* is a "public" charity. That is only material under s. 539 of the Civil Procedure Code, but on the point whether the property is alienable or not, no question arises as to the "public" character of the charity, for it is laid down in *Krishnarav Ganesh* v. *Rangrav* (2) in general terms that "grants of *inams* for religious or charitable purposes are generally held in perpetuity and cannot be aliened or incumbered." See also *Narayan* v. *Chintaman*(3), and cases there collected. Again, the question as to the nature of the interest of the Dev family and the Chinchvad shrine in these villages was decided by this Court in appeal No. 71 of 1886. And although the decree in that appeal does not operate as a *res judicata* between the parties before us, it is admissible as a piece of evidence under s. 42 of the Indian Evidence Act, and that decree shows, when taken, as it ought to be, in connection with the judgment of the Court—see *Kali Krishna Tagore* v. *The Secretary of State for India in Council* (4)—that these villages form part of the property of the Chinchvad *devasthan.* Upon the whole, therefore, we have come to the conclusion that the two villages comprised in the mortgage on which this suit is brought must in this suit be held to be *devasthan* property, granted for religious and charitable purposes and, therefore, except under special circumstances, inalienable.

But it was said that it is not open to the trustee-respondent before us to take this point, because he is estopped by the act of his predecessor in the trust, and for this argument the well known decision of Green, J.,

(1) 10 B. H. C. R. 471.
(2) 4 B. H. C. R. A. C.J. 1 (7).
(3) 5 B. 393 (396).
(4) 16 C. 173 (183).

in *Maniklal* v. *Manchersha* (1) was [636] relied upon. In that case the plaintiff, a trustee of certain charitable property, sought the help of the Court to annul an act of the previous trustee in mortgaging the property of the charity to the defendant. Mr. Justice Green thought that the plaintiff was not entitled to maintain the suit, which he considered could only be sustained either by the *cestuis que trusts* or the Advocate-General. Assuming that decision to be correct, it has no application to the case before us. In the first place, the trustee of the charity does not come here as a plaintiff, as he did in *Maniklal* v. *Manchersha*; he appears only as a defendant to dispute the right of the plaintiff to have his debt charged on the property of the savasthan. Secondly, religious property is regarded as belonging to the "idol" as a fictitious entity—compare *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (2)—and there is, therefore, strictly speaking, no living *cestui que trust* to sue in respect of such property. And as to the Advocate-General, prior to the Civil Procedure Code of 1877, there was no authority, that we are aware of, for his instituting or sanctioning a suit in a Mofussil Court. If, therefore, the view of Green, J., were strictly applied to cases in the Mofussil, and the right to sue in respect of breaches of trust of religious property confined to the Advocate-General or the *cestui que trust*, such breaches would prior to the Code of 1877 have remained without any remedy whatever. In *Radhabai* v. *Chimnaji* (3), however, Westropp, C. J., and Kemball, J., held, that in such cases a suit might be maintained by any one who was a worshipper of the idol whose *devasthan* was in question. If, then, any worshipper might institute such a suit, the person whom the Court has appointed a trustee of the *savasthan*, after ordering the removal of a defaulting trustee in a suit devoted by the Advocate-General, would seem *a fortiori* to be entitled to raise such a defence as that we are now considering. Further, it is to be remarked that in the case before Green, J., the act of the trustee was considered by him to be "a proper and reasonable exercise of her office as trustee." It may well be, that a succeeding trustee should not be allowed to impeach a former trustee's act when it is one of that character, without following, as a logical consequence, that where the trustee avowedly acts in breach or repudiation of the trust, such act should be binding by estoppel upon his successors in the trust. To apply that to the facts of this case, when Chintaman Bajaji parted with these two villages in favour of Ganesh Dharnidhar Dev, he was apparently acting as full owner of the villages, and not as trustee of them on behalf of the savasthan. He was certainly not professing to act as trustee, and at least impliedly he was repudiating the trust. Any estoppel, then, binding upon him in consequence of that act, would be binding, not on the succeeding trustee who says Chintaman Bajaji was not full owner, but on Chintaman Bajaji's legal representatives in his personal capacity. The case of *Maniklal* v. *Manchersha*, therefore, does not, in our opinion, prevent the trustee-respondent from claiming the decision of the Court in this case as to the religious character of the property. And we may further point out that in the case of *Narayan* v. *Chintaman*, already cited, the hereditary trustee, who was the son of a deceased trustee, was permitted, in execution, to dispute the right of the decree-holder to enforce his decree against the trust property, although the decree had declared the debt to be charged on such property by virtue of certain mortgages passed to the decree-holder by the deceased trustee. The

(1) 10 B. 269. (2) 12 B. 247. (3) 3 B. 27.

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decree-holder was there held entitled to his remedy against the son only as heir of his father in his own personal capacity.

The next question that arises is whether, assuming the property to be religious property, and that the trustee-respondent is not estopped from relying on that circumstance as against the plaintiff, the latter has given evidence of circumstances justifying the mortgage in suit as a charge on religious property. The plaintiff contends that he has done so by the evidence contained in Exs. 303, 308, 310, 368, 389, 390, 392, 393, 440, 441. We are not disposed to accept those exhibits as sufficient evidence that the money raised on the mortgage to Baburao, which was paid off by means of the mortgage now in question, was actually applied towards the performance of religious celebrations at the Chinchvad shrine. But, even assuming that the money was so applied, there is no authority for holding that any one, other than the duly authorized trustee, can alienate by [638] sale or mortgage the property of a religious trust. And there can be no doubt in this case that the mortgagor here was not a duly authorized trustee and did not even claim to act as such. Upon both grounds, therefore, the Court cannot give effect to the mortgage in dispute as against the property of the Chinchvad *devasthan*. And the question in the appeal, therefore, reduces itself to a mere question of account between the plaintiff on the one hand and the first defendant *personally* upon the other.

On this branch of the case, the plaintiff claims to be allowed in account, several items disallowed by the Subordinate Judge. Firstly, he claims the amount alleged to have been paid by him in respect of the *judi* on the two villages for the year 1875-76. The Subordinate Judge has disallowed this item, on the ground that the plaintiff, not having been in possession when the payment is alleged to have been made, was not bound to pay the amount, and "the mortgagor has not at all been benefited by the payment." As we are of opinion that the plaintiff has not by his mortgage obtained any interest in the villages themselves, the plaintiff can only succeed in this claim as against the defendant personally in the present suit by showing a contract, express or implied, on the part of the defendant to pay the amount. No such contract appears to be alleged or proved. We must, therefore, uphold the decision of the Subordinate Judge on this point.

The same remarks, in substance, apply to the amounts alleged to have been returned by the plaintiff to the tenants for the purpose of paying off the Government dues. The evidence as to this return is not altogether satisfactory, but even were it otherwise, it would hardly justify anything more than an allowance of the item in the mortgage account, if one had to be taken. It would not justify the award of that amount, nearly Rs. 516, as against the defendant personally.

As regards the next group of items, *viz.*, the sums spent for costs of the various suits and proceedings instituted by the plaintiff, the Subordinate Judge has disallowed them all, on the ground that the proceedings were all improper and against public policy. We are unable to accept this view. The correspondence between the parties certainly indicates that some [639] proceedings were instituted by the plaintiff at the special desire of the first defendant himself. And we cannot look upon those proceedings as of the character attributed to them by the Subordinate Judge. They may be open to some of the criticisms made upon them by him, but they are not in such a sense immoral as to require the Court to refuse to enforce the defendants' liability, if any, in respect of

them to the plaintiff. The question, however, arises whether there was any such liability on the part of the first defendant to pay the costs of those proceedings to the plaintiff. The mortgage-deed itself provides that the costs of any proceedings necessitated by the default of tenants in payment of rents should be deducted from the revenues. There is no express promise by the defendant to personally pay those expenses, and in the face of the express provision in the deed for one mode of payment it is difficult to imply any other mode. And if no such implication can be drawn, it follows that as against the defendant personally the plaintiff is not entitled to claim the costs of proceedings against tenants. Upon the materials before us, however, it would appear that there were proceedings of a different nature also instituted by the plaintiff, the costs of which he claims in this suit. But the details of those proceedings cannot be ascertained from those materials, and this Court is not in a position to see which, if any, of those proceedings were expressly called for or sanctioned by the defendant in the various letters to which reference has been made in argument. It appears to us that where any particular proceeding is shown to be expressly called for, or sanctioned by the defendant, the costs, properly incurred, of and incidental to that proceeding may be allowed against the defendant personally as on an implied contract. The amount of such costs must be ascertained by the Court below. These remarks apply to the items marked 2 and 8 by the Subordinate Judge.

Passing now to items 3, 4 and 5 dealt with by the Subordinate Judge at p. 9 of his judgment, Rao Saheb V. J. Kirtikar for the appellant does not press for them, and the Subordinate Judge's order as to them will stand. Item 7 relates to proceedings against tenants which the Subordinate Judge has characterized **[640]** as "fictitious, and colourable, and collusive." We have already stated that we cannot agree with the Subordinate Judge in thinking the proceedings to be of such a character as to justify the Court on the ground of public policy in refusing to enforce the liability of the first defendant in respect of them. The item was not seriously contested by Mr. Jardine, and it will be allowed to the plaintiff. Item No. 6 is not one which can be properly charged against the defendant personally; although it might have been allowed to the plaintiff in the account of the mortgaged villages. Upon item No. 1 we see no sufficient reason for dissenting from the order of the Subordinate Judge, to which, indeed, Mr. Vasudev hardly offered any serious objection.

The next question to be dealt with is as to whether the rule of *damdupat* is properly applicable to this case or not. In *Nathubhai* v. *Mulchand* (1), the Court held that where principal and interest were charged on one side and rents and profits on the other, "it would be inequitable that the interest should cease when it amounts to the same sum as the principal, if the rents and profits continue to be charged." The rule thus laid down has been since uniformly followed in this Court. But the ground of equity upon which that rule is rested does not justify a decree in favour of a mortgagee for more than double the amount actually advanced; it only prevents the rents and profits being deducted from the amount so doubled. If, then, the whole account of the mortgage is taken first independently, of the rule of *damdupat*, and it is found that the balance at foot of such account after deducting rents

(1) 5 B.H.C.R. A. C. J. 196.

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and profit received is more than double the principal, the ground of the decision in *Nathubhai* v. *Mulchand* does not require the whole of such balance to be awarded, while the rule of Hindu law, on which a modification was said to be engrafted by that decision, does require the amount of the award to be limited to double the principal amount. But, in truth, what the Court in *Nathubai* v. *Mulchand* spoke of as a restriction on the application of the rule of Hindu Law may fairly be looked at as no restriction all, but an enforcement of it in the form laid down in *Dhondo* v. *Narayan* (1). **[641]** For each item of rents and profits received by the mortgagee can properly be regarded as a payment by the mortgagor, and the rule of *Damdupat* as expounded in *Dhondo* v. *Narayan* places no limitation on the aggregate amount of such payments. It is only when the final payment comes to be made in satisfaction of the whole mortgage-debt that there is room, in such a case as the present, for the application of that rule.

In the case of *Balambat* v. *Sitaram* (2), an opinion appears to have been expressed by the Court that where the nature of the contract as originally made by the parties contemplates the mortgagee keeping an account, the rule of *damdupat* does not apply. But the circumstances of that case are not very clear, nor are any authorities cited. It is not, therefore, easy to determine the precise ground of the opinion alluded to. In *Nathubhai* v. *Mulchand* and the later cases in which that decision has been followed, the *ratio decidendi* is not stated so broadly. And we do not think that the rule can be supported in the general form in which Mr. Vasudev contends it was laid down in *Balambhat* v. *Sitaram*.

Upon the whole, therefore, we have come to the conclusion that the plaintiff is entitled to have interest added to the principal amount advanced by him at the rate stipulated in the mortgage-deed, and to appropriate the rents and profits received by him in or towards satisfaction of such interest; but that after such appropriation, if the amount of interest now due and payable on foot of the mortgage exceeds the amount of principal, the decree on that part of the claim must be limited to double such principal amount.

It is now necessary to consider the points made on behalf of Ganesh, the defendant-mortgagor. It was first contended that the plaintiff (mortgagee) must be taken to have been fully paid off, as he signed the writ of possession in favour of the defendant issued under the decree obtained by him against Chinto Bajaji. It is to be observed, however, that the award, according to which that decree was made, and presumably also the decree itself, expressly recognises the mortgage to the plaintiff as still **[642]** subsisting mortgage and provides for its satisfaction. The signature of the plaintiff, therefore, to the writ (Ex. 340), does not afford any real support to this contention on behalf of the defendant. As regards the oral evidence relied on to show that the plaintiff has received more revenue than he has given credit for, it is not of such a definite tangible character as to lead the Court to the conclusion that more was received by the plaintiff than he shows by his accounts, as to which the Subordinate Judge observes that they are "quite accurate. The detailed nature of those accounts furnishes a strong ground for believing them, and they have been proved by the evidence of the plaintiff as well as the evidence and account books of Mr. Dhamankar." And as regards actual receipt of the rents of the property, we think the dates show that the case of the plaintiff is the

(1) 1 B. H. C. R. 47.

(2) P. J. for 1883, p. 31.

true one. On the 4th of December, 1875, the order of the Mamlatdar (Ex. 185) is made directing aid to be given to the plaintiff through the Revenue Department for recovery of the rents. On the same day Chinto issues his notices to the tenants forbidding any payment to the plaintiff (Ex. 439). Thereupon further proceedings take place in the Revenue Department, which end ultimately in a refusal by Government to aid the plaintiff. (See Exs. 331—2.) The next proceeding about possession and receipt of rents disclosed in the evidence takes place in January, 1879, when Chinto applies for and obtains an injunction from the Mamlatdar's Court against plaintiff's recovering rents from the tenants (Ex. 3). The explanation of this renewed activity on the part of Chinto is doubtless to be found in the attempts indicated by Exs. 210 and 233 (26th November, 1878) to induce the tenants to recognise the plaintiff in spite of all that had happened before. The success of those attempts doubtless compelled Chinto to take steps to enforce and preserve his own rights. It would thus appear that in 1875-76 the plaintiff probably obtained merely what was equivalent to an order for possession, which was never in fact enforced, and was in the end practically cancelled; and that in November 1878 he got at the tenants in some way and received rents from them, but was in January, 1879, prevented by the Mamlatdar's injunction from continuing to do so. So that it [643] was only from the latter end of November, 1878, to the beginning of January, 1879, that the plaintiff actually received the rents and profits of the two villages in question. And it is to that period that the items of revenue mentioned in Exs. 371—5 appertain. As to those Exs. 371—5, we do not think that the contention on behalf of the mortgagor is correct. Taking the whole of the plaintiff's answers together, we think the fair result of his deposition, Ex. 351, is that the items in Ex. 371 are not all items of realized revenue come to his hands. That being our view, and it also appearing to us that the Rs. 20 per *candy* mentioned in Ex. 233 is the proper rate at which the grain received from the tenants alluded to in that exhibit should be valued, and not the Rs. 40 mentioned by the plaintiff in his evidence, we are unable to accept the contention of the mortgagor that the plaintiff's figures are on his own showing untrustworthy. We must, therefore, hold, on the evidence before us, that the defendant has not succeeded in surcharging the plaintiff's account and showing that the loan has been paid off, especially as in July, 1881, when the award was made between the defendant Ganesh and Chinto, provision was actually made for the repayment of the plaintiff's mortgage. If the defendant's present contention is correct, this was entirely unnecessary.

Upon the whole, therefore, we must hold that the plaintiff is entitled to recover the amount due to him on taking an account on the principles already laid down. As the pleaders for both parties ask that the case should be sent down to the Court below in order that the account might be there taken, we must reverse the decree of the Subordinate Judge and send back the case to him for a fresh decree to be made after taking an account in accordance with the principles laid down in this judgment.

As to costs, we think the trustee-respondent must have his costs from the mortgagee, and the mortgagor must pay the costs of the mortgagee both in this Court and in the Court below.

Decree reversed and case remanded.