A128

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.10866-10867 OF 2010

IN THE MATTER OF :

M. Siuddiq (D) Thr. Lrs. ....Appellant

VERSUS

Mahant Suresh das & Ors. Etc.etc. ...Respondents

COMPILATION OF JUDGMENT
BY SHRI K. PARASARAN SR. ADV

PAPER BOOK
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BHAKTI VARDHAN SINGH
ADVOCATE ON RECORD

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THE SECRETARY OF STATE IN COUNCIL OF INDIA - - - - - - - - } *Appellant,*

AND

KAMACHEE BOYE SAHABA - - - - - *Respondent.**

On appeal from the Supreme Court at Madras.

Jurisdiction—Act of State—Power of Municipal Courts to enquire into—East India Company, if a sovereign body or state—Power to annex territories of Indian sovereigns—Hindu Law—Inheritance—Raj—Succession to—Private property of Raja—Widow's right to succeed—Partibility—Presumption of, under Hindu Law—Agent of Government exceeding authority—Ratification—Effect.

Transactions of Independent Sovereign States between each other, are governed by other laws than those which Municipal Courts administer. Such Courts have neither the means of decreeing what is right, nor the power of enforcing any decision which they may make.

The *Rajah* of *Tanjore*, a native independent Sovereign, but in virtue of Treaties under the protection of the East India Company, died without leaving issue male, when the East India Company, in the exercise of their Sovereign power, and in trust for the British Government, seized the *Raj* of *Tanjore*, and the whole of the property of the deceased *Rajah*, as an escheat, on the ground that the dignity of the *Raj* was extinct for want of a male heir, and that the property of the late Rajah lapsed to the British Government. Held, that as the seizure was made by the British Government, acting as a Sovereign power, through its delegate, the East India Company, it was an act of State, to inquire into the propriety of which a Municipal Court had no jurisdiction.

Semble.—There is a distinction between the public and private property of a Hindoo Sovereign, as upon his death his private property goes to one set of heirs, and the *Raj* and the public property to the succeeding *Rajah*.

The general rule of the Hindoo law of inheritance is partibility. The succession of a single heir, as in the case of a *Raj*, is the exception.

An act done by an agent of the Government, though in excess of his authority, being ratified and adopted by the Government, held to be equivalent to previous authority.

1st, 4th, & 9th July, 1859.

AMEER SING, a former *Rajah* of *Tanjore*, was in the year 1787, the absolute Sovereign of the fort and country of *Tanjore*, in the Presidency of *Madras*. In that and subsequent years three Trea-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessor,—The Right Hon. Sir Lawrence Peel.

ties were entered into between the *Rajahs* of *Tanjore* and the East India Company. The first of these Treaties was dated the 10th of *April*, 1787, and made between Sir *Archibald Campbell*, then Governor of *Madras*, and *Ameer Sing*; but as this Treaty was annulled by the Treaty next mentioned, it is unnecessary to state its provisions. The second Treaty, dated the 11th of *June*, 1793, was made between Sir *Charles Oakley*, Bart., then Governor of *Madras*, and *Ameer Sing*, which annulled the former Treaty, and the stipulations of which, so far as material here to be stated, were as follows:—"Art. 1. The friends and enemies of either of the contracting parties shall be considered the friends and enemies of both. Art. 2. In order to execute the foregoing Article in its full extent, the East India Company agree to maintain a military force; and the *Rajah* of *Tanjore* agrees to contribute annually a certain sum of money hereinafter mentioned as his share of the expense of the said military force; the said *Rajah* further agreeing that the disposal of the said sum, together with the arrangement and employment of the troops supported by it, shall be left entirely to the said Company. Art. 3. It is hereby also agreed, that for the further security and defence of the countries belonging and subject to the contracting parties in the *Carnatic*, &c., that all forts shall be garrisoned by the troops of the said Company. Art. 8. In case the said *Rajah* shall at any time have occasion for any number of troops for the collection of his revenues, the support of his authority, or the good order and government of his country, the said Company agree to furnish a sufficient number of troops for that purpose, on public representation being made by the said *Rajah* to the President in

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Council of Fort *St. George*, of the necessity for employing such troops, and of the objects to be obtained thereby. Art. 9. The said *Rajah* shall receive regular information of all negotiations which shall relate to declaring war or making peace, wherein the said Company may engage, and the interests of the *Carnatic* and its dependencies may be concerned; and the said *Rajah* shall be considered as an ally of the said Company in all Treaties which shall in any respect affect the *Carnatic* and countries depending thereon, or belonging to either of the contracting parties contiguous thereto; and the said *Rajah* agrees that he will not enter into any negotiations or political correspondence with any European or native power without the consent of the said Company."

The third Treaty was dated the 25th *October*, 1799, and was made between *Sevajee*, the then *Rajah* of *Tanjore*, and *Benjamin Torin*, Esq., Resident at *Tanjore*, acting under powers from the Governor-General, the material provisions of which were as follows:— Art. 2, After reciting that it had become indispensably necessary to establish a regular and permanent system for the better administration of the revenue of the country of *Tanjore*, stipulates "that all former provisions for securing a partial or temporary interference on the part of the Honourable Company in the government or in the administration of the revenues of the country of *Tanjore* shall be entirely annulled; and that, in lieu thereof, a permanent system for the collection of the revenue, and for the administration of justice, shall be established in the manner hereafter described." Art. 3. The Honourable Company shall be at liberty, as soon as possible, to ascertain, determine, and establish rights of property, and

to fix a reasonable assessment upon the several *Soubahs, Pergunnahs,* and villages of the country of *Tanjore*, and to secure a fixed and permanent revenue. Art. 4. A Court, or Courts, shall be established for the due administration of civil and criminal justice, under the sole authority of the English East India Company. The said Courts shall be composed of officers to be appointed by the Governor in Council of Fort *St. George* for the time being, and shall in no instance whatever be subjected to the control, authority, or interference of the said *Rajah*; but shall be conducted according to such Ordinances and Regulations (framed with due regard to the existing laws and usages of the country) as shall, from time to time, be enacted and published by the said Governor in Council. Art. 9. It is stipulated and agreed that the *Rajah* shall be treated on all occasions in his own territories, as well as in those of the Company, with all the attention, respect, and honour which is due to a friend and ally of the British nation. Art. 10. Whereas his Excellency, the *Rajah*, has had occasion to complain of inconvenience to his Excellency and his servants, from the present mode of garrisoning his Excellency's hereditary fort of *Tanjore* by a part of the Honourable Company's troops, it is stipulated and agreed, with a view to the accommodation and satisfaction of his Excellency, that the said fort of *Tanjore* shall be evacuated by the Company's troops entirely, and that his Excellency shall be at full liberty to garrison the said fort in such manner as to him shall seem fit. Art. 12. In complaints brought before any of the Courts of justice in which it shall appear, either by the application of the *Rajah* or the representation of the Defendant, at or before the time of giving in his

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or her answer, or by the petition of the Complainant, that both parties are relations, or servants, or dependants of his Excellency, or inhabitants usually resident within the fort of *Tanjore*, it is stipulated and agreed that such parties shall, in the first instance, be referred for justice to the *Rajah*, or to any person he may appoint to dispense it. Any complaint against the *Rajah's* relations, immediate servants, or others, residing in the fort of *Tanjore*, by persons of a different description, shall, in the first instance, be made to the Company's representative at *Tanjore*, who shall prefer it to his Excellency. By other articles of this Treaty, provision was made for the collection of the revenue by the Governor in Council, and for the payment of one-fifth part of the same to the *Rajah*.

Subject to the obligations to the British Government imposed by these Treaties, the reigning *Rajah* of *Tanjore* remained Sovereign of the country, and within the fort of *Tanjore* his power continued absolute, extending to the power of life and death.

On the 29th of *October*, 1855, *Sevajee* died at the fort of *Tanjore*, without leaving male issue, or son by adoption, or any brother him surviving. Upon the fact of his death being communicated to the Court of Directors of the East India Company, they by a despatch to the Government of *India*, dated the 16th of *April*, 1856, in concurrence with the opinion of such Government, and of the Government of *Madras*, declared the dignity of *Rajah* of *Tanjore* to be extinct; and declared the *Raj* of *Tanjore* lapsed to the British Government.

In consequence of the lapse of the *Raj*, questions with respect to the maintenance of the late *Rajah's*

family, and other matters, came before the Government of *Madras* for their decision; and on the 10th of *July*, 1856, the Chief Secretary to that Government addressed a letter from their political department to the Government of *India*, of which the following is an extract:—"Par. 5. On the demise of the *Rajah* the Government directed the Resident to continue, until further orders, the payment of all customary pensions, allowances, or wages, to the family, dependants, or servants of the late prince; but that the recipients were clearly to understand that these disbursements had been authorized only temporarily and until the decision of the Honourable Court upon the whole question was received. Par. 6. The investigation of the numerous claims to provision of some kind that will be advanced by the parties referred to in the preceding paragraphs, will of itself be no light task. There are, however, several other important subjects for inquiry, in connection with the late *Rajah*, besides these claims. Par. 7. First, there are some very valuable *Chuttrums*, of *Choultries* endowed with lands yielding an annual revenue of about a *lac* and Rs. 20,000. There are large balances outstanding against the holders of these lands, who, aware of the *Rajah's* objections to seek the aid of the Company's Courts to enforce his just rights, have wilfully withheld their rents. In some cases the lands have been misappropriated or fraudulently alienated, and there are numerous idlers and hangers-on of the palace, servants who hold useless offices in these institutions. These *Choultry* establishments should be remodelled and freed from all abuses, and the property belonging to them devoted for the purposes for which it was originally granted. Par. 8,

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Secondly, claims on the part of *Pagodas* to payments of allowances have to be investigated, and some scheme laid down in respect to the continuance of these endowments, in some cases, either by money grants, or by assignment of lands. Par. 9. Thirdly, there are some valuable villages belonging to the *Raj* in different parts of the Province, some retained by *Sevajee* when the country was assumed by the British Government, and some subsequently acquired by purchase. These should be examined, and any claims to or liens upon them considered. Par. 10. Fourthly, some debts due by the late *Rajah* to private parties, or claims on behalf of members of the family, still remain to be settled. Par. 11. Fifthly, arrangements must be made for the abolition of the *Rajah's* Courts, and for the disposal of suits already on the file, as well as for the establishment of a Company's Court (probably that of a District *Moonsiff*) in the fort of *Tanjore*, which will henceforth be under the jurisdiction of the civil and criminal Courts of the *Zillah*. Par. 12. Sixthly, there are in the palace state jewels of great value, a valuable library of Oriental works, and an armoury, which have fallen in to Government with the *Raj*. Par. 13. It appears to this Government, that the several matters above recited cannot be duly inquired into except by an Officer specially deputed for the purpose. The present acting Collector has been but lately appointed; he is new to the District, has had no experience in the intrigues of a *Mahratta* Court, and even were his acquaintance with them greater, the onerous duties devolving on him as Collector and Magistrate of one of the heaviest Districts under this Presidency, would leave him no leisure for such a task. Par. 14. Under these considerations, I am directed to suggest, that

some officer should be specially sent as Commissioner to *Tanjore*, should be placed in charge of the Residency, and be directed to investigate and report upon the various important questions above enumerated, and any others that may hereafter occur to this Government as demanding inquiry in connection with the general subject. Par. 15. If this be approved, the Government propose to select for the duty, as the officer best qualified for it, Mr. *H. Forbes*, at present acting as third member of the Board of Revenue, who has for several years been Resident at *Tanjore*, as well as Collector and Magistrate of the district, and who possesses an intimate acquaintance with the affairs of the *Durbar*."

In reply to this letter, the Secretary to the Government of *India* addressed a letter to the Chief Secretary to the Government of *Madras*, dated the 8th of *September*, 1856, of which the following is an extract:—"Par. 3. In your previous letter, dated the 10th of *July* last, the Government of *Madras* have sufficiently shown that the subjects which call for investigation and settlement are so numerous and important, as to require to be dealt with by an officer appointed for that special purpose. The selection of Mr. *H. Forbes*, late the Resident at *Tanjore*, for this duty, is a very proper one, and is accordingly sanctioned by his Lordship in Council. Par. 4. Of the various questions requiring consideration, those connected with the *Choultries*, and lands on which balances of revenue are due, the claims for *Pagodas*, the rights over villages retained by the *Rajah* when the administration of the country was assumed by the British Government, and the abolition of the *Rajah's* Courts, the Governor-General in Council leaves for disposal

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by the Government of *Madras*. Par. 5. But the mode in which it may be proposed to deal with the *Rajah's* debts, and with the state jewels, library, and armoury, should be reported to the Government of *India* before any measures are taken; as also the apportionment of pensions or gratuities to the family and dependants of the *Rajah*."

Upon the receipt of the above letter from the Government of *India*, the *Madras* Government, on the 25th of *September*, 1856, appointed Mr. *Forbes* to be Commissioner for the purpose of the matters in question, and furnished him with instructions in regard to the conduct of his duties as such Commissioner. The material portions of those instructions were as follows:—"Par. 2. Under the authority now conveyed from the Supreme Government, the Right Honourable the Governor in Council proceeds to appoint Mr. *Forbes* to be Commissioner for the purpose of inquiring into and reporting upon the various questions demanding settlement in connection with the extinction of the *Raj* of *Tanjore*. Par. 3. These subjects may be divided into two classes: namely, those which have been left for the disposal of this Government, and those which are to be reported to the Government of *India* before any measures are taken. Par. 4. Under the first head fall—First. The *Chuttrums* endowed by the *Rajah* of *Tanjore*; the arrangements to be made for their future administration, and for placing them upon an improved footing, as well as for the recovery of the rents due to them, and of lands gradually alienated from them. Second. Allowances to *Pagodas* by assignment of the late *Rajah*, or his ancestors, their nature, whether terminable with the *Raj*, or proper to be continued as perpetual endowments,

and in the latter case, whether by grants of money or of land. Third. The state of the landed property, villages, or detached lands retained by *Sevajee* on the cession of the *Tanjore* country in 1799, or subsequently acquired by him or by the late *Rajah*, the claims to or liens upon them. Fourth. The abolition of the *Rajah's* Courts, and provision to be made for the dispensation of civil and criminal justice by Courts of the Honourable Company of some of the classes obtaining in their territory. Par. 5. On all these questions it will be for the Commissioner to report to Government after due inquiry, and the Government will then pass on each such final orders as may appear to be called for. Par. 6. The subjects reserved for the ultimate decision of the Supreme Government are—First. The debts of the late *Rajah*. Second. The State property, viz.:—jewels, library, armoury, &c. Third. Stipends, pensions, or gratuities to the family, servants, and dependants of the late *Rajah*. Par. 7. On these matters it will be for Mr. *Forbes* to report in detail, and to supply all the information that may be necessary to assist the Government of *India* in their settlement. Par. 8. Lists will of course be taken of all the jewels belonging to the *Raj*, and passing with it to the Honourable Company, as also of the State armour and weapons, and catalogue of the library. Due means will be adopted for the safe and careful custody of these valuables, until the pleasure of the Government of *India* be known regarding them."

Acting under this authority Mr. *Forbes* directed the chief officer of the palace to prepare statements of the lands and other State property of the *Raj*, and on his arrival at *Tanjore*, as the statement had not been made out, he addressed a letter, dated the 17th of *October*,

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1856, to that officer, in which were these paragraphs: —"Par. 4. When, on the 15th instant, I communicated to you, to the *Durbar* generally, and the nephews of the late *Rajah*, the decision at which the Government had arrived with reference to the *Tanjore Raj*, and the general principles on which I was instructed to act in resuming the *Raj* and making provision for the family and retainers, I informed you that, while all private property would be scrupulously respected, the public property of the State would pass to the British Government: that property the Government have ordered me to place in safe and careful keeping. Par. 5. To enable me to do this, and also to place it in my power to obtain all the information I require about the State property, whether in land, jewels, or otherwise, it is my intention to assume possession, in the name of the British Government, of all the late *Rajah's* villages and gardens, including endowments to *Choultries* and *Pagodas*, of the public property now in the fort of *Tanjore*, and of all the records connected with the *Raj*; but while it is necessary that I should do this, I have to assure you, and to beg that you will assure others, that a careful investigation will be made into all claims that may be advanced by institutions or individuals to any part of the property, and that all to which a claim may be substantiated will be restored to its proper owner."

On the 18th of *October*, 1865, Mr. *Forbes* took possession of the property within the fort of *Tanjore*, and of the lands held by the late *Rajah*, or held by those who held them under *Sunnuds* of the *Rajah*.

After taking possession of the property in the manner above mentioned, and while Mr. *Forbes* was

engaged in making lists and catalogues of the articles constituting the different descriptions of the property, and selling part of the property, a Bill was filed by the Respondent on the 18th of *November*, 1856, on the equity side of the Supreme Court at *Madras*, against the East India Company. The Bill stated, that *Sevajee* at the time of his death, was possessed of and entitled to, as of his own right and private property, and distinct from the property belonging to the *Raj* of *Tanjore*, large estates, both real and personal, of the value of many *lacs* of rupees ; that on the death of *Sevajee*, the Respondent, as his eldest widow, according to Hindoo law, became entitled to inherit and possess his private and particular estate, real and personal, and to administer the same ; and that, with a full knowledge of the Respondent's rights, the East India Company, by their officers, servants, and agents acting by their orders, and in particular by the Collector and subordinate officers of the Collectorate of *Tanjore*, and by Mr. *Forbes*, began to interfere and intermeddle with the private estate and effects of *Sevajee*, and thereby, and from their power and control over the country, prevented the Respondent from receiving and possessing the same, and had refused to deliver the same to the Respondent, and that the officers and servants and agents of the East India Company had possessed themselves of the whole of the private and particular estate and effects, real and personal, of *Sevajee*, and had made, or were making, full and particular lists and inventories thereof, and had sold and disposed of and destroyed a considerable part thereof, and had received the proceeds of the sale and disposal thereof, and retained the same in

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their hands, and threatened and intended, unless restrained by the injunction of the Court, to sell and dispose of the remainder thereof, and to appropriate the proceeds to their own use; and the Bill prayed that the Respondent, as the eldest widow of *Sevajee* deceased, and the first married among his surviving widows, might be declared by the decree of the Court entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereout of the private debts, if any, of *Sevajee*, and to any legal claims and demands that might exist against such private and particular estate and effects. That the East India Company might be declared to be trustees for the Respondent for and in respect of the private and particular estate and effects, real and personal, left by *Sevajee* at the time of his death, and possessed by them, their officers, servants, and agents, as in the Bill mentioned, or which without their wilful neglect or default might have been so possessed. That an account might be taken of the private and particular estate and effects, real and personal, of *Sevajee*, possessed by the East India Company, their officers, servants, and agents, or which without their wilful neglect or default might have been so possessed, and of the value thereof, distinguishing what shall remain in specie from what shall have been sold or otherwise disposed of. That the East India Company might be directed forthwith to deliver up to the Respondent the private and particular estate and effects of *Sevajee* which may so remain in specie, and to pay to the Respondent the value of such part thereof, which by their wilful neglect or default

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might not have been possessed by them, their officers, servants, or agents, as aforesaid, or which may have been sold or otherwise disposed of by them, their officers, servants, or agents, as aforesaid. That the East India Company, their officers, servants, and agents, might be restrained by the injunction of the Court from further interfering, intermeddling with, selling, or disposing of the private and particular estate and effects, real or personal, left by *Sevajee* at the time of his death, and for a receiver.

The Supreme Court at *Madras* granted an injunction restraining Mr. *Forbes* from proceeding with the sale.

The answer of the East India Company stated that *Rajah Sevajee* was up to and at the time of his death, *Rajah* and reigning monarch of *Tanjore*, and was a Sovereign prince entitled to and in the exercise and enjoyment of the rights, privileges, powers, and dignity of an absolute Sovereign within the limits of the hereditary fort of *Tanjore*, and of certain other Districts and lands adjacent thereto, but subject as to the residue of the country appertaining to the *Raj*, or kingdom of *Tanjore*, to certain engagements and relations between himself and the British Government. And the answer further stated, that in entering into the Treaties before mentioned, and in treating the sovereignty and territories of *Tanjore* as lapsed to the East India Company for the purposes of the Government of *India* in trust for the British Crown; in appointing, through the Government of *India*, Mr. *Forbes* as Special Commissioner, and in taking possession of the property of the late *Rajah*, they acted in their public political capacity, and in exercise of the general powers, privileges, and au-

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thorities vested in them by the various Charters and Acts of Parliament, by which the possession and government of the British territories in *India*, and the powers of making peace and war, and entering into Treaties, had been committed to them in trust for the Crown of *Great Britain*; and that all the acts and matters set forth in the answer, were acts and matters of State. And by their answer the East India Company insisted, that the question as to their right to take possession of the estate and property which *Rajah Sevajee* died possessed of and entitled to as *Rajah* of *Tanjore*, or of any and what parts of the estate and property, was a question of State arising from the character of the *Rajah* as a Sovereign, and the political relations between the East India Company, acting in trust for Her Majesty, and the State of *Tanjore*; and they, therefore, submitted that the matters set forth in the answer, and on which they rested their right to take possession of the property which was of the late *Rajah* of *Tanjore*, involved the construction of Treaties and of other acts of State, and were matters which could not be inquired into by the Court, or in any Municipal Court of justice within Her Majesty's dominions. And the answer further stated that, without in any way waiving the right of the East India Company to retain the whole of the property possessed by them and mentioned in the schedules thereto annexed, and without in any way admitting the jurisdiction of the Court to inquire into the grounds on which such right was vested; it had been determined, as an act of State and government, by the East India Company, through their Governor-General of *India* in Council and their Governor of Fort *St. George* in Council, that the

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property and effects specified in certain schedules marked G. H. O. P. and Q. should be dealt with and disposed of as if the same had been the property of *Rajah Sevajee* as a private individual, regard being had in the first instance to the just debts of and claims upon *Rajah Sevajee*, which debts the East India Company were desirous should be paid from the estate, they being willing to allow the whole of such estate and property to be delivered over, subject to the debts of and claims upon the late *Rajah*, to the person or persons who would have been the legal representative or representatives of the *Rajah*, had he been a private individual, upon such person or persons giving adequate security, to the satisfaction of the East India Company, for the proper administration of the property in payment of the debts and otherwise. And the answer further stated, that the Government had resolved to appropriate the whole of the property mentioned in certain other schedules thereto maked M. and N., and all property similarly circumstanced which belonged to *Rajah Sevajee*, and not to third persons who might claim the same, for the payment of any of the debts due by the deceased *Rajah* which might appear to them to be fair and just, and after such payment to appropriate the residue of such property towards making a provision for the family of the *Rajah*. And the answer submitted, that, in any point of view, the question whether any and what portions of the property left by *Rajah Sevajee* were his private property, or were property of the State of *Tanjore*, was a question involving the construction of a Treaty and relations between the States and the general political powers of the Government of *India* ; and was, therefore, a question not

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cognizable by any Municipal Court of justice. And the answer further submitted, that the Court had no jurisdiction in respect of the matters aforesaid, being matters concerning the revenues under the management of the Governor and Council. The answer admitted the State of *Sevajee's* family, at the time of his death, as stated in the Bill, but without admitting that his property was liable to be administered as that of a private individual; and the Defendants submitted whether, on the death of *Sevajee*, all his surviving widows did not become his joint heiresses and representatives, and would not have inherited his private and particular estate, if any, to the extent of the interest of a Hindoo widow according to Hindoo law. The Defendants set forth in schedules annexed to their answer an account of the property, estate and effects of *Sevajee*, including the property claimed by third parties, possessed by them, or by their officers or agents on their behalf, and of the value thereof, so far as they were able to form any opinion respecting such value; but without admitting that the *Rajah* left any property that could be called his private or particular property; and without admitting that the Respondent had any legal claim or right in respect of any property taken possession of by the East India Company or their officers or agents, the answer stated that they did not intend to treat the property of *Sevajee* in the schedules, marked G. H. O. P. and Q. respectively, as belonging to them for their own use, or in trust as aforesaid, or otherwise, or as forming part of their revenues, or as being applicable to the purposes aforesaid.

Schedule G. of the answer, contained a list of certain property, described as real property acquired since

1799, which from its nature was not essentially public or State property. Schedule H. contained a list of similar property not taken possession of by the East India Company. Schedule O. contained a list of personal property described as acquired since 1799, and which from its nature was not essentially public or State property. Schedules P. and Q. contained a list of personal property of the same nature, not taken possession of by the East India Company. Schedule R. contained a list of the horses, elephants, cattle, carriages, &c., of the late *Rajah* which had been sold.

The hearing of the cause took place on the 29th and 30th of *September*, and the 1st of *October*, 1857, when evidence not material to state was gone into on both sides. The cause stood over until the 11th of *December*, 1857, for judgment, on which day the Court decreed and declared that the Respondent, as the eldest widow of *Sevajee*, and the first married among his surviving widows, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereout of the private debts, if any, of *Sevajee*, and to any legal claims and demands that might exist against such private and particular estate and effects, and that the Defendants were trustees for the Respondent for and in respect of the private and particular estate and effects, real and personal, left by *Sevajee* at the time of his death and possessed by them, their officers, servants, and agents; and the Court ordered that it should be referred to the Master to take an account of the private and particular estate and effects,

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real and personal, of *Sevajee*, possessed by the Defendants.

The following reasons for this decree were transmitted by the Chief Justice, Sir *Christopher Rawlinson*:—"The Plaintiff by her Bill prays that she may be declared, as senior or first married widow of *Sevajee*, the late *Rajah* of *Tanjore*, who died without male issue, to be entitled to the private and particular estate and effects of her deceased husband, subject to the payment of his debts, &c. She also prays that the Defendants may be declared to be trustees for her of such of the property as may have been taken possession of by them or their servants; also for an account and a Receiver. The Defendants in their answer set up two lines of defence; first, that the Plaintiff has no case on the merits; and, secondly, that the Court has not any jurisdiction to try the suit. As regards the first, they submit that the late *Rajah Sevajee* was an independent and absolute Sovereign, and as such was not possessed of any private estate as distinguished from the public or State property; and they further allege, that, according to Hindoo law, all the widows, and not the senior widow alone, are entitled to succeed to the estate of a *Mahratta* man dying without male issue either natural or adopted. In support of their second line of defence, namely, that the Court has no jurisdiction, they submit that they took and detained the property of the late *Rajah* in their public and political capacity; that their taking of the property was an act of State, and that the question of what portion is private and what public property involves the construction of a Treaty, and that consequently neither this nor any other Municipal Court in Her Majesty's dominions has any

jurisdiction to entertain the question. It was also urged that the Court had no jurisdiction, because the suit has reference 'to a matter concerning the revenue under the management of the Governor and Council.' I will now state what I consider to have been established on the one side and on the other, and how much of the several defences relied on by the Defendants have been made out. I think that all the material facts set out in the Plaintiff's Bill have been clearly proved. I am of opinion also that the Plaintiff, according to Hindoo law, is, as the senior and first married widow of the late *Rajah Sevajee*, entitled to her late husband's private and particular estate and effects; and that the Defendants have wholly failed to prove or point out to us any law or custom, such as is alleged in their answer, under which all the widows succeed to their deceased husband's estate under circumstances such as have been established in this suit. This ground of defence, it may be observed, goes only to the *quantum* and not to the root of the Plaintiff's claim. I am also satisfied on the evidence that the late *Rajah Sevajee*, a Hindoo of the *Soodra* caste, was not a member of an undivided family, and that he was possessed of private and self-acquired property, both real and personal, and that a distinction was observed during his life between his State or Crown jewels and those which he either purchased himself or caused to be made for the use of his numerous wives and their families. An inspection of the schedules attached to the answer, as well as the answer itself, confirms me in my opinion that much of the property detained by the Defendants is of such a nature as cannot allow of its being considered State property. Take, for instance schedule R., the contents

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of which have been sold by the Defendants. Can it be believed that all the carriages, including numerous pony carriages and children's carriages, and palanquins, or the cows and horses, ponies, &c., were State or public property, or ever treated as such, or that all the contents of schedule M., including numerous female jewels and trinkets, or, that all the female apparel, clothes, shawls, silks, laces, &c., in schedule O., are State property? It is true that, as regards some of these schedules, G., H., O., P., and Q., the Defendants, in their very cautiously drawn answer (and which, were it not that of a Corporation whose personal knowledge in most instances is necessarily small, might be considered unsatisfactory), admit that the property in the last-named schedule 'is not essentially public,' a somewhat ambiguous phrase; and that as regarded it and some other property, both real and personal, they do not intend treating it in the same way, or on trust, as the property in the other schedules, but are willing to give it up as if it had been private property. I will only observe on this, that I do not exactly see, unless the property referred to is private, how the Defendants can justify treating in any other way than as public property, really public, and which as such has come to their hands in trust. But the learned Counsel for the Defendants contend that the contents of the schedules and the nature of the property are immaterial, as no distinction, they say, can be allowed between the public and private property of an absolute Sovereign, as he can dispose of the whole of it as he may think fit; citing as an authority for this principle the case of *The Advocate-General of Bombay* v. *Amerchund* (1 Knapp's P. C. Cases, 329 n.), and *The Lord-Advocate* v. *Lord*

Dunglas (9 Cl. & Fin. 211). This last case was referred to for the following *dictum* of Lord *Brougham's*, namely, 'It is only within the last half-century that any private property has been acknowledged to exist in the Crown at all; prior to that, all lands descending on the Crown, even from ancestors or collateral relatives, were held *jure coronæ*. All the property of the Crown is held for public purposes, and is Crown property, except that which the individual Sovereign has retained a right to deal with in his private and personal capacity.' This *dictum* appears to be confined to landed property, and, whether strictly correct as regards all landed property, is, I think, with every respect to the noble and learned Lord, fairly open to doubt; for, though it is true that according to the Common law of *England* the King, being a Corporation, purchases of real property made by him after the assumption of the Crown vest in him in his Sovereign capacity, and descends to his successors, 'still purchases made before the accession to the Crown, or descent from collateral ancestors after the accession of the Crown, vests in a natural capacity' (see Co. Litt. 15 b, note 4), showing that even in *England* the Monarch could take real as well as personal property in his own right. As was, however, observed by the Bench during the argument, the Statutes of 1 *Anne*, c. 7, and 39th & 40th *Geo.* III., c. 88, regulate questions regarding the private property of the British Sovereign; and it is not by the English Statute, or Common law, that the questions in this suit are to be decided, but by the Hindoo law. And even the statement in the case referred to, 1 Knapp's P. C. Cases, 329, namely, that there was no distinction between the public and private property of

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an absolute Sovereign, must, I think, be taken in connection with the facts of that case, and the point then under the consideration of the Court. In that case, as well as in *Elphinstone* v. *Bedreechund* (1 Knapp's P. C. Cases, 316), the question arose out of the seizure of an enemy's property; and it was held that on the seizure of the property of a hostile Sovereign, *si non flagrante sed non dum cessante bello*, no distinction could be allowed between his public and private property. Here there is no question as to the seizure of an enemy's property, or as to peace or war, but whether the late *Rajah Sevajee* possessed any private property, and if so, whether the detention of such property, now belonging to an inhabitant of a territory peaceably become part of the British territories in *India*, can be justified, and on the grounds set up by the Defendants. But admitting that in the case of an absolute Sovereign, such as was contemplated in the above case, no distinction can be made between his public and private property (and few such, I think, can be found in the present age), can I assume, on the facts before us, that the late *Rajah* was such an absolute Sovereign as that he could have disposed of his fort or other public buildings or State jewels as he did of his other property, both real and personal? There was no proof before us of his ever having disposed of any of the State property; and as to his being an absolute Sovereign, what evidence had the Court before it of that fact? The evidence, as far as it went, tends, I think, to show that his Sovereignty was little more than nominal; that he exercised no Sovereign powers over the Kingdom of *Tanjore*; that he resided within the circumscribed limits of the fort of *Tanjore* (where a resident and officer of the East

India Company was always present), enjoying little more than, to use the expression of the Directors of the East India Company, 'a titular Sovereignty,' and certainly not more than, to adopt the words of the Defendants' answer, 'the outward state and dignity of the reigning monarch.' To what even that amounted was not very clearly shown. We had evidence, however, that the late *Rajah* never did any of the acts that mark Sovereign power; for instance, he did not send or receive Ambassadors, or keep up political relations with any foreign States; he did not coin money; he did not collect or in any way manage the revenues of the Kingdom of *Tanjore*; but it was shown that he received an annual stipend from the East India Company, some of his receipts for which were put in, for what purpose I hardly know, unless, perhaps, for the last few words, by which the receipt of a certain sum on account of the East India Company was acknowledged 'as part of my lac of star pagodas and one fifth part of the net revenue of my country for the year ;' not of any kingdom, be it observed. Upon the whole of the evidence before us I am satisfied that the late *Rajah Sevajee* was not the absolute Sovereign suggested by the Defendants, and that he had private property, both real and personal, as I have above stated. I am further strengthened in this last conclusion by the fact that, according to Hindoo law and custom, a Hindoo Sovereign may have private property. See *Strange's* "Hindu Law," vol. i. p. 209, where, after stating that a kingdom is not divisible, it is added, that 'the effects and private estate of a Sovereign, like those of an ordinary individual (Hindoo), are in common, and distributable amongst his sons.' And 2nd vol., App.

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329, is to the same effect. See also 2 *Colebrooke's* Hindu Law, c. 4, s. 1, *et seq.* My judgment on the above part of the case has been formed without any reference to the Treaty of 1799, put in evidence by the Defendants, possibly for the purpose of supporting one of the points raised by them, namely, that the Court could not take cognizance of the suit, because it involved the construction of a Treaty. Upon this point I would here remark, as well as upon some others equally beyond dispute, but which were much dwelt on by the learned Counsel for the Defendants, that the Court has never entertained any doubt respecting them, though not able to see their applicability to the facts of the present case. I refer to such points as that the construction of Treaties, or the public acts of State between Sovereign powers, or acts relating to peace or war, could not be tried by any Municipal Courts. As little matter of doubt is it that the East India Company, though subjects, have certain Sovereign powers delegated to them, such as those of making peace and war, and of making Treaties with certain of the native powers in *Asia*, and that concerning such acts as can be included under the above heads neither this nor any other Municipal Court has any jurisdiction to inquire. But in the way in which the Plaintiff shapes her case before the Court, I think, that these points do not fairly arise. The Plaintiff sues as a private individual, and as the subject of a country forming part of the British territories in *India*. Of the annexation of the *Raj*, of the Defendants taking possession of its revenues, or of the State property of the kingdom, whether consisting of lands, forts, jewels, or munitions of war, she makes no complaint. She sues only for what

she alleges to be her property according to the Hindoo law, namely, the private estate and effects of her deceased husband, *Rajah Sevajee*, the whole of which, she alleges, the Defendants detain from her without any justification. Let us proceed now to the Defendants' second line of defence, namely, that to the jurisdiction of the Court. They say, assuming that there was private property, its seizure and detention cannot be inquired into by this Court: first, because its seizure was an act of State, and, secondly, because the property seized, or a portion of it at least, is revenue. First, then, as to the seizure being 'an act of State' (though many of my arguments will bear on both lines of defence). What is an act of State? It is not every act by a Government, or by those representing the Sovereign in a foreign country, which will be exempted from the jurisdiction of the Municipal Courts. (See *Cameron* v. *Kyte*, 3 Knapp's P.C. Cases, 332). But assuming an act of State to be an act of the Sovereign power, in relation to peace or war, or an act done by it as being absolutely necessary for the public safety, or *ne quid detrimenti res publica capiat* (and under this head a benefit or increase to the revenue can hardly be included), or acts of a similar description, have the Defendants brought the acts of seizure and detention of the Plaintiff's property within the principle of the protection they set up? And further, was, in fact, the seizure of the private property an act ordered by any Government at all? Now what are the facts proved which bear on this portion of the case? After the death of the late *Rajah Sevajee*, which took place in *October*, 1855, it was determined by the East India Directors that the *Raj* of *Tanjore* had lapsed to the East India Company for want of

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male heirs to *Rajah Sevajee*. Though this lapse was not immediately publicly announced, the East India Company must, I think, be considered to have become the Sovereign power throughout the kingdom of *Tanjore* from the death of *Rajah Sevajee*. No very perceptible change in the government of the country at large would be made, as the territories of *Tanjore* had long been under the management and control of the East India Company. Such then being the state of things, it is only after a correspondence between the East India Directors and the Government of *India* and of *Madras*, that in *September*, 1856, Mr. *Forbes* is appointed, under the direction of the Government of *India*, for the purpose of inquiring into and reporting upon the various questions demanding settlement in connection with the extinction of the *Raj* of *Tanjore*. In the letter of the Government of *India*, of the 8th of *September*, 1856, authorizing the appointment of an officer on this special duty, I find the following passage:—'But the mode in which it may be proposed to deal with the *Rajah's* debts, and with the State jewels, library, and armoury, should be reported to the Government of *India* before any measures are taken.' It might be contended from the concluding words of the above extract that no authority was given or intended to be given for the taking possession of even the State jewels, &c., till some further report had been made to the Government of *India*. Such, however, does not appear to have been the construction put upon it by the Government of *Madras*, who, on the receipt of the above letter, instructed Mr. *Forbes*, in a letter of the 25th of *September*, 1856, 'to take lists of the jewels belonging to the *Raj*, and passing with it to the Honourable Company, as also

of the State armoury and weapons.' Neither of the above letters appear to contemplate, much less to authorize, the seizure or detention of other than State property, or, in other words, of the property of the *Raj*, passing with it to the East India Company. It was proved, however, I may here remark, that previous to this authority being given, the rents and profits of the villages and lands bought by *Sevajee* had been received by Mr. *Forbes* since the *Rajah's* death. The evidence of *Ramachundra Row*, uncontradicted, is, that Mr. *Forbes* had been receiving the rents and profits of those villages since *Sevajee's* death. The sale also of the contents of schedule R. had taken place early in 1856. On the 18th of *October*, 1856, it is that Mr. *Forbes*, having received his new authority, which is relied on for making this seizure an act of State, took possession of the property in the fort of *Tanjore*. It appears to have been an indiscriminate seizure, both of public and private property; the orders of the two Governments, as I have above pointed out, having been expressly confined to the State property. Assuming then that the taking possession of the public and State property can be considered an act of State, as ordered by the Government of *India*, and as being a necessary consequence, perhaps, of the assumption of the *Raj*, how can the seizure and detention of private property (and especially of such portion as consists of rents and the produce of sales made previous to *October*, 1856) come under the same protection? The seizure of the private property can, I think, be held to be brought within the protection of the act of State plea only on proof either that the property was *bona fide* believed at the time to be all public, or that its seizure was rendered

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unavoidable from the impossibility of distinguishing the one from the other, or because the public could not possibly have been taken possession of without also seizing the private. This last ground, it should be observed, affords no excuse for the detention. But we had not any evidence of such a state of circumstances existing as I have above suggested; no State property was shown to have been in danger, nor was there any evidence that there existed any difficulty in separating the one from the other, which ordinary care and patience, even after the seizure, might not have overcome. I say even after the seizure, for it should be borne in mind that the gravamen of the Plaintiff's complaint before the Court is the detention of her private property; not the seizure, which of course would have been the subject-matter of an action of trespass on the plea side of the Court; nor had we any proof that there was any *bona fide* belief that all was public property. On the contrary, Mr. *Forbes*, in his letter of the 17th of *October*, 1856, written the day before the seizure, shows that he knew there was private property amongst that about to be seized, for he expressly states that all property to which a claim shall be established shall be restored to its owner. It appears then from the above, that an order having been issued to take possession of public property, private property was taken, and is now detained under the circumstances above set out. I am of opinion that such detention cannot be considered an act of State, nor can I consider that the subsequent adoption by the Defendants can make that an act of State which originally was not so. The remaining ground relied on by the Defendants to bar the jurisdiction of the Court is, that the seizure

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related to a matter of revenue, from inquiry into which the Court is expressly precluded by the 23rd clause of the Charter establishing the Court. In support of this point the learned Counsel cited the Statute, 16th & 17th *Vict.*, c. 95, sec. 27, by which it is enacted 'that all real and personal estate within the said territories, escheating or lapsing for want of an heir or successor, and all property within the said territories devolving as *bona vacantia* for want of a rightful owner, shall (as part of the revenues of *India*) belong to the East India Company, in trust for Her Majesty for the service of the Government of *India*.' Looking to the words used in the Charter, and the inconvenience intended to be guarded against, I am inclined to think that a very fair doubt may be entertained as to whether an escheat, or lapse under the above Statute, comes within the words of the Charter as 'revenue under the management of the Governor (of Fort *St. George*) and Council, or as revenue collected under Regulations made by him.' I think also that the same reasons do not exist for preventing the subjects of the Queen from resorting to Her Courts in the case of such escheats as in cases relating to the collection of the ordinary revenue, made as it is to a great extent in small sums, and under regulations and usages which it might be exceedingly inconvenient to submit to the consideration of the Queen's Court. I think, however, that this line of defence, namely, that the property seized was revenue, may be disposed of on the same grounds as I have considered a sufficient answer to the defence that the seizure was an act of State; for supposing that the seizure of the public property, which had lapsed to the East India Company under the Statute,

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to have been an act done in the collection of the revenue within the meaning of the Charter, can we extend the same protection over the wilful seizure and detention of private property; an act not ordered either by Government, or justified by any Regulation, or necessitated by any difficulty or unavoidable necessity, as I have above already shown? I think we should not be justified in doing so, being of opinion that the property was seized and has since been detained with the knowledge that some of it was private property. This fact, I think, distinguishes this case from *Spooner* v. *Juddow* (4 Moore's Ind. App. Cases, 353), which was relied on in support of the revenue defence as well as of that of the act of State. In that case a slip had been made; and there can be little doubt, after reading the facts of that case, but that the Defendant *bona fide* believed that he might make the distress for the whole arrears of quit-rent due from the premises, without regard to the question of whose name was mentioned in the warrant. I fully subscribe to the authority of that case, as well as to the large class of cases establishing the rule, that parties *bona fide* believing they are acting in pursuance of a Statute and according to law, are entitled to the special protection which the Legislature may have afforded them, though they have been guilty of an illegal act. But I do not think the principles there laid down applicable to the present case, which is distinguishable not only on account of the want of *bona fides,* but also on the ground that it is not an action of trespass for the seizure, but a suit for the detention of the property of the Plaintiff. I must here observe that though I am now delivering the judgment of the Court, Mr. Justice *Davidson,* who, owing to his absence, has not

had any opportunity of reading this judgment, and consequently is not answerable for the reasons or observations contained in it, fully concurs with me in the facts of the case and in the conclusion at which I have arrived, namely, that the Plaintiff is entitled to a decree, on the ground that, as to part at least of what they have done, the defence set up by the Defendants cannot avail them, because they are unnecessarily and wilfully detaining private property of the late *Rajah Sevajee*, with full knowledge that it is such private property, and that they have not any title to it whatever. The Defendants having then failed to establish any of their grounds of defence, it remains for me only to declare the Plaintiff entitled to the decree of the Court as prayed:—First, that as senior, or first married widow, she is entitled to the private and particular estate and effects of her deceased husband, the late *Rajah Sevajee*. Second, that the Defendants may be declared trustees for her for so much of such property as they have possessed themselves of. Third, for an account of all property. The other points (including costs) reserved until after the Master's report, and for further directions."

The present appeal was from the above decree, and was prosecuted by the Secretary of State in Council of *India*, who came in the place of the East India Company (*a*).

Sir *Hugh Cairns*, Q.C., Mr. *Forsyth*, Q.C., and Mr. *W. H. Melvill*, for the Secretary of State in Council for the affairs in *India*.

The substantial question is, whether the taking pos-

(*a*) See Statute, 21st & 22nd *Vict.*, c. 106, for the better Government of *India*; section 3 declares that the Secretary of State is to have the powers formerly exercised by the East India Company.

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session of the deceased *Rajah's* property by the East India Company, in virtue of Treaties authorizing the annexation of the *Raj* of *Tanjore,* was not such an act of State and Sovereign authority as cannot be questioned or inquired into by a Municipal Court within the territories of the East India Company. Three questions are involved in this consideration: First, whether by the Charters and Statutes creating and defining the jurisdiction of the Supreme Court at *Madras,* the East India Company, as the governing power in *India,* is amenable to that jurisdiction for acts done by them in their governing and Sovereign character; secondly, whether the acts complained of are not acts of State and Government and of such a nature, that the Government who have done the acts, cannot be made amenable to any Municipal Court whatever; and thirdly, whether, having regard to the fact that the seizure involved the question of a Sovereignty, namely, the *Raj* of *Tanjore,* there was any foundation for the distinction taken by the Court below between the public and private property of the late Sovereign the *Rajah.*

Upon the first point. The Supreme Court of *Madras* was created by the Charter of 1800. The 21st section of that Charter defines the jurisdiction of the Court, the powers of which are extended by Statute, 4th *Geo.* IV., c. 71, s. 17. The 23rd section expressly provides that it shall not be competent for the Court to entertain or exercise jurisdiction in any suit or action against the Governor-General or the Governor of *Madras* for or on account of any order, or other act, matter, or thing done in their public capacity, or acting as Governor-General or

Governor and Council. The 30th section directs and points out the mode of suing the East India Company when it is capable of being sued in the Supreme Court. The *Calcutta* Charter of 1774, and the Statutes, 13th *Geo.* III., c. 63, sec. 13 & 14, and 21st *Geo.* III., c. 70, sec. 2, are in *pari materia* with the *Madras* Charter. The quarrel between Sir *Elijah Impey* and *Warren Hastings* respecting the jurisdiction of the Supreme Court of *Calcutta,* led to the passing of the latter Statute (vol. 4 *Mills'* Hist. of Brit. India, by *Wilson,* Book V. ch. 6), which excludes that Court from taking cognizance of the acts of the Governor in Council. It is necessary, therefore, to consider the position of the East India Company at the time the Supreme Court at *Madras* was created by the Charter of 1800. Under the Statute, 9th & 10th *Will.* III., c. 44, and the Charter of incorporation of *Will.* III. of 1693, and Statute, 33rd *Geo.* III., ch. 52, sec. 1 & 74, the East India Company had a twofold character: first, they were a trading Company; and secondly, they had Sovereign authority, with the power of making peace and war. The Statute, 3rd & 4th *Will.* IV., c. 85, took away the trading monopoly, but the Sovereign rights were left to the East India Company in trust for the British Government.—[Lord *Kingsdown*: Does your argument go to this extent, that the East India Company could not be sued at all in the Indian Courts?]—No, they were liable to be sued in the Courts in *India,* as here, for acts done in their trading capacity. They could be sued upon a contract. *The Bank of Bengal* v. *The United Company* (*a*). In *Gibson* v. *The East India Com-*

(*a*) Bignell's Reps. 127. S. C. 2 Knapp's P. C. Cases, 245.

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pany (*a*), the Chief Justice *Tindal* defines the character of the East India Company and their liability to be sued for acts done in their trading capacity. He says, "It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of *India*), power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of *India*."—[Sir *John Coleridge*: *Doe d. Seebkristo* v. *The East India Company* (*b*), was a case of ejectment brought in the Supreme Court of *Calcutta* to recover a piece of freehold land which the East India Company claimed to be entitled to.]—The transactions upon which the question in this suit depended were not matters subject to the jurisdiction of the *Madras* Court, or indeed of any Municipal jurisdiction in *India*. They were matters of State arising out of a political transaction. The maintenance of such a suit, as is here contended for, would be inconsistent with principles of public policy.—[Dr. *Lushington*: That very question was decided here in 1827, in the case of *The East India Company* v. *Syed Ally* (*c*), when the Privy Council held that the Supreme Court had no jurisdiction. That was a case of resumption of a *Jaghire* held as an *Altumghah enam* under a grant from former *Nawabs* of the *Carnatic*, which the East India Company under the Treaties resumed by virtue of their Sovereign power. It was determined that the propriety of the

(*a*) 5 Bingh. N. C. 273. (*b*) 6 Moore's Ind. App. Cases, 267.
(*c*) See this case, *post*.

exercise of such Sovereign power could not be questioned by the Supreme Court at *Madras;* the very Court from whence the present appeal comes.]—That case has not been reported. It is no doubt most applicable, and is all important to our argument. There is, however, another case, *Dhackjee Dadajee* v. *The East India Company,* which is similar in principle, which came before the Supreme Court at *Bombay* in 1843, a report of which is to be found in Sir *Erskine Perry's* notes of decided cases (*a*). That was an action of trespass brought against the East India Company, for breaking and entering the Plaintiff's dwelling house by order of the *Bombay* Government, and it was held by both the Judges of that Court that no action would lie against the East India Company, as it was an act done by the authority of the Governor and Council, and, therefore, an act of State, and for which the East India Company were not answerable. Being an act of State, it was clear that the Supreme Court could not take cognizance of the action. On the first head we submit then, that upon the authorities as well as the principles of international law, the seizure and taking possession of the property of the *Rajah* of *Tanjore,* was an act of Government and State, done by the East India Company in their Sovereign character, and by virtue of their Sovereign power; and as such, incapable of being questioned or inquired into by any Municipal Court, more especially the Supreme Court of *Madras,* created by the *Madras* Charter of 1800. *The East India Company* v. *Syed Ally.*

This brings us to the second question involved in the inquiry, namely, whether the acts done were

(*a*) 2 Morley's Dig. 307.

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not only acts of State, but done as acts of State; for if so, as already shown, they could not be inquired into by the Supreme Court at *Madras*. Now, the authority for the seizure emanated from the Government. The despatch of the 16th of *April*, 1856, declared the dignity of the *Raj* extinct, and that the *Raj* had lapsed to the British Government; and the subsequent correspondence from the Government to the Collector, and the appointment of Mr. *Forbes* as Commissioner, were all acts of the Government exercising the Sovereign authority, and the ultimate seizure and possession of the *Raj* of *Tanjore*, and property of the deceased *Rajah*, by Mr. *Forbes*, was the seizure of the Government, and an act of State. The judgment of the learned Judge of the Court below admits that the seizure of the public property, as it is there described, was an act of the State, and incapable of being inquired into by the Supreme Court, and limits the remedy to the private property of the *Rajah*; thereby affirming the jurisdiction of the Supreme Court to adjudicate on the validity of the seizure, by determining what was public and what was private property. Now, that would be to assume authority over the entire transaction. For if the Court has power to sever the acts of Mr. *Forbes* by adjudicating upon what they thought was an excess of his authority, they must have power to ascertain and declare whether his authority in general has been rightly exercised; and we insist that in this respect it has not. Suppose an action of trespass had been brought against Mr. *Forbes* for the seizure. Could the Supreme Court entertain such action? Certainly not. No person has a *locus standi* to bring such an action, nor could the Court take cognizance

of it. The acts of Mr. *Forbes* were the acts of the Government, and if the Government is not liable to the jurisdiction of the Court, neither is he. But admitting that the authority given to Mr. *Forbes*, was limited, and that he did exceed it, still his acts have been recognized and ratified by the Government, which would cure such defect, *Buron* v. *Denman* (*a*). The *"Caroline"* (*b*). The authority of a Prize Court in time of war, is an illustration of the argument upon this part of the case, that the Supreme Court of *Madras* had no jurisdiction in a matter entirely of State policy. In the time of war the maxim *"inter arma silent leges,"* would apply in a Prize Court. That Court is established by Royal Commission; its authority is special, but as affecting the objects of it, universal: therefore, if a seizure be made of an enemy's ship, though wrongfully, no action can be maintained against the Government, or any of the parties concerned in such seizure, in a Municipal Court; resort must be had to the Prize Court, which is the only Court having authority delegated from the Sovereign power to try such a question. This is distinctly laid down by Lord *Mansfield* in the cases of *Le Caux* v. *Eden* (*c*), and *Lindo* v. *Rodney* (*d*), and has been recognized and admitted by this Court in *Elphinstone* v. *Bedreechund* (*e*). As regards the question that no suit will lie against the East India Company for acts done by them as a Sovereign power in *India*, the cases of *Moodalay* v. *The East India Company* (*f*), *The Nabob of Arcot* v. *The East India*

(*a*) 2 Exch. Rep. 167.
(*b*) 3 Phillimore on International law, 51.
(*c*) Doug. 594. (*d*) Ib. 313, n.
(*e*) 1 Knapp's P. C. Cases, 316. (*f*) 1 Bro. C. C. 469.

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Company (*a*), decided in the Court of Chancery in *England*, are conclusive. So in *Tandy* v. *The Earl of Westmoreland* (*b*), the official acts of the Lord Lieutenant of *Ireland* were considered acts of State, and not within the cognizance of the Municipal jurisdiction. *The Duke of Brunswick* v. *The King of Hanover* (*c*), is an authority to show that a Sovereign Prince, resident in his kingdom, although a peer of the realm, is exempt from the jurisdiction of the Court of Chancery for acts of State done by him in *Hanover*. The same policy has been applied to Governors of Colonies. In *Mostyn* v. *Fabrigas* (*d*), Lord *Mansfield* laid it down that no Governor of a Colony could be sued while he is exercising the functions of a Governor. This case, it is true, has been in some degree shaken by the decision in *Hill* v. *Bigge* (*e*). That was an action of debt brought upon a contract entered into by the Defendant before he became Governor, and it was held that upon such a contract being utterly unconnected with his political character of Governor he was liable to be sued in the Colony of which he was Governor. *Cameron* v. *Kyte* (*f*), relied upon by the Court below, has nothing to do with the case. There the Governor exceeded the authority conferred upon him by his commission.

Thirdly. The late *Rajah* was, as regards this suit, an absolute Sovereign, and the decree of the Court below erroneously proceeds on the supposition of there being, in point of law, a distinction between the public and private property of an absolute Sovereign. No such distinction exists. In *The Advocate-General*

(*a*) 4 Bro. C. C. 180. (*b*) 27 State Trials, 1246.
(*c*) 6 Beav. 1. S. C. 2 H. L. Cases, 1. (*d*) Cowp. 161.
(*e*) 3 Moore's P. C. Cases, 465. (*f*) 3 Knapp's P. C. Cases, 332.

of Bombay v. *Amerchund* (*a*), Lord *Tenterden* puts the very question now in dispute. He asks, "What is the distinction between the public and private property of an absolute Sovereign?" and says, "When you are speaking of the property of an absolute Sovereign, there is no pretence for drawing such a distinction: the whole of it belongs to him as Sovereign, and he may dispose of it for his public or private purposes in whatever way he may think proper." Lord *Brougham* in *The Lord Advocate* v. *Lord Dunglas* (*b*), says, "I must beg to enter my protest against the distinction which has been taken in arguing this case, as to the prerogatives of the Crown being different, where the Crown is supposed to be dealing with what is called its private and individual property and public property. The prerogative of the Crown is precisely the same as regards what is called the property of the Sovereign, and the property of the public. It is only within the last half century that any private property has been acknowledged to exist in the Crown at all. All property of the Crown is held for public purposes, and is Crown property; it is public property which the Crown administers for the maintenance of the State." *Comyn's* Dig., tit. "Prærogative," D. 64, supports this view. The *Rajah* of *Tanjore* was by the Treaties of 1793 and 1799, an absolute Sovereign in the fort of *Tanjore;* he had there the power of life and death: as absolute Sovereign, he could, therefore, have no private property, distinct from State property. By the Hindoo law in the case of regalities like this *Raj,* the succession is exempted from the ordinary law of distribution, as the *Raj* goes to a single heir, *Strange's* "Hindu Law," vol. i. p. 209; ib. vol. ii.,

(*a*) 1 Knapp's P. C. Cases, 329 n. (*b*) 9 Cl. & Fin., 211.

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App. p. 328-9 (Edit. 1830). *Colebrooke's* "Dig. of Hindu Law," vol. i. p. 126; ib. ii. 122. It is asked, then, whether there is any difference between an English Sovereign before the Statute, 39th & 40th *Geo.* III., c. 88, and a Hindoo Sovereign, as to the right of private property? No evidence is adduced upon this point, and the *onus* undoubtedly lies upon the Respondent to establish that there exists such difference.

Lastly, the decree proceeds on the footing of the Plaintiff, as senior widow, being entitled to administer the private estate of the late *Rajah*. Now, there is nothing in the relations between the Respondent and the East India Company to sustain a suit in equity. There is no privity of interest between them such as could sustain a suit. The remedy, if any wrong had been committed, would have been at law by an action of trespass, in trover, or detinue. *The East India Company* v. *Nuthumbadoo Veeraswamy Moodelly* (*a*), *Spooner* v. *Juddoo* (*b*). Again, the Respondent asks for an account when no complexity of accounts exists. *Foley* v. *Hill* (*c*), *Fluker* v. *Taylor* (*d*), establish the proposition that, if the accounts are not complicated they are the subject of an action, not of a Bill in Chancery. If there was no remedy in law or equity, a petition of right would be the proper course. But if a suit like the present could be sustained, the only proper decree would have been the usual decree for the administration of the estate. There should have been first a reference to the Master to inquire whether the deceased *Rajah* had any pri-

(*a*) 5 Moore's Ind. App. Cases, 217.
(*b*) 4 Moore's Ind. App. Cases, 353.
(*c*) 2 H. L. Cases, 28. (*d*) 3 Drewry, 183.

vate property; and secondly, that the East India Company should render an account of the property so found to be private. Such a course has not been pursued in this case. Upon all these grounds, therefore, we submit, this decree cannot be sustained.

The Attorney-General (Sir *Richard Bethell*) (*a*) and Mr. *Ayrton* for the Respondent.

It will be necessary in the first place to ascertain the true *status* of the East India Company, in order to see whether they are not amenable to the jurisdiction of the Supreme Court of *Madras*, and accountable before that Court for the wrongful acts complained of. Our contention is, that the East India Company did not stand in the position of a Sovereign power; they were only a corporation endowed, it is true, with considerable franchises and prerogatives, but by legislative enactments made accountable for their acts. Sovereignty implies the exercise of absolute uncontrollabe power, without any qualification. How then could the East India Company be said to possess the Sovereign power if they are compellable to justify their acts, and to show that what they did it was within their power? The acts we complain of were arbitrary acts, and can be brought in question before the ordinary legal Tribunals. They were not done in virtue of Treaties or *Jure belli*. The account given by the Defendants in their answer is, that the

(*a*) The Attorney-General (Sir *Richard Bethell*) had been consulted on behalf of the Respondent before his appointment to the office of Attorney-General, and it was arranged that Sir *Hugh Cairns*, the late Solicitor-General, should at the hearing, conduct the case of the Appellant.

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annexation of the *Raj* of *Tanjore* and the taking possession of the property was not an act of State, but that the *Raj* and property lapsed to the Government; and that, therefore, the East India Company as the *ultimus haeres*, took possession as *bona vacantia*. Now, it can only be upon the hypothesis that the Company has the same right towards the State of *Tanjore* that the Queen of *England* has with regard to *haereditas jacens* that they could so claim the private property. Such a pretension however is preposterous. For it is apparent from the letter of Mr. *Forbes* of the 17th of *October*, 1856, that the seizure was not intended to include, or was in exercise of any right the East India Company might have over the private property of the *Rajah*, whatever they might claim to have over the *Rajah's* State property, for the instruction is that "all private property would be scrupulously respected." Indeed, no authority for such a seizure was ever delegated to Mr. *Forbes* by the Government. This fact is an admission that the East India Company would not interfere with the rights of the members of the *Rajah's* family to his private property. The Respondent as the senior widow was the proper party to sue, as well for an account of property of her own, which was unjustly seized and then was in the East India Company's possession, as of her husband's private property. As the East India Company got possession of the property by the unauthorized act of Mr. *Forbes*, no protection can be claimed by them on the ground of State policy, nor are they exempt from the jurisdiction of the Municipal Courts for the commission of such a wrongful act. *Buron* v. *Denman* (*a*) does not apply. That was an action for

(*a*) 2 Exch. Rep. 167.

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damages by reason of the Defendant, an officer in the English navy, destroying slave baracoons. The English Government, it appeared, adopted his acts as having been done by their authority, which the Court held equivalent to prior instructions; being an act of State, the Crown was alone responsible, and, therefore, no action would lie against the Defendant. So in the case of The "*Caroline.*" But here there is, in truth, no act of State, but a wrongful seizure by the East India Company, who are bound to submit to an inquiry and to account for their acts. The *Nawab* of *Surat's* case (*a*) was under a Treaty almost *in ipsissimis verbis* with the Treaties in question. The Government in that case distributed the *Nawab's* property among his heirs in a certain manner, provided by a special Act of the Legislature of *India,* No. XVIII. of 1848. It would be an act of injustice to say the Respondent has no remedy. In this country, if the Crown took possession of property, although a Bill could not be filed in the Court of Chancery, yet a petition of right would issue at the instance of the subject aggrieved. The Defendants do not frame their answer as if the seizure had been made in exercise of a Sovereign power, but they justify the taking under an asserted legal title, alleging that the property lapsed to them. Now, we contend, that the East India Company is only a corporation created by Charters and Acts of Parliament, but that they have not the Sovereign power in *India.* The Sovereign power as exercised in *India* is alone vested in the Governor-General and Council. The Governor-General we admit is exempted from the jurisdiction of the Queen's Courts in *India* for acts done relating to State or

(*a*) See 5 Moore's Ind. App. Cases, 499.

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public policy, but the East India Company we submit, like any other British subjects, are liable to the jurisdiction of the Court.

It will be necessary to establish this proposition to review the Charters and Acts of Parliament affecting the East India Company. The Charter of King *Charles* the First, of 1661, authorizes the East India Company to export warlike stores, and make peace and war with native Princes within the limits of their trade. The Charter of 1683, confers similar powers; but there the Crown reserves the Sovereign rights over the forts in *India,* and the power of making peace and war when it shall think fit to interpose the Royal authority. Now, we submit, that the Charter of 1661 was absolutely null and void, as the power of making war and peace are admitted by all Jurists to be an incommunicable prerogative. By the Charter of *Will.* III., of 1698, the powers of the East India Company are restricted to raising forces to defend the forts; but all Sovereign rights are again reserved, and amongst them the power of establishing Courts of Judicature. The Statute, 13th *Geo.* III., c. 63, puts the question of the undoubted Sovereignty of the Crown in *India* beyond all doubt. This is the first legislative enactment that introduced a particular provision for the Sovereign administration of the dominions in the *East Indies* that had been acquired by the Company. By section 7, such Sovereign rights are vested in the Governor-General in whom all the civil and military power is vested, who is really the only representative of the Crown, in *India,* and not the East India Company, as claimed by the Appellant. His powers are defined in section 9; and section 13, reserves the right of the

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Crown to erect a Supreme Court of Judicature at *Fort William*, to whom the Governor-General and Council are made amenable by the 15th section, in cases of treason or felony; and also, by the 39th section for any crime, misdemeanour, or offence, to the Court of King's Bench in *England*. The Statute, 19th *Geo.* III., c. 61, sec. 5, renewed the appointment of the Governor-General for five years: this office was continued by the 20th *Geo.* III., c. 61, sec. 5. Statute, 21st *Geo.* III., c. 65, sec. 8, for the first time gave the proprietors in the stock a title to share in the Company's territorial acquisitions. If, then, the East India Company had done the act complained of shortly after the passing of this Statute, and, therefore, for the benefit of their proprietors, how could it be said that they did it in virtue of a Sovereign power created by that Act? By the Statute, 33rd *Geo.* III., c. 52, sec. 9, the Board of Control have power given them to superintend all concerns relating to the civil or military Government or the revenue in the *East Indies*. Now, we insist that the Board of Control has no greater power than the East India Company, and, therefore, the creation of that Board cannot be said to invest the Company with any new or increased prerogatives. Sections 40 & 41 empowered the Governor-General at *Fort William* to superintend the Presidencies of *Madras* and *Bombay*, if not repugnant to orders from *England;* and the 42nd section prohibits the Governor-General in Council from declaring war, except in a case of emergency, without the consent of the Court of Directors and the Board of Control. Statute, 37th *Geo.* III., c. 142, empowers the Crown to erect Courts of Judicature

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at *Madras* and *Bombay;* and section 10, exempts the Governor or Council of *Madras* or *Bombay* from the jurisdiction of the Courts, except for treason or felony. Now, this proviso would be unnecessary if, as claimed by the Appellant, the East India Company had the actual Sovereignty. So again under Statute, 53rd *Geo.* III., c. 155, sec. 123, provision is made that the general issue may be pleaded in actions or suits brought against the East India Company or their agents for acts committed by them in arresting persons not authorized to reside or traffic in the *East Indies.* By Statute, 3rd & 4th *Will.* IV., c. 85, a further arrangement is made with the East India Company for the government of *India* for a limited period. Section 10 expressly enacts, that the same remedy by proceedings, legal or equitable, is to be had against the East India Company, and their property is to be subject to execution. By section 39 the whole power for the government of *India* is vested in "The Governor-General of *India* in Council." The authorities cited by the Appellant, *Doe d. Seebkristo* v. *The East India Company* (*a*), *The Bank of Bengal* v. *The East India Company* (*b*), *The East India Company* v. *Nulhumbadoo Veeraswamy Moodelly* (*c*), to sustain their proposition that a Bill in Equity was not the proper remedy, shows that the East India Company are generally liable to the jurisdiction of the Courts in *India;* and the question, then, is reduced to this simple point, whether what they have done is an act of State? which we contend it was not.

Secondly. In any circumstances, the East India Company, as successors to the deceased *Rajah,* suc-

(*a*) 6 Moore's Ind. App. Cases, 267. (*b*) Bignell's Reps. 118.
(*c*) 5 Moore's Ind. App. Cases, 217.

ceeded only to the State property attached to the *Raj*, and not to the private property of the late *Rajah*. He was at the time of his death entitled, as of his own right by the Hindoo law, to private property, consisting of real estate, cash, jewels, horses, &c., distinct from the rights appertaining to the *Raj*. He was of the *Soodra* caste, and had power by the Hindoo law to dispose of his private property, distinct from the *Raj*. *Strange's* "Hindu Law," vol. i., p. 209 (Edit. 1830), clearly so treats this point. He lays it down that "the effects and private estate of a Sovereign, like those of any ordinary individual, are in common, and distributable among all the sons." That is an authority that a Hindoo Sovereign can have private property distinct from State property. *Allen*, "On the Royal Prerogative," p. 143, says that "the ancient Anglo-Saxon Kings had private estates which did not merge in the Crown, but were divisible by Will, gift, or sale." So by international law, as appears from *Puffendorf*, who, referring to *Grotius*, points out the distinction, and lays it down that the income may belong to the Sovereign, and be dealt with by him differently from the *corpus* of the property which goes to the State (*a*). In modern times the same right has been recognized. *Ryves* v. *The Duke of Wellington* (*b*) was a case in which a legatee filed a Bill against the executor of *George* the Fourth, claiming under the Will of *George* the Third, with respect to a bequest made by that Monarch of his private property, and the Court of Chancery repu-

(*a*) B. viii. c. 6, sections 22 & 23. *Gro.* B. iii. c. 9 & 16. See also *The Att.-Gen.* v. *Weeden* (Parker's Rep. 267), where it was determined that choses in action belonging to an enemy are forfeited to the Crown.

(*b*) 9 Beav. 579.

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diated the jurisdiction of the Court on the sole ground, that the Will had not been proved in the Prerogative Court. The cases relating to the exemption of a Governor of a Colony, relied upon by the Appellant, do not apply. *Cameron* v. *Kyte* (*a*) was confined to the single point of the power of the Governor of a Colony, and it was held to be fettered by the terms of the Governor's commission from the Crown. *Hill* v. *Bigge* (*b*) is in our favour, as it determined that the Civil Court in the Colony had jurisdiction to entertain an action of debt brought against the Governor while in office in the Colony. *Campbell* v. *Hall* (*c*) was an action brought against an officer of the Government in *Grenada*, for the purpose of trying the question whether the King, having promised the inhabitants of *Grenada* a local Legislature, and having by his commission to the Governor authorized the convocation of an Assembly, could afterwards of his own accord impose taxes. Lastly. The case of *The East India Company* v. *Syed Ally* is distinguishable from the present. The resumption of the *Jaghire* by the Company, as the representative of the Crown, was under the authority of a Treaty made by them in that character with a native Prince. They had, under the Treaty, the same power as the former *Nawabs*. The resumption related to the revenue, and, being a matter of State policy, the Supreme Court was properly held to have had no jurisdiction.

Sir *Hugh Cairns*, Q.C., in reply.

The Respondent endeavours to support the decree appealed from, upon grounds which are antagonistic

(*a*) 3 Knapp's P. C. Cases, 332. (*b*) 3 Moore's P. C. Cases, 465.
(*c*) Cowp. 204.

to those relied upon in the judgment of the Court below. It is now urged that the East India Company are mere traders, who have arrogated to themselves the rights of Sovereignty, and that their assumption was a mockery of the rights of the Crown. The argument on the other side goes to this extent, that the East India Company, as a corporation, have certain powers emanating from the Sovereign delegated to them, but that the act complained of is *ultra vires* the East India Company; as the Sovereign power is only vested in the Governor-General of *India*. Now, the Court below treats the proceedings as being within the authority of the East India Company, but denies what has been done by Mr. *Forbes* with respect to the alleged private property to be an act of State. This argument proves too much, as everything which the East India Company did would be wrong; the annexation of the *Raj*, the seizure of the public property, which are not complained of, would also be wrongful. Nothing, however, can be more fallacious than this argument, as at the time when the acts in question took place, nothing could be done in *India* in the shape of Government, but through the East India Company, and the Court of Directors under the supervision of the Board of Control. Supposing, for the sake of the argument, it was conceded that it is in the Governor-General in Council that the Sovereign delegated power exists, we still have then his authoritative sanction, and confirmation of all the proceedings taken by Mr. *Forbes*. But the true position of the Government of *India* is this: The East India Company have power given them by Charters and Acts of Parliament for the Government of *India*, and they delegate those powers to the Governor-General as

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executive in *India*. The Statute, 21st *Geo.* III., c. 63, was passed in consequence of the exorbitant exercise of power claimed by the Chief Justice, Sir *Elijah Impey*, and that Statute not only exempts the Governor-General from responsibility for anything he may do, but any one acting under his instructions who shall plead such instructions in a suit or action. Here the Governor-General has sanctioned what Mr. *Forbes* has done, and it must, therefore, be treated as his act. The principle of legislation as to the Governor-General in *India* is this: Anterior to the creation of that office, or any officer in *India* as the executive Governor of *India*, the East India Company, as the executive Government upon the spot, had Sovereign powers conferred on them from the Crown, by Charters and by Acts of Parliament; and, as they could not delegate those powers upon ordinary principles of law to any one else, it became necessary to give large powers to an executive upon the spot, and that was done by parliamentary authority. The first Act creating the Governor-General was the 13th *Geo.* III., c. 63, and the preamble shows the evil it intended to remedy in the constitution of the governing body of the East India Company at home, and the imperfection of the executive Government in *India*: the 7th & 8th sections appoint a Governor-General, and define his powers. The Statute relied upon by the Respondent, the 53rd *Geo.* III., c. 155, sec. 123, obviously contemplates an act which cannot be considered an act of State, done as a Sovereign power, but as traders, and one which the East India Company might be sued for, *Gibson* v. *The East India Company* (*a*). The Statute, 3rd & 4th *Will.* IV., c. 85, puts this matter still

(*a*) 5 Bingh. N. C. 262.

clearer; that Statute took away the exclusive trading rights of the Company, and left them their Sovereign rights only for a limited period. Sovereign powers have, undoubtedly, been conferred upon the East India Company of levying war or making peace, and making Treaties. These powers are shown in the case of *The Nabob of Arcot* v. *The East India Company* (*a*), where it was decided that the particular acts the *Nawab* complained of were acts of public policy and State, and that the Court of Chancery had no jurisdiction to take cognizance of those acts. *The East India Company* v. *Syed Ally* further illustrates this, and shows that the Sovereign power in the *Carnatic* has become vested in the East India Company. If a Treaty was made between this country and *France*, a complaint as to the mode in which it was carried into effect could not be entertained in a Municipal Court. The Respondent argues, that it has not been pleaded that what was done by Mr. *Forbes* was an act of State, and that the defence set up by the answer is, that the East India Company took the *Raj* and property by succession. Such is not the fact: the answer clearly treats it as an Act of State, and negatives such assumption that the seizure was a succession at law.

No distinction exists between public and private property of an absolute Sovereign. *The Advocate-General of Bombay* v. *Amerchand* (*b*) is conclusive upon that point. The argument by analogy to Sovereigns in this country who have made Wills and disposed of their private property does not apply, as it is not the case of an absolute Sovereign, like the *Rajah* of *Tanjore*, but of Sovereigns whose powers by the constitution are limited. In this country the

(*a*) 4 Bro. C. C. 180. (*b*) 1 Knapp's P. C. Cases, 329, n.

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hereditary revenues of the Crown have been made over by Act of Parliament to the country, in consideration of a civil list during the life of the Sovereign; and the 39th & 40th *Geo.* III., c. 88, gave His Majesty, his heirs and successors, full power of disposition by deed, or Will, of certain real and personal property, at the same time subjecting the private property to the payment of private debts contracted during the Sovereign's lifetime. There is no allegation or evidence that there is a custom in this *Raj*, or by the Hindoo Law, that upon the death of an absolute Sovereign, no disposition being made by him during his lifetime, there could be a division made among his family of a certain kind of property. Another error in the decree is, that it assumes, without proof, that there was private property of the deceased *Rajah*.

The case stood over for consideration.

27th July, 1859.

Judgment was now delivered by

The Right Hon. Lord KINGSDOWN.

This is an appeal from a decree of the equity side of the Supreme Court of Judicature at *Madras*, by which it was declared that the Respondent, the Plaintiff in the suit below, as the eldest widow of *Sevajee*, late *Rajah* of *Tanjore*, who had died intestate, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereout of the present debts, if any, of *Sevajee*, and to any legal claims and demands that might exist against such private and particular estate and effects; and the Court declared that the Defendants, the East

India Company, were trustees for the Plaintiff for and in respect of the private and particular estate and effects, real and personal, left by *Sevajee* at the time of his death, and possessed by them, their officers, servants, and agents, as in the Bill mentioned. The decree also proceeded to direct various accounts and inquiries founded upon these declarations.

In the very able argument addressed to us at the Bar, many objections were made by the Appellant's Counsel to this decree; but the main point taken, and that on which their Lordships think that the case must be decided, was this, that the East India Company, as trustees for the Crown, and under certain restrictions, are empowered to act as a Sovereign State in transactions with other Sovereign States in *India;* that the *Rajah* of *Tanjore* was an independent Sovereign in *India* ; that on this death, in the year 1855, the East India Company, in the exercise of their Sovereign power, thought fit, from motives of State, to seize the *Raj* of *Tanjore* and the whole of the property the subject of this suit, and did seize it accordingly; and that over an act so done, whether rightfully or wrongfully, no Municipal Court has any jurisdiction.

The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer : such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

But it was contended on the part of the Respondent, that this case did not fall within the principle, for the following reasons:—

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First. Because, as it was said, the East India Company did not stand in the position of an independent Sovereign; that such powers of Sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by legislative enactments for what they may do in that character. Secondly, that the seizure in this case did not take place by the exercise of a Sovereign power against another independent power; but was a mere succession, by an asserted legal title, to property alleged to have lapsed to the Company. And, thirdly, that there is a distinction between the public and private property of the *Rajah*, and that the Company never intended to exercise their Sovereign powers as to the latter, whatever they might do with respect to the former; that the Company, therefore, are in possession of property by the unauthorized act of their officers, for which no protection can be claimed on the grounds which would protect the public property from the jurisdiction of the Court.

On the first point their Lordships are unable to discover any room for doubt. The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the law, as it stood in the year 1839, is accurately stated in the following passage in the judgment of Chief Justice *Tindal* in case of *Gibson* v. *The East India Company* (5 Bingh. N. C. 273), in which, after referring to various legislative enactments, he observes that from these—"It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other;

namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of *India*), power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of *India*."

That acts done in the execution of these Sovereign powers were not subject to the control of the Municipal Courts, either of *India* or *Great Britain*, was sufficiently established by the cases of *The Nabob of Arcot* v. *The East India Company*, in the Court of Chancery, in the year 1793; and *The East India Company* v. *Syed Ally*, before the Privy Council in 1827.

The subsequent Statute, 3rd & 4th *Will.* IV., c. 85, in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of *Great Britain*, and subject to the control thereby provided, these delegated powers of Sovereignty.

The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of *Great Britain*, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late *Rajah* of *Tanjore*, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.

It is extremely difficult to discover in these papers any ground of legal right, on the part of the East India Company, or of the Crown of *Great Britain*, to the possession of this *Raj*, or of any part of the pro-

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perty of the *Rajah* on his death; and, indeed, the seizure was denounced by the Attorney-General (who, from circumstances explained to us at the hearing, appeared as Counsel for the Respondent, and not in his official character for the Appellant), as a most violent and unjustifiable measure. The *Rajah* was an independent Sovereign of territories undoubtedly small, and bound by Treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company; nor does there appear to have been any pretence for claiming it, on the death of the *Rajah* without a son, by any legal title either as an escheat, or as *bona vacantia*. It should seem, therefore, that the possession could hardly have been taken upon any such grounds.

Accordingly, the Defendants in their answer, allege that on the death of the late *Rajah*, "It was determined, as an act of State, by the Defendants and the British Government" that the *Raj* and dignity of *Rajah* of *Tanjore* was extinct, and that the State of *Tanjore* had thereupon lapsed to the Defendants in trust for Her Majesty; and it was thereupon also determined by the Defendants, as an act of State and Government, that the whole dominions and Sovereignty of the State of *Tanjore*, together with the property belonging thereto, should be assumed by the Defendants in trust for Her Majesty the Queen, and should become part of the British territories and dominions in *India*, in trust for Her Majesty. They then allege that the whole of the property which they have seized has been seized by virtue of their Sovereign rights on behalf of Her Majesty, and insist that

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the Court has no jurisdiction to inquire into the circumstances of the seizure, or its justice with respect to the whole or any part of the seizure.

The facts, as they appear in the evidence, are these:—In *November*, 1855, the *Rajah* died. The Government of *Madras*, within which Presidency *Tanjore* is situated, communicated the fact of his death to the Governor-General of *India*, and this fact, with the views of the Government of *Madras*, and of the Governor-General in Council as to the steps which ought to be taken upon his death in regard to his dominion and property, was communicated to the Court of Directors in *England*.

The letters in which these views were communicated are not found amongst the papers before us; but it appears from the letter of the Court of Directors, dated the 16th of *April*, 1856, that these Governments were of opinion, that the dignity of *Rajah* of *Tanjore* was extinct, and that they had taken possession, or were about to take possession, of the dominions and property of the *Rajah*, and intended to deal with them in such manner as appeared to them to be just.

The answer of the East India Company is to the following effect:—After adverting to a suggestion which had been made, to recognize one of the daughters of the deceased *Rajah*, as his successor, they say:—"3. By no law or usage, however, has the daughter of a Hindoo *Rajah* any right of succession to the *Raj*, and it is entirely out of the question that we should create such a right for the sole purpose of perpetuating a titular Principality at a great cost to the public revenue. 4. We agree in the unanimous opinion of your Government, and the Government of *Madras*, that the dignity of *Rajah* of *Tanjore* is extinct. 5.

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It only remains to express our cordial approbation of the intentions you express of treating the widow, daughters, and dependants of the late *Rajah* with kindness and liberality. We shall, doubtless, receive, at an early period, from you or from the *Madras* Government, a report of the arrangements made for carrying these intentions into effect. 6. The Resident was very properly directed to continue all existing allowances until he could report fully on them to Government; but to inform the recipients that Government were not to be considered as pledged to their continuance."

It seems obvious from this letter that the East India Company intended to take possession of the dominions and property of the *Rajah*, as absolute lords and owners of it, and to treat any claims upon it of his widows, and relations, and dependants, not as rights to be dealt with upon legal principles, but as appeals to the consideration and liberality of the Company.

The further proceedings were of the same character.

On the 10th of *July*, 1856, the Government of *Madras* wrote to the Governor-General in Council, and after giving an account of different portions of the property of the late *Rajah*, and pointing out various difficulties and questions which might arise out of it, they suggested that some person should be specially sent as a Commissioner to *Tanjore*, who should be "directed to investigate and report upon the various important questions above enumerated, and any others that may hereafter occur, to this Government, as demanding inquiry in connection with the general subject."

By a letter of the 8th of *September*, 1856, the

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Governor-General in Council approves of the suggestion of appointing a Commissioner, and of the selection of Mr. *Forbes* for the purpose. He points out certain matters; amongst others, the abolition of the *Rajah's* Courts, which he leaves to the disposal of the Government of *Madras*. "But the mode in which it may be proposed to deal with the *Rajah's* debts, and with the State jewels, library, and armoury, should be reported to the Governor of *India*, before any measures are taken, as also the apportionment of pensions and gratuities to the family and dependants of the *Rajah*. Upon the last point it will be necessary to lay down rules by which the Government of *Madras* should be guided."

Mr. *Forbes* was accordingly appointed to discharge this duty, and written instructions for that purpose were given to him by the Government of *Madras*, on the 25th of *September*, 1856. He was directed not to make any general announcement of the orders of the Government of *India*; but to possess the *Durbar* generally with the purport of those instructions, informing them that it had been decided by the home authorities that the *Raj* of *Tanjore* had become extinct, but that all liberality would be shown to the members of the family, servants, and dependants. He was also, should such caution appear called for, to warn them of the consequences that would certainly ensue from any factious opposition to the policy that had been decided on in the case of the *Tanjore Raj*.

In what manner Mr. *Forbes* executed the powers conferred upon him, appears in his evidence and by the documents proved in the cause.

On the 29th of *September*, 1856, he caused an order to be made on the *Sirkele*, an officer of the late *Rajah*, directing him to make out a list of the property

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belonging to the *Raj*. No attention having been paid to this order, Mr. *Forbes* soon afterwards went himself to *Tanjore*, and took up his abode at the Residency, and on the 17th of *October*, 1856, sent a letter to the *Sirkele*, in which he informs him of his intention to take possession of the public property of the State for the British Government, and to place it in safe keeping. He informs the *Sirkele* that he intends to take charge of the public property within the fort, early the next morning, and to place it in charge of a detachment of the British troops, and he requests that the *Sirkele* will meet him at the east gate of the fort at half-past 5 o'clock, in company with the *Murdeshuns* of the *Tashackdera*, the arsenal, and the various other departments.

On the following morning, accordingly, taking advantage, as he says, of the presence of the 25th Regiment of Infantry, he goes to the palace. He takes possession of the property which is found in it. He has it placed in rooms, sealed with his seal, and stations sentries at the different doors.

It is clear from Mr. *Forbes's* report to the *Madras* Government of what took place on the occasion, that though no resistance was offered by the family of the *Rajah*, or the inhabitants of the fort, to the seizure of the *Raj*, and of the palace and property of the *Rajah*, it was regarded on both sides as a mere act of power not resisted, because resistance would have been vain. "Much sorrow," he says, "was expressed, and much grief was shown; but all submitted at once to the authority of the Government, and placed themselves in its hands."

It is by these acts of Mr. *Forbes* that the East India Company is in possession of whatever property it holds now claimed by the Respondent. The acts of

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Mr. *Forbes* were approved by the Governor of *Madras* by a minute, dated the 21st of *October*, 1856; and they are adopted and ratified by the East India Company in their answer in this suit.

What property of the *Rajah* was within the authority given to Mr. *Forbes*, and what may be the consequence of any seizure in excess of that authority, we will consider under the next head; but that the seizure was an exercise of Sovereign power effected at the arbitrary discretion of the Company, by the aid of military force, can hardly admit of doubt.

But then, it is contended, that there is a distinction between the public and private property of a Hindoo Sovereign, and that although during his life, if he be an absolute Monarch, he may dispose of all alike, yet on his death some portions of his property, termed his private property, will go to one set of heirs, and the *Raj* with that portion of the property which is called public, will go to the succeeding *Rajah*.

It is very probable that this may be so; the general rule of Hindoo inheritance is partibility, the succession of one heir, as in the case of a *Raj*, is the exception. But assuming this, if the Company, in the exercise of their Sovereign power, have thought fit to seize the whole property of the late *Rajah*, private as well as public, does that circumstance give any jurisdiction over their acts to the Court at *Madras*? If the Court cannot inquire into the act at all because it is an act of State, how can it inquire into any part of it, or afford relief on the ground that the Sovereign power has been exercised to an extent which Municipal law will not sanction?

It is said, however, that it was not the intention of

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the East India Company that the private property of the *Rajah* should be the subject of seizure, and it is observed in the judgment of the Court below, that the letter of Mr. *Forbes* to the *Sirkele* of the 17th of *October*, 1856, shows that he knew there was private property amongst that about to be seized; and that he expressly states that all property to which a claim can be established shall be restored to its owner.

But it appears to their Lordships that in this passage the Chief Justice has not quite accurately collected the meaning of Mr. *Forbes's* letter; the distinction there made between private and public property seems to apply, not to property of the *Rajah*, but to property which might be seized by the officers as in the possession of, or apparently belonging to, the *Rajah*, while in fact it belonged to, or was subject to, the claims of other persons. All claims which might be advanced to any part of the property seized, by institutions or individuals, were to be carefully investigated, and all to which a claim might be substantiated would be restored to the owner.

But, whatever may be the meaning of this letter, it affords no argument in favour of the judgment of the Court; but rather an argument against it. It shows that the Government intended to seize all the property which actually was seized, whether public or private, subject to an assurance that all which, upon investigation, should be found to have been improperly seized, would be restored. But, even with respect to property not belonging to the *Rajah*, it is difficult to suppose that the Government intended to give a legal right of redress to those who might think themselves wronged, and to submit the conduct of their officers, in the execution of a political measure, to the judg-

ment of a legal tribunal. They intended only to declare the course which a sense of justice and humanity would induce them to adopt.

With respect to the property of the *Rajah*, whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters, his relations and dependants; but they intended to do this according to their own notions of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts. In the letter already referred to of the 8th of *September*, 1856, from the Secretary of the Government in *India* to the Government of *Madras*, it is distinctly stated:—"The relations whom the *Rajah* of *Tanjore* has left are in this position: they are without any rights of inheritance;" and it then proceeds to enumerate those relations who are thus without any rights of inheritance, and mentions as the first amongst them the Queen Dowager, the Respondent in this appeal; and it proceeds to speak of all those relations as claimants upon the consideration of the Government, and to describe in what manner those claims are to be met. How is it possible, in the face of this declaration, to hold that it was the intention of the Government to recognize the right of inheritance of the Respondent, and to exclude from seizure, and to subject to process of law, any portion of the property of the deceased Sovereign? If there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent, which

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according to the principle of the decision in *Buron* v. *Denman*, is equivalent to a previous authority.

The result, in their Lordships' opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of *Madras* has no jurisdiction.

Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.

They must advise Her Majesty to reverse the decree complained of, and to dismiss the Plaintiff's Bill; but they will recommend that no costs should be given of the proceedings either in the Court below or in this appeal.

The following proceedings took place in *India* upon the receipt of the above judgment, as appeared recorded in the minute by the Honourable the President, Sir *Charles E. Trevelyan*, dated the 8th of *November*, 1859.

"1. The Lords of the Committee of the Privy Council, conclude their judgment on the appeal of *The East India Company* v. *Kamachee Boye Sahaba* as follows :—'The result, in their Lordships'

opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate, the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of *Madras* has no jurisdiction.

"'Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.'

"2. While, on the one hand, the Government is left, by this decision, free to take whatever course it considers best; on the other, a serious responsibility has been cast upon it. The Government is declared to be sole arbiter, unrestrained by the ordinary obligations of Municipal law; and it is, therefore, peculiarly incumbent upon us to show that we are prepared to act in the spirit of those principles of equity and liberality which are the foundation of all law.

"3. The original proceeding by which the *Raj* of *Tanjore* was declared to have escheated to the Government of *India* on the death of the late *Rajah* has often been described as an act of spoliation. I cannot see it in that light. I have always been opposed to what has of late years been called 'The policy of annexation.' It has always appeared to me that well-constituted Native States are an essential element of the

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Anglo-Indian Empire; and this view has been amply confirmed by the experience acquired during the late convulsion. But *Tanjore* was not a Native State. The *Rajah* had neither people nor territory beyond the walls of his palace. He had no duties of Government to perform. He and his numerous dependants were a heavy charge upon the industrious portion of the population, without rendering any return. So far as any political effect was produced, it was decidedly injurious, because the arrangement kept alive pretensions which circumstances might at any time quicken into open hostility, as lately happened at *Delhi*. The entire community is interested in the growth of a feeling of loyalty to the Sovereign, and there ought to be nothing to interfere with the undivided allegiance of the Queen's own subjects in Her own dominions. It has also been proved by numerous examples, that there is no condition so demoralising as that of a society which, while it is elevated above public opinion, has no appropriate duties to engage in.

"4. The *Rajah* had died leaving no legitimate or adopted son. The only claimant is his senior surviving widow. My first twelve years of public service were passed in the Indian Diplomatic department, and I have as extensive a knowledge of the customs and practice of Native Chiefs as most people. I mention this as my justification for offering a confident opinion, that the succession of females forms no part of the constitution of Native States or Chiefships. It may occasionally have taken place, as in the instance of *Holkar's* widow, *Arhalaya Bhai*, and the *Begum Sumroo*, but the special nature of the circumstances in those cases, shows that it was a deviation from an established rule. No well-informed and im-

partial native would maintain the right of succession of a female to a Hindoo *Raj*.

"5. I, therefore, consider that, whether regard be had to the customs of the country or to the public good, this is a true escheat. The so-called *Tanjore Raj* has lapsed to the Government of *India*. That Government stands in the place of the late *Rajah*. While we are bound to fulfil his just obligations, it is our duty to secure, on behalf of the public, everything belonging to the *Raj* not required for that purpose.

"6. A great deal of discussion has taken place about what ought to be considered public or private property. This seems to me to proceed upon a mistaken view of the nature of the case. The *Raj* has merged in the Government of *India*. Everything which belonged to the late *Rajah* at the time of his death, therefore, now belongs, by right, to the Government. If, previously to his decease, he had made a *bonâ fide* alienation of any property acquired out of his savings, that property has passed into the condition of private property. Otherwise, all that he left would have descended to his heir, if he had had one; and not having had one, it has lapsed to the paramount authority representing the general public. We have to pay the late *Rajah's* debts, and to provide for his numerous relations and dependants as *ultimus haeres;* and we are entitled, in the same character, to all that remained of his property. It would not have been possible for any one except the successor to the *Raj* to have undertaken these obligations. To any other, the loss would have greatly exceeded the advantage. The view taken in this paragraph is the same which is maintained by the Advocate-Generals at *Calcutta* and *Madras*.

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"7. Assuming the correctness of these principles, I will consider the several points requiring decision.

"First, the late *Rajah's* debts must be ascertained with a view to their early liquidation. Experience shows that more than ordinary care should be taken, in such cases, in order to shut out fictitious claims.

"Secondly, the Supreme Government laid down as long ago as the 8th of *September*, 1856, rules for the grant of pensions to the family and dependants. These are divided into three classes: viz., first, the immediate members of the *Rajah's* family; secondly, his relations; and thirdly, his servants and pensioners. In the case of the third class, these rules have already been acted on, and the pensions awarded have for some time been paid. The pensions of the chief members of the family only are heritable. In the case of a man, they may pass for two generations, a moiety lapsing on each succession; while, in the case of a woman, they may descend with the same deduction for one generation only. The case of those belonging to the second class, who are not nearly allied to the late *Rajah*, was considered to be fully met by the grant of a pension for a single life, which may be commuted for a gratuity.

"8. Mr. *Phillips*, the late Commissioner of *Tanjore*, proposed to place 103 persons in the first class, as follows:—'1. The mother of the late *Rajah*. 2. His senior widow. 3. His fifteen junior widows. 4. His daughter. 5. His two elder sisters. 6. His niece, her husband and children. 7. His son-in-law. 8. Three nephews and their families. 9. The late *Rajah Sevajee's* seraglio, in number 59 persons; including, apparently, 6 natural sons and 11 natural daughters of the *Rajah*. 10. The *Rajah Sarabhoji's* seraglio, 18 persons. 11. The descendants, four in

number, of *Tukuji Sahib,* fourth *Rajah* of *Tanjore.'*

"9. As far as the eighth head, no objection can be made; but I cannot think that the 59 persons belonging to the late *Rajah's* seraglio, or the persons who claim through former *Rajahs,* are entitled to heritable pensions. This advantage may, however, be conceded to the natural sons and daughters of the late *Rajah.*

"10. Not long before his death, the late *Rajah* married sixteen wives in one day. These ladies and their families came from the *Deccan;* and every facility should be given, by commuting their pensions, or making the payments elsewhere, for their returning to their original homes.

"11. The pensions should be in full of every personal claim. No establishment should be kept up for any one; and the old system of procuring supplies through the Collector should come to an end. Any additional allowance should be made which may be required to compensate for the loss of these advantages; and the agent should continue to protect the interests of the ladies and assist them by his advice.

"12. *Sukharam,* the late *Rajah's* son-in-law, ought not, I think, to be subjected to any deduction of his stipend, on account of his inheriting his late wife's settlement; and the *Rajah's* only surviving legitimate daughter should be allowed an additional Rs. 6,000 a year on her marriage, as proposed by Mr. *Phillips.* No difference should be made between those who supported and those who stood aloof from the senior widow in the late litigation.

"13. The contents of the library, armoury, and jewel rooms should be carefully examined; and while such articles as were exclusively State property should

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be held at the disposal of the Government, the most liberal consideration should be given to any claim that may be made on behalf of the *Ranee* or others connected with the late *Rajah*.

"14. The only remaining point is the landed property. The bulk was retained by the *Rajah*, contrary to the provisions of the Treaty by which the Province was ceded to the East India Company in 1779; but, according to my view, as expressed in the early part of this minute, it matters not in what manner property came into the possession of the *Rajah*. Whatever actually belonged to the *Rajah* at the time of his death is included in the escheat, and now belongs to the Government.

"15. Fourteen villages are claimed on behalf of the mother of the late *Rajah* as having been granted to her by her late husband, *Rajah Sarabhoji*; such a grant is undoubtedly extant, but if her possession was ever more than nominal, it altogether ceased in 1827, after which the *Rajah* dealt with the property entirely as his own. Our Advocate-General is, therefore, rightly of opinion that these villages must be considered as belonging to the *Raj*. Mr. *Phillips*, while he admits that the Dowager *Ranee* has no just claim, proposes that she should have the enjoyment of these villages during the remainder of her life. I do not concur in this. The aged lady should have a pension allowed her, sufficiently liberal to enable her to spend the remainder of her days with all possible ease and comfort; but more than this is not required; and it is not desirable that she should have the management of villages. There are three villages, the *Mirasi* rights in which were originally purchased by the widow of *Tulasiji*, the adoptive father of *Sarabhoji*. They descended to the late mother of the *Rajah's*

only surviving daughter, to whom they should now be made over, together with the arrears which have accumulated since her father's death. Alienations from the landed property, which are of the nature of *Enam*, should be dealt with under the *Enam* rules.

"16. If my colleagues concur in these views, I propose that Mr. *Phillips*, who is well acquainted with the whole subject, should be specially appointed as Commissioner, to give effect to the arrangements that may be finally approved by the Supreme Government.

"17. There is no reason to doubt the correctness of the *data* upon which Mr. *Phillips* calculated the pensions proposed by him for the several classes of claimants; but if my views are adopted, some modification will be required in particular cases; and if Mr. *Phillips* should think, on the review he will now have to take of the subject, that his first proposals should in any other instance be amended, we shall be ready to reconsider them with him.—*C. E. Trevelyan.*"

"Minute by the Honourable the President, dated 23rd of *November*, 1859.

"On the first point, in must be observed, that the villages were not only managed, but their proceeds were appropriated by the *Rajah*. In short, they were treated after 1827, entirely as his own property. This has been reported by our Commissioner, and has been argued upon as a fact by the Law Officers.

"As regards the objection to Mr. *Phillips* on the ground of his connection with the *Sudder* Court, this case has been expressly declared by the Privy Council to be beyond the limits of any Municipal jurisdiction.

"*C. E. Trevelyan.*"

"*Gindi*, 23rd *November*, 1859."

J. C.* 1919 *June* 26.

ARUNACHELLAM CHETTY AND OTHERS . APPELLANTS;

AND

VENKATACHALAPATHI GURUSWAMIGAL . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Religious Endowment—Property of Math—Trust—Usage of Math—Right to Possession—Adverse Possession—Limitation.

Property belonging to a religious institution may by the usage and custom of the institution vest in trustees other than its spiritual head. In any case the property is held solely in trust for the purposes of the institution; surplus income must be added to the endowment and not applied for the personal enjoyment of the trustee or trustees.

The respondent, the head of a math, sued the appellants for possession of a village forming part of its endowment. The evidence showed that for a period of eighty years trustees, represented by the appellants, had had possession and management of the village and had applied the income to the purposes of the institution; they were recorded as trustees in an Inam Register of 1864, which mentioned the assent of the zamindar, from whose predecessors the original title to the land had flowed:—

Held, that the respondent had no title to the village; further, that the appellants' possession was adverse to him and that the suit was barred by limitation.

In the absence of actual and authentic evidence as to the history of a math, the utmost importance attaches to information set forth in an Inam Register.

APPEAL from a judgment and decree of the High Court (August 10, 1914), varying a decree of the Subordinate Judge of Madura (October 9, 1908).

The suit was brought by the respondent against the appellants for a declaration "that the defendants have no right to the village of Patharakudi and that the plaintiff as head of the math was entitled to possession . . . . , and to receive the income of the same in the hands of the Receiver." The plaint alleged that the respondent was head of the ancient math of Patharakudi, which in the 16th century had been endowed by one of the Pandiyan kings with Patharakudi and

* *Present*: VISCOUNT CAVE, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, SIR JOHN EDGE, and MR. AMEER ALI.

J. C.

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other villages, the title of the math to the endowments having been confirmed by an inam title deed in 1864. That the plaintiff had been duly appointed head in 1867, and that being at the time young, he had allowed certain Nattukottai Chettys, disciples of the math, to manage its affairs under his control and supervision; that for some years the Chettys had efficiently managed the affairs, but that from about 1901 they had improperly claimed to be trustees and that disputes and disorders had resulted. That in 1903 the Head Assistant Magistrate had ordered that the math should remain in the possession of the respondent, and that the village of Patharakudi should be attached, a Receiver being appointed later. That the Chettys had acted merely as the respondent's agents, and that the respondent had throughout been in possession of the village of Patharakudi. The appellants by their written statement pleaded that the matam had been created by Chettys for their own private accommodation, and that it possessed none of the characteristics of a math; they alleged that from time immemorial the Chettys had been exclusively managing the villages and applying the income to the purposes of the institution; that as a matter of convenience, eight families of Chettys were entrusted with the management, the senior members in rotation by immemorial custom administering the affairs; that on the death of the gurukkal in 1863, the then representatives of the eight families had according to the usage appointed the plaintiff as their priest.

The following issues among others were framed: (1.) What is the nature of the institution described as the math and adhinam at Patharakudi? . . . . (4.) Whether the alleged previous matathipathies, or the plaintiff, were the trustees of the institution at Patharakudi, and whether the plaintiff was, since his appoitment, in possession of the plaint-mentioned villages within twelve years prior to suit or to the date of the Magistrate's order of attachment? (5.) Whether the trusteeship has been held by the eight families, represented by the defendants and one Kulandaivelan Chetty hereditarily as alleged by the defendants? (7.) Whether the Chettys had acquired the right of trusteeship by adverse possession for

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more than twelve years? (9.) Whether the suit was barred by limitation?

The facts appear from the judgment of their Lordships.

The Subordinate Judge on October 19, 1908, delivered his judgment, in which he dealt exhaustively with the evidence. Dealing with issues 1 to 6, of which issue 4 was the important issue, he considered first the evidence, almost wholly documentary, as to the period ending with the death of the plaintiff's predecessor in 1863. He found that that evidence showed that the institution existed before the sixteenth century, and that the endowment of the village was then granted by a Pandiyan king to its gurukkal; that the gurukkals always held and enjoyed the endowments of the institution, and were recognized as their owner, proprietor, and the matathipathy or head of the institution; and that the Chettys had nothing to do with the endowments except as disciples of their guru. There was some evidence to show that the Chettys assisted in the management, but insufficient to establish their right as trustees or hakdars. Passing to the period after 1863, in a passage set out at greater length in the judgment of their Lordships, he found that for this period the evidence showed "the full and complete management, control, and supervision of the endowments and their income by some Chettys or others, to the knowledge of the plaintiff," that management not being as agent for the plaintiff. He was of opinion that "the Chettys in 1863 claimed to be hakdars and trustees solely because there was not then a guru or head of the institution, and there was nobody else to represent the institution at the Inam inquiry," and that they subsequently call themselves hakdars and trustees, the plaintiff acquiescing in their management. He was inclined to believe that the Chettys appointed the plaintiff as gurukkal, and found that they had arranged for the construction of the agraharam, raising loans for the purpose. He concluded this part of his judgment as follows: "Thus, on the whole, I think that the plaint institution is a religious institution of Acharayas or Gurus, whose disciples are the Nattukottai Chettys. . . . . In the absence of any evidence about a special

constitution regarding its management, etc., the head of the institution is the beneficiary entitled to the income of the endowment, granted in this manner, subject perhaps to his liability to maintain and perpetuate the institution as a corporation sole. . . . . Apart from the nature of this institution, which leads to the aforesaid conclusion, I am further of opinion on the clear evidence in the case, that the gurukkals of the plaint institution, as the successors of the original grantee of the endowments for this institution, are the persons who are the beneficiaries and trustees and managers of the endowments, and are entitled therefore to their possession and enjoyment, as well to the enjoyment of the income, so long as they are the gurukkals and the head of the math. I further hold that the defendants, Chettys, had no such right as managers or trustees in their own right either by virtue of the original constitution or of any special custom or valid scheme for management. On the evidence I cannot find this to be in its nature a caste institution. . . . . Thus, for these reasons, I find the first part of issue 4 for the plaintiff, and hold that, according to the nature of this institution and according to the evidence in the case, the plaintiff's predecessor and the plaintiff have been the holders, superintendents, and managers and the beneficiaries of the endowments of the plaint institution and are therefore entitled to its income subject only to its maintenance; and I further find on issue 5, that the hereditary title of eight families of Chettys on behalf of Nagarathars to be its hakdars and trustees, either according to the original constitution of the institution or the terms of the original grant of the endowments or according to any custom sprung up subsequently, has not been made out."

On issue 7 the Subordinate Judge held that from 1867 there had been a discontinuance of the gurukkal's exclusive possession within the meaning of art. 142 of the Indian Limitation Act, 1877, Sched. II, and that the Nagara Chetty community had held the management without break through some one or more of its members, but not to the exclusion of the plaintiff from the management.

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In the result a decree was drawn up as follows: "It is ordered and declared that the plaintiff as the gurukkal and head of the plaint Patharakudi institution, and consequently as a trustee and manager of the same conjointly with the Eliathagudy Nagara Chettys, is entitled to the possession and management of the plaint village of Patharakudi and its hamlets, item No. 1 in the plaint schedule, forming part of the endowments of the said institution, along with the defendants representing and forming part of the said Nagara Chetty community, without prejudice to the rights of the latter to continue in actual possession and direct management of the same as they have been holding and managing them till now from 1863. And that he, as such head and gurukkal of the institution, is further entitled to the entire beneficial enjoyment of the income of the said villages during his life and continuance as the spiritual head of the institution, subject only to the maintenance of the said institution, consisting of his own maintenance as gurukkal and spiritual head, and the performance of the poojah of Palampathinathaswami, and the feeding of Brahmins as appurtenant the reto, according to the usage till now. It is hereby further declared that the plaintiff is entitled to draw the surplus income in deposit to the credit of the suit as he is the sole beneficiary entitled to such surplus income."

Cross-appeals to the High Court were heard by the officiating Chief Justice (Sir John Wallis) and Kumaraswami Sastri J., who allowed the plaintiff's appeal and dismissed the defendants' appeal.

The learned officiating Chief Justice, while not prepared to say that a community, such as the Nattukottai Chettys, could not acquire a right of joint management by prescription against the head of the institution, was of opinion that the defendants had failed to prove their right. He agreed with the Subordinate Judge's view that the endowment was granted to the plaintiff's predecessors, and was enjoyed by them for a lengthy period, subject to the trusts of the endowment, and that the defendants had not shown that in 1867 they acquired the right of management. He said: "It is not easy to

imagine what sort of joint management there could be by the guru and the whole Chetty caste, but it is not necessary to go into this as, in my opinion, the large part in the management taken by certain influential and energetic Chettys is not shown to have been adverse to the plaintiff. It is not enough to show that the plaintiff knew of the large part in the management taken by individual Chettys, it must be shown clearly that it was adverse to him; and this in my opinion should be very clearly made out where the relation between the parties was that of religious teacher and adherents, and for some time after the plaintiff's succession the facts proved admit of the interpretation that they were acting as de facto guardians of the minor. In view of the intimate and confidential relations of the parties, the Courts, I think, should require adverse possession to the knowledge of the plaintiff to be very clearly made out and, I think, that in this respect the defendants have failed to discharge the burden which lies on them. . . . . The Subordinate Judge has come to the conclusion that the acts of the Chettys must be considered to have been done on behalf of the caste as a whole and adversely to the plaintiff's right of exclusive management. The evidence appears to me to lend itself as readily to the view that the acts done by these individual Chettys were done on behalf of the plaintiff. The Subordinate Judge has not taken the view contended for by either side, but has come to the conclusion that the Chettys acquired a right of managing jointly with the plaintiff. I do not say such a right of joint management could not be acquired but I should certainly expect evidence of incidents of joint management, and it cannot be based upon the ground that, though the Chettys actually managed, there is no evidence that the plaintiff was excluded from the management. I find no evidence of such joint management or of the manner in which it was to be enjoyed."

Kumaraswami Sastri J. in the course of his judgment said: "I have no hesitation in holding that the decision of the Subordinate Judge to the effect that the plaint-mentioned institution was an ancient religious math presided over by a Brahmin who was also the spiritual head of the Chettys and

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that it was not merely a trust founded by the Chettys (the gurukkal being only their servant with no interest in math properties) is correct . . . . The head of the math has therefore prima facie the right to possession unless it can be shown that he has either parted with his rights or that adverse rights have been acquired by third parties..... It cannot be disputed that the Chettys, who were in management, though calling themselves hakdars or trustees, professed to manage the properties for the benefit of the math which is in this case represented by the plaintiff as the gurukkal. This is not a case where the property belongs to an idol with a trustee or dharmakartha, but a case where the property vests in the guru himself who is the sole beneficiary. The fact that he is bound to apply the income for certain purposes would not affect the question. It has no doubt been held that, where property is dedicated to an idol, the office of dharmakartha may be acquired by adverse possession, but where property is given to the head of a math and vests in him absolutely, subject to the application of the income to certain purposes, the person, who manages the property on behalf of the math, prima facie manages it also on behalf of the gurukkal who is the sole person entitled to the properties. Even assuming that the Chetty community as a whole were managing the properties for the math, their management was only a management on behalf of the plaintiff and prima facie the plaintiff has a right to put an end to their management if he chooses to do so. Mere length of time of management on behalf of another would not deprive the owner of the property of his power to put an end to the management and assuming the same himself. In the present case we have to see whether the evidence is such as to support the view that the entire body of the Chetty community acquired as against the plaintiff a right to hold the property in spite of his desire to be in possession." In his opinion the defendants had not succeeded in showing that that was the case.

A decree was drawn up whereby it was inter alia ordered and declared "that the plaintiff, as head of the Patharakudi math, is entitled solely to the possession and enjoyment of the plaint village of Patharakudi, being item No. 1 in the schedule

annexed to the decree of the lower Court, and that the said plaintiff, as head of the said math, is entitled to draw the surplus income realized by the receiver and deposited by him to the credit of the suit, and also to receive from the receiver any further surplus income which may have been realized by him subsequently, and that the defendants have no right to the said village of Patharakudi."

1919. May 1, 2, 5, 6. 8. *Romer K.C.* and *Kenworthy Brown* for the appellants. The High Court was in error in treating the institution as though it were a regular monastic math. The decisions as to the right and powers of the head of a math of that character do not apply. Although the institution was loosely referred to as the Patharakudi matam or math, the priest was not a gosain nor under vows of asceticism (save that while holding office he had to be unmarried), there was no monastic brotherhood, or college for instruction in Hindu theology. It is an institution of the Chetty community, the plaintiff being gurukkal or priest. There being no written constitution, or direct evidence of the intention of the founder, the rights depend upon the custom and usage of the institution: *Ram Parkash Das* v. *Anand Das* (1) and decisions there referred to. The evidence of long user showed that the Chettys according to the constitution of the institution had the right to be trustees and to manage its affairs. Under Madras Regulation VII. of 1817 the general superintendence of all endowments was vested in the Board of Revenue; ss. 10 and 13 providing for the appointment of managers. In petitions filed under that Regulation it was stated that the villages belonged to the Nagara Chettys, and that they were trustees. Similar proceedings in 1832 confirmed that view. The findings and report of the Inam Commission in 1864 conclusively established that the Chettys were hakdars and trustees for the institution. The High Court failed to give due effect to the long discharge of the functions of hakdars, trustees and managers by the appellants and their predecessors, with the acquiescence of all concerned, and to the

(1) (1916) L. R. 43 I. A. 73.

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advantage of the trust. The respondent claimed to be sole beneficiary, but in any case the property vested in him only in trust for the institution: *Ram Parkash Das* v. *Anand Das.* (1) The suit should have been dismissed upon that ground. In any case, the appellants admitting that their possession was as trustees, the suit was barred by limitation: *Balwant Rao Bishwant Chandra Chor* v. *Purun Mar Chaube.* (2) [In the course of the argument reference was also made to *Vidyapurna Tirtha Swami* v. *Vidyanidhi* (3); Thurston's Castes and Tribes of Southern India (1909), vol. v., pp. 260, 264; and to Standing Orders of the Board of Revenue, Order 116, p. 211.]

De Gruyther K.C. and *Dube* for the respondent. The Courts below have concurrently found that this institution is an ancient religious math, presided over by a Brahmin who was also spiritual head of the Chettys, and that it was not merely a trust of the Chettys. The math was of the usual type of such institutions in Southern India. The possession and management of all the endowed properties, including the village in suit, vested in the respondent as head: *Jagadindra Nath* v. *Hemanta Kumari Debi* (4); *Sethuramaswamiar* v. *Meruswamiar.* (5) The findings of the Inam Commission were not against the respondent's contention. At that time there was no head to the math, the proceedings were properly taken by those interested in it. The Chettys are not shown to have asserted any right adversely to the head of the math. In the years preceding the appointment of the respondent, the title was recognized as being vested in the head or matatipathi. The grant by the Inam Commission was to the dharmakartha of Patharakudi math. The respondent was not claiming the income in the hands of the receiver for his personal enjoyment, but as head of the math, and on its behalf. The appellants' allegation that the institution was not properly a math, and that the respondent was their servant and liable to dismissal, was negatived by both Courts. The evidence did not establish

(1) L. R. 43 I. A. 73, 76.
(2) (1883) L. R. 10 I. A. 90.
(3) (1904) I. L. R. 27 M. 435.
(4) (1904) L. R. 31 I. A. 203.
(5) (1917) L. R. 45 I. A. 1.

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that the appellants were appointed trustees, or that they claimed adversely to the respondent.

Romer K. C. replied.

June 26. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the High Court of Judicature at Madras, dated August 10, 1914, which varied a decree of the Subordinate Judge of Madura, dated October 19, 1908. The exact terms of these judgments will be afterwards referred to. It is necessary, however, in order to understand them to keep clearly in view the form and nature of the suit as brought.

The suit was brought by the present respondent "to declare that the defendants have no right to the village of Patharakudi, and that the plaintiff, as head of the math, is entitled to the possession of the village . . . . and to receive the income of the same from the hands of the Receiver."

The village is part of the property of a math. It has been long administered by the appellants, who are Nagara Chettys. Broadly speaking, the contest in the case—and for the purpose of stating this contest colourless terms are employed—is between the head of the math on the one hand, who claims in virtue of his office to be entitled to the management and possession of the entire property of the math; while, on the other hand, the appellants claim that they are entitled as trustees or managers of the part of the property of the institution which is in suit to be continued in the possession and management thereof. The form of the action brought in these circumstances is a suit for possession instituted by the head of the math, who does not have that possession, against the trustees or managers, who and whose predecessors for very many years have had it.

In such circumstances there naturally arises a subsidiary question of limitation, but their Lordships are unwilling to have the suit disposed of merely on the latter ground, and the case was argued before the Board with much fullness on its merits. In the Courts below this appears also to have been done, and in these Courts judgments of much elaboration

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were pronounced. Again, however, it must be stated that the suit is one the substantial aim of which is the eviction of the present possessors at the instance of the respondent, with the subsitution in lieu thereof of possession and enjoyment by the respondent of the property in question, and of its entire income.

In the village of Patharakudi there are: (1.) A temple of the god specially revered by the Nagara community, of which the appellants are members and have acted as representatives. This community forms a sub-caste of the Chettys; (2.) a residence for the Nagara priest or gurukkal; (3.) a shelter house or matam, for the use of Nagarathars when they resort to the place for religious exercises; (4.) a choultry (1), where food is distributed to Brahmans; and (5.) a street of houses forming part of a great enlargement made in recent times by the Chettys—that is, by the appellants and their predecessors. This street of houses is an agraharam. (2) It is said to be the usual adjunct of a Hindu temple, and to be for the accommodation of Brahmans or Brahmanical worshippers; while (6.) there is the village itself and the lands belonging to it, the income of which falls into the general revenue of the math as an institution.

In consequence of a certain assumption throughout the evidence of the knowledge of distinctions between these various parts of the property, there is a lack of clearness on that subject notwithstanding the voluminous evidence; but, speaking generally, their Lordships may assume that the temple or place of worship, together with the residence of the respondent as spiritual head of the institution, the shelter house, and the choultry, or place for the feeding of Brahmans, stand on one side, while on the other stands the remainder of the property.

The latter is now in the hands of the Receiver, and has been so for some years. Their Lordships are relieved of difficulty in

(1) Chawati or chauti, corruptly choultry: a public lodging house, a shelter for travellers. Wilson's Glossary.

(2) Agraharam: a village or part of one occupied by Brahmans, and held either rent free under grants, or at a reduced assessment. Wilson's Glossary.

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regard to the distinctions referred to by this fact of a receivership. The suit has reference, and reference alone, to the property which is in the Receiver's hands. His management has not interfered with the purely spiritual functions of the gurukkal and with those parts of the property, like the place of worship and his own residence, which naturally attach to the performance of such functions by him.

In the plaint the respondent treats the other parts of the property under the general term "village," and this is quite a convenient term. His position on the pleading is that he, the mahant, was all along in the possession and enjoyment of the village. In the course of the case, however, no substantial denial could be offered to the fact, which was notorious, that the actual possessors were the Chettys. The averment is that "the Chettys were managing the affairs of the math only as agents under the plaintiff and under his supervision, and were at no time in possession of the village of Patharakudi, the same having all along remained in the possession and enjoyment of the plaintiff." This is the case attempted to be set up by the respondent and by certain witnesses whom he produced, but they were disbelieved.

The respondent was appointed head of the math in the year 1867. There seems little reason to doubt that a decree in the terms sought by him would, to say the least, involve a very considerable subversion of the mode of occupation, possession and management which have obtained during his entire term of office. Under a decree in terms of his plaint he could dismiss the Chettys from office, and assume possession and management himself or by his nominees. Of course, if he had hitherto been, as is alleged in his suit, in possession and management himself, the demand made in the plaint would have been the natural relief sought. It is, therefore, important to see how the facts on this point stand.

Their Lordships have very carefully considered the evidence; and they see no reason to doubt the soundness of the conclusion thereon arrived at by the learned Subordinate Judge in that part of his pronouncement which is now cited. It is as follows: "Except the vague and meagre oral evidence,

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there is not much evidence, on the plaintiff's side in this period (1), while considerable documentary evidence, consisting of accounts, receipts, official correspondence and other papers, has been adduced on the defendants' side to prove their management as trustees and hakdars. (2) I may at once state here that the general effect of the entire evidence of this period is to show, beyond all doubt, the full and complete management, control and supervision of the endowments and their income by some Chettys or others to the knowledge of the plaintiff, who appears to have all through acquiesced in the same and not to have interfered with the Chettys in such management. The plaintiff has virtually conceded this state of things, not only in the present case, but has also done so in his previous depositions, in all of which he has unequivocally admitted the management of the Chettys, and the fact of the accounts, etc., being kept, checked and controlled by them. His explanation for this state of things, which his witnesses also try to make out, and which, he contends, is corroborated by a few documents on his side, is that the Chettys did all that business only under his orders, and that their management was never independent and exclusive of his rights as the proprietor and head of the math and its sole beneficiary entitled to appropriate the income as he wished. . . . . The Chettys constructed the houses and the new matam, etc., repaired tanks, etc., paid road-cess, etc., and in fact did everything which an owner or manager or trustee must do for the management and administration of the property. It is also shown by the same evidence that money and paddy payable to the plaintiff's house and to the plaintiff for poojah were treated as amounts standing to their credits and were paid accordingly; that moneys for the plaintiff's expenses for his trips to Chidambaram immediately after the installation, for his visit to Sringeri Swamigal at Kunnakudy, and for his Benares trip on pilgrimage, were all paid after correspondence between the servants and the Kariakkar Chettys. . . . . The revenue and

(1) I.e., after 1863.

(2) Hakdar: the holder of a right, a person vested with any property, perquisite, or privilege. . . . Wilson's Glossary.

zemin officers also seem to have recognised the Chettys as hakdars and issued the road-cess pattas and notices, etc., sometimes generally, to hakdars or managers without names, and sometimes to Nachiappa Chetty, one of the eight persons already referred to as hakdar."

Other portions of the learned Judge's judgment deal with the case attempted to be made by the plaintiff that all this possession and management by the hakdars was as his agents. He brings that matter to a point by saying, "In this case the Chettys were in management in their own right as hakdars before the plaintiff's appointment, and continued as such afterwards also. The plaintiff does not prove his case of their management as his agents, or the commencement of their management with his or his predecessors' permission." It might, in the view of the Board, have been open upon the evidence to make upon the allegation of agency a much more emphatic pronouncement in the negative, but it is not necessary for their Lordships to go into that; they are in agreement with the learned Subordinate Judge that the case of agency is not made out, and that accordingly the attempt of the plaintiff either to ground or to fortify his right on possession either by himself or by others has entirely failed. They see no reason to differ from the view of the judge, who holds that the evidence of the plaintiff and his witnesses upon this topic cannot be believed.

The period of time over which the possession referred to extends covers more than half a century. But the documents in this case are of an important public character, and carry the record of this math much further back. As already stated, the plaintiff's appointment to the headship took place in the year 1867. But the Inam Register for the year 1864 has been produced, and to it their Lordships attach importance. It is true that the making of this Register was for the ultimate purpose of determining whether or not the lands were tax free. But it must not be forgotten that the preparation of this Register was a great act of state, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be

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remembered that the Inam Commissioners through their officials made inquiry on the spot, heard evidence and examined documents, and with regard to each individual property the Government was put in possession not only of the conclusion come to as to whether the land was tax free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases; yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam Register.

From that it appears as follows: "Villages of Variyanendal, Surakudi, Kanjiram Kurchi Yendaland, Hamlet Padattanendal. I. These are the four villages in the zamindary of Sivaganga. These were granted by Savundara Pandiyan king in column 11 for the support of a matam in Patharakudi Village. This has no patta. This is an ancient grant. It appears by the tradition that the object of the grant is to keep the matam which is presided by the priest of Yalayattangudy Nattukottai Chettys efficiently by feeding Brahmins in a chattram situated close to the matam, by worshipping the Swamy in Palambady Nader Koil situated close to the matam, and by maintaining the dignity of the priest or guru. Now the object of the grant is efficiently kept up by doing all the above things. The Chettys, who are very rich, spend considerable sums annually for feeding Brahmans, etc. The priest of the matam died about fifteen months ago. The Chettys are in contemplation in electing a priest for the matam. It appears that when the priest was alive, some of the principal Chettys, whose names are given in column 16, were managing the affairs of the matam and of the villages attached to it. The managers or trustees are elected by the Chetty community itself. Thus, the grant falls under Rule III., Clause 1. Tax free. This is a hereditary grant. This is in uninterrupted possession of its holders since the date of the grant. The village is entered as Patharakudi matam village in all the accounts in column 12. The persons in column 16 are now trustees of the matam. They are managing the affairs thereof."

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In further observations made by the Deputy Collector who signs the Register it is stated that "the trustees in column 16 added 126½ acres of wet and 280 acres of dry to the area entered in the account"; and in another note it is added, "The matam is under the management of the trustees with their villages." Further, a matter of not inconsiderable importance is contained in these words: "The zamindar has no objection to registering the names of the trustees here." The names of the trustees are duly set forth in the column headed "Particulars regarding present owner"; and these particulars are headed "Patharakudi Matam Trustees." Eight trustees who are Chettys, beginning with Natchiappa Chetty, are then mentioned, the name and age of each Chetty being given. As to the title to the property, that is set forth in a further column as "To be confirmed under Rule III., Clause 1. Tax free."

This makes it of importance to consider the rule thus referred to. It is one of the "Rules for the adjudication and settlement of the inam lands of the Madras Presidency," being part of Order 116 printed at page 211 of the Standing Orders of the Board of Revenue. It is in these terms: "If the inam was given for religious or charitable objects, such as for the support of temples, mosques, colleges, choultries, and other public buildings or institutions, or for services therein, whether held in the names of the institutions or of the persons rendering the services; it will be continued to the present holders and their successors, and will not be subject to further interference, so long as the buildings or institutions are maintained in an efficient state, and the services continue to be performed according to the conditions of the grant."

It thus appears to their Lordships to be quite clear that the eight Chettys named, who are stated to be trustees, were in 1864 confirmed, after inquiry and in terms of the Rule, as holders of the village. And unless the Rule was to be departed from, the inam "will be continued to the present holders and their successors and will not be subject to further interference" so long as two things happen, namely, the buildings are efficiently maintained and the services are continued. Both of these

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things have happened, and accordingly the adjudication stands: the Chettys were the holders, they were continued as such, and they were not to be interfered with.

Two points may be mentioned in connection with this adjudication. In the first place, the most important person, apart from the institution itself, was the zamindar, from whose predecessors undoubtedly the original title to the lands had flowed; and it will be noted that the zamindar had no objection to the registration of the trustees as proposed. In the next place, it is a mistake to treat the transactions of 1864 as merely bearing upon that year. They form, in their Lordships' judgment, a record of an anterior state of matters, from which record of possession, etc., a conclusion is formed by the Commissioner as to what was the real state of the title.

Following the Report, a title deed was granted by the Inam Commissioner, on June 3, 1864, to "the Dharmakartha of Patharakudi Math," that is to say, to the trustee or manager of the charity, and in this title deed it is stated, first: "On behalf of the Governor-in-Council of Madras I acknowledge your title to a religious endowment matam or inam, situated in . . . . held for the support of the pagoda called . . . . in that village. . . . . (2.) This inam is confirmed to you and your successors, subject to the existing quit rent of Rs. 132-11-1 per annum, to be held without interference so long as the conditions of the grant are duly fulfilled."

But at least one further section of the earlier history of this math can be found. Their Lordships attach weight to the transactions of the year 1832. On April 30 of that year a petition was presented by the zamindar, narrating that the Nagara Chettys originally came from the Tanjore Division and settled long ago in his zamindari and that their family deities are in that jurisdiction. He stated that "on account of the performance of those charities, the said Chettys have been paying the porupu (1) due to the sircar in respect of the villages in our zemindari jurisdiction, managing the said temples, matam, etc., and by spending certain moneys out of their own

(1) Porupu: a low or quit rent, levied from lands originally granted in inam, or rent free. Wilson's Glossary.

pocket in addition to the income . . . . are conducting in the said temples, matams, etc.," the worship, and that " they have constructed tanks and have been performing the feeding charity and other charities." He then sets forth that the Chettys had reported to him that the amildar had contrary to practice appointed monigars (1) and sampratis (2) and called for accounts. Then follows the petition in these terms : " We therefore beg to submit that orders may be issued to the head tahsildar to the effect that porupu amount in respect of the said devastanams, matams, etc., may be collected as was being done up to last year, that the monigars and sampratis now newly appointed therefor may be recalled, and that no trouble be caused by calling for any account whatsoever, so that the Chettys may, day by day, do on a grand scale the established poojah, annadhanam (feeding charity), etc., in the said temples and matams." The Board again notes the significant fact that the zamindar is himself the petitioner.

On June 25 of the same year a petition was presented on behalf of the Nagarathars by Venkatachallam Chetty to the Principal Collector of the Madura District, which narrated that " We ourselves have been managing the said temples, matams, etc., from the days of our ancestors up to date, spending large sum of money from our private funds," and it prayed that orders might be passed " to the effect that, in accordance with the provisions of Act VII. of 1817, we alone should without violating the mamul (practice) have claim over the said charities and conduct them, and that the monigars and sampratis now newly appointed by the said Amildar be recalled."

It is important to observe what was the Regulation founded upon. It was that of September 30, 1817, passed by the Governor-in-Council of Fort St. George "for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindu temples and colleges, or other public purposes ; for the maintenance and repair of bridges, chaultries

(1) Maniyakaram, Tam., corruptly Monigar, Moniagar : a superintendent in general, ... a superintendent of a temple. Wilson's Glossary.

(2) Samprati : a person employed to . . . . examine and make out check accounts. Wilson's Glossary.

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or chattrams, and other public buildings." Under the tenth head of the Regulation it was provided that the local agents should ascertain and report "the names of the present trustees, managers or superintendents of the several institutions, foundations or establishments above described, together with other particulars respecting them, and by whom and under what authority they have been appointed or elected." Then follows the thirteenth branch of the Regulation, which is in the following terms: "On the receipt of the report and information required by the preceding clause, the Board of Revenue shall either appoint the person or persons nominated for their approval, or shall make such other provision for the trust, management or superintendence, as may to them seem right and fit, with reference to the nature and conditions of the endowment, having previously called for any further information from the local agents that may appear to them to be requisite."

The Regulation of 1817 seems to have been complied with in terms. The language of the petitions by the zamindar and the Chettys was adopted in the decree issued, namely, that the Chettys should be left in their possession and that they would perform the charities according to mamul. The operative words were these: "Let orders be issued to the effect that, in accordance with mamul, the temples, matams, etc., and their villages mentioned above, belonging to the said Nagara Chettys, be delivered over to them alone, without monegars and others being appointed thereto."

This is the most remote period to which the authentic history of this math can be said to reach. From the fact that it was a math it follows that it must have had a head as such, with all that that implies, as hereinafter to be referred to. But with regard to the village which is now under receivership, and which is a part of the endowment of the math, the management and possession thereof were in the hands of the Nagara Chettys at least for a period of about eighty years prior to the institution of this suit, and their dispossession and the substitution for such management and possession of that of the plaintiff would, as already said, be a subversion of the

history of the property. Such subversion may be a necessity of the case on account of the nature of the institution; and this, which is an important point, will be dealt with. Apart from that point, the right of the plaintiff either to the eviction of the Chettys or to possession for himself is not supported by the history of the lands.

No question arises in this case of misappropriation by the defendants; such a thing is not suggested against them. On the other hand, they admit that their administration must be, not for their personal ends, but entirely for and on behalf of and in the interests of the math itself. This is the settled rule of administration with regard to such institutions under the law of India.

In the circumstances above set forth the demand made in the plaint does not appear to their Lordships to be warranted by law. It may be difficult to trace the origin of the property under receivership in the sense of ascribing its acquisition either to gifts from the Chettys out of their own private resources, or to offerings of worshippers, or to accumulations of income; but however that may be, the case of possession by the Chettys in their own right, and not as agents for the gurukkal, appears to be made out and is not indeed challenged in the Courts below. The difficulty on this head which the learned judges in the Courts below have experienced arises from two causes, which will now be dealt with: first, in regard to the rights of the gurukkal or mahant, which are construed as necessarily equivalent by law to the ownership of the village; and second, in regard to the possession itself, which, although protracted and undoubted, is treated, particularly in the judgment of the High Court, as being ineffective because it was not, according to the view that Court takes, adverse possession.

With reference to the first point, the Board has recently had occasion to deal with the position and rights of a mahant of an asthal, or, as in this case, of the gurukkal of a math, in the two cases of *Ram Prakash Das* v. *Anand Das* (1) and *Sethuramaswamiar* v. *Meruswamiar*. (2) In the former of

(1) L. R. 43 I. A. 73. (2) L. R. 45 I. A. 1.

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these cases the body of authority upon this subject was dealt with. Two propositions may be cited as now expressing the general state of the law with regard to these institutions. In the first place, the nature of the ownership is an ownership in trust for the institution itself. Secondly, while it may no doubt be true that the ownership in the general case is with the spiritual head of the institution, still, to use the language of Sir Charles Turner in *Sammanatha Pandara* v. *Sellappa Chetti* (1): "We do not, of course, mean to lay it down that . . . . the property may not in some cases be held on different conditions and subject to different incidents." As pointed out in *Ram Parkash Das* v. *Anand Das*, there are varieties of circumstances and tenure, and in respect to these the usage and custom of the math fall to be determined. Once that usage and custom are clear they form the law of the math.

In the opinion of their Lordships, it would be a contravention of the usage and custom of this math, as disclosed by the evidence during the long course of its history, to affirm that the ownership of the village in suit was in the gurukkal. It is in the Chettys, whose title has been officially and apparently quite properly recognized as the "holders." But even this latter proposition is not in truth necessary for the determination of the case, for if the plaintiff's own title as owner fails, and the Board is clearly of opinion that it does, the suit as laid by him cannot be maintained.

With regard to the second point mentioned, namely, that the possession by the Chettys has not been adverse to the gurukkal, their Lordships fail to understand on what the difficulty of the Court below rests. Here was possession, not as in right of the gurukkal, but as in the Chettys' own right, with all the incidents of possession, namely, the purchase of lands, the borrowing on lands, the erection of buildings, the letting of holdings, the making payments to the priest for his support and spiritual services, the keeping of the village accounts. The mahant was presumably aware of these transactions, extending now in his own time for over half a

(1) I. L. R. 2 M. 179.

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century, yet the first real challenge thereof appears to be the institution of this suit itself. This is a very ordinary case of possession nec vi nec clam nec precario. The person now claiming to be owner has stood by while others continued to possess not by any derivative title but in practical contravention of his alleged rights. The law does not require that the claimant to ownership must in such circumstances be shown to have protested that his rights were being violated, and that the possession went on adversely to his protests. In short, their Lordships cannot agree with the legal view upon this subject of possession adopted by the Court below.

In these circumstances there seems to the Board no reason why the law of limitation should not apply. In *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube* (1) it was held that limitation applied to cases where the defendant admitted he was a trustee, and the plaintiff, without proving misapplication, brought a suit more than twelve years after the cause of action arose, the object of the suit being to obtain control of the management. As Lord (then Sir Arthur) Hobhouse observed, in words which are applicable to the present case :—

"Here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a trustee and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage, or in some way to control the management of the endowment."

The present case is still stronger for the application of the rule of limitation, as the assertion is made not only of the right to management, but of the right of beneficial ownership. But while, in their Lordships' opinion, the suit would be excluded by the twelve years' limitation, they have, on the ground already stated, thought it right to deal with the whole breadth of the argument presented.

(1) L. R. 10 I. A. 90.

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Their Lordships desire in conclusion to say that no objection was made out to the personnel of the defendants as true successors of the Chettys to whom the rights of ownership for the benefit of the math were confirmed as already narrated; and no challenge is made of the substantial accuracy of the narrative on that subject contained in the evidence of Annamalai Chetty, the son of Natchiappa Chetty.

By the judgment of the Subordinate Judge it was declared that the plaintiff, as the gurukkal and head of the institution, and "consequently as a trustee and manager of the same conjointly with" the Chettys, was entitled to the possession and management along with them, "without prejudice to the rights of the latter to continue in actual possession and direct management of the same as they have been holding and managing them till now from 1863." Underlying this part of the judgment it is plain that the learned judge desired to make clear the propriety of continuing the Chettys' possession, but the decree given does not appear to be in workable form. A further objection thereto arises from the latter portion thereof, under which it is declared that the gurukkal "is further entitled to the entire beneficial enjoyment of the income of the said villages during his life and continuance as the spiritual head of the institution, subject only to the maintenance of the said institution," etc.

A ready test of the application of this is with regard to the accumulated income, amounting to Rs. 20,000 or thereby, now in the hands of the Receiver. Under the decree quoted the gurukkal would be entitled to instant possession and entire beneficial enjoyment of that sum. If the present purposes of the math did not consume it, he could employ it for his personal use quite apart from the dignity of his office. It is plain to their Lordships that this would be not only a subversion of the usage and custom of the math, but would be a violation of the law applicable to such institutions. A fair test to be applied in such cases is to demand what is the true principle or nature of the administration of surplus income. It is, of course, the duty of a trustee to refrain from the personal enjoyment of such surplus and to add the same to the capital

of the estate to be administered; and this law also applies to the property of a math or asthal, and that whether the title to the same is in the gurukkal as spiritual head of the institution—which is an ordinary case—or is in trustees like the Chettys according to the usage and custom of the institution as in the present case. This law appears to have been complied with by the defendants and their predecessors during the past history of this institution, and should be continued. This would not be done by an affirmance of the decree of either of the Courts below.

The view of the High Court on this topic was even stronger than that of the Subordinate Judge. The plaintiff was declared to be entitled solely to possession and enjoyment of the village, and as head of the math to be "entitled to draw the surplus income realised by the Receiver and deposited by him to the credit of the suit, and also to receive from the Receiver any further surplus income which may have been realised by him subsequently." In their Lordships' opinion this declaration cannot be made.

Their Lordships will accordingly humbly advise His Majesty to recall both of the decrees of the Courts below and to dismiss the suit, the appellants being entitled to a decree for costs of the suit and of this appeal against the respondent, and failing payment thereof, to be entitled to charge the same against the funds and property now in the hands of the Receiver.

Solicitor for appellants: *Douglas Grant.*
Solicitors for respondent: *Barrow, Rogers & Nevill.*

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T. R. BHAVANI SHANKAR JOSHI

v.

SOMASUNDARA MOOPANAR

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Act of State—Properties of Late Ruler seized by Government—Subsequent restoration to heirs of private properties—If amount to a grant—Nature of the property—Whether "estate" Occupancy rights—Madras Estates Land Act, 1908 (Mad. 1 of 1908), as amended by Madras Act 18 of 1936, s. 55.

The property in suit belonged to what was known as the Tanjore Palace Estate. The appellant became owner of the property in 1936 by virtue of a sale on foot of a mortgage decree obtained by his father in a suit of 1926. The respondent had been in possession of the property by virtue of a lease deed dated July 30, 1932, and on August 13, 1936, he got a lease of the property for two years from the appellant. Under the Madras Estates Land Act, 1908, as amended by the Third Amendment Act of 1936, occupancy rights vested in a person who was in direct and actual possession of the Land on June 30, 1934. The respondent instituted a suit against the appellant for the grant of a patta in occupancy right on payment of a fair rent. The appellant pleaded that the provisions of the Act were not applicable to the property in suit on the ground, inter alia, that as it was a part of the Tanjore Palace Estate it could not be considered to be an estate within the meaning of the term in the Act. The history of the Tanjore Palace Estate showed that after the Rajah of Tanjore died in 1855, leaving no male heirs, the Government seized all his properties. Subsequently, in 1962 the private properties of the Rajah were "relinquished" and "restored" by the Government to the widows of the Rajah. The appellants contention was that the manner in which the properties reverted to the widows of the Rajah in 1862 after an act of State showed that it was not a case of a fresh grant by the Government but a restoration of the *status quo ante*, so that the widows enjoyed both the warams, as before.

Held, that the act of State having made no distinction between the private and public properties of the Rajah the private properties were lost by that of State leaving no right outstanding in the existing claimants. The Government order was thus a fresh grant due to the bounty

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of the Government and not because of any antecedent rights in the grantees.

The words "relinquished" or "restored" in the Government order did not have the legal effect of reviving any such right because no rights survived the act of State. The root of title of the grantees was the Government order.

The Secretary of State in Council of India v. *Kamachee Roys Saheba, (1859) 7 M. I. A. 476, Vijoyiamba Bayi Saiba* v. *Komkashi Bayi Saiba, (1868) 3 M. H. C. R 424, Srimant Chota Raja Saheb Moyitai* v. *Sundaram Ayyar, (1936) L. R. 63 I.A. 224* and *Chidambaram Chettiar* v. *Ramaswamy Odayar, [1957] 1 M. L. J. 72,* relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 54 of 1952.

Appeal from the judgment and decree dated March 19, 1953, of the Madras High Court in S. A. No. 1513 of 1948.

K. N. Rajagopala Sastri, M. I. Khowaja and *B. K. B. Naidu,* for the appellant.

M. C. Setalvad, Attorney-General of India, A. V. Viswanatha Sastri, R. Gopalakrishnan, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the respondent.

1962. April 24. The Judgment of the Court was delivered by

Hidayatullah J.

HIDAYATULLAH, J.—In this appeal on a certificate, the appellant was the original Defendant No. 1 in a suit filed by the respondent under s. 55 of the Madras Estates Land Act, 1908, seeking a direction for the grant of a patta to him in regard to the suit land. The suit was decreed by the Revenue Divisional Officer, Kumbakonam, who fixed the rent at the rate of Rs. 1-8-0 per *mah,* the land being about 64 acres or 192 *mahs.*

This land originally belonged to what was known as the Tanjore Palace Estate, and by a suit

of 1919, it fell to the share of Ry. Sivaji Rajah Saheb of Tanjore (Palace). It came into the possession and ownership of the appellant by virtue of a sale on foot of a mortgage decree obtained by his father in a suit of 1926. The appellant obtained possession in 1963. While the suit was pending, the property was in the possession of four minors through their maternal uncle, who was appointed as their guardian by the District Court, West Tanjore. In 1932, the respondent took the suit property on lease from the guardian for 3 years, by a lease deed dated July 30, 1932. Under this lease, the respondent remained in possession and enjoyment of this property till June 30, 1935, cultivating it, as he alleged, under *pannai* cultivation. During the execution proceedings, however, a receiver was appointed, and on May 12, 1935, the receiver granted a lease for 3 year from July 1, 1935. After the appellant entered into possession, he executed on August 13, 1936, a fresh lease deed for two years (faslis 1346 and 1347) and till the suit, according to the respondents, he continued in uninterrupted possession and enjoyment of the property. The claim was made under the Madras Estates Land Act, 1908, as amended by the Third Amendment Act of 1936, under which occupancy rights vested in a person who was in direct and actual possession of the land on June 30, 1934. The respondent, therefore, claimed the protection of the provisions of the Madras Estates Land Act, and thus to be entitled to a patta in occupancy right on payment of a fair rent suggesting Rs. 1-8-0 per *mah* as the fair rent.

The appellant contended that the land in question known as *Pattiswaram Thattimal Padugai* was included in a revenue village, *Thenam Padugai Thattimal*, and was neither an entire village nor an estate or part of an estate, and that thus the provisions of the Madras Estates Land Act did not

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apply to it, because the land in question was not *ryoti* land. It was also averred by the appellant that the respondent was a mere farmer of revenue, that is to say, an intermediate lessee, who was not cultivating the suit land himself or in *pannai* or with the help of hired labour. Various other pleas were raised, but to them no reference is necessary, because the arguments in this Court were limited to the consideration of the findings on Issues 1 to 3 framed in the original suit. Those Issues were :

> "(1) Is the village wherein the suit properties are situated an inam within the meaning of Act XVIII of 1936 ? Was it an Estate prior to the enactment of Act XVIII of 1936 or did it become an Estate under the provisions of the Act ?
>
> (2) Is the Plaintiff a mere lessee or farmer of rent or the actual cultivator of the suit lands ?
>
> (3) Is the Plaintiff a ryot entitled to occupancy rights under Act XVIII of 1936 for the reliefs claimed in the plaint ?"

The suit, as already stated, was decreed by the Revenue Divisional Officer. On appeal, the District Judge of West Tanjore, dismissed the appeal, but modified the rent to Rs. 4/-per *mah* as the proper and equitable rate of rent. On further appeal to the High Court, the judgment and decree of the District Judge were confirmed with the modification that the rent was determined at Rs. 7/-per *mah*, and Rs. 1,350/-were fixed as a lump sum. There was a cross-objection, which was also dismissed.

The question in this appeal is whether the property in suit, being a part of the Tanjore Palace Estate, can be considered to be an "estate" within the meaning of the term in the Madras Estates

Land Act. That it would be so if it was part of an inam was counsel for the appellant. He, however, contended that the manner in which the property reverted to the widows of the Rajah in 1862 after an act of State, did not show that the estate was freshly granted, but was restored to the widows who enjoyed both the *warams*, in the same way as the *warams* wers enjoyed before. Much of the arguments in the case, therefore, was directed to establishing that in 1862 there was a "restoration" of the *status quo ante* rather than a fresh grant by the British Government. It is, therefore, necessary to recount, in brief, the facts leading up to the Government Order No. 336 of 1862. These facts have been given in considerable detail by the Privy Council in *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1), and they are also very well-known. The Rajah of Tanjore died in October, 1855, leaving no male heir to succeed him. He left behind him a large number of widows and two daughters. After his death, Mr. Forbes who was the Commissioner, under authority of Government, seized the properties of the Rajah, and took them under his charge. He, however, reported to the Government that the private properties of the Rajah and others would be returned after an enquiry into any claims that might be submitted. The senior widow, Kamachee Boye Sahaba, thereupon, filed a Bill on the Enquiry Side of the Supreme Court of Madras, and obtained a decree that the seizure of the private properties was wrong. On appeal by the Secretary of State in Council of India, the Privy Council reversed the decree, and ordered the dismissal of the Bill. Thereafter, a memorial was submitted to the Queen and Mr. Norton Senior went to England to interview the Government. As a result of his efforts, in 1862 the

(1) (1859) 7 M.I.A. 476.

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private properties were "relinquished" and "restored" by the Government Order No. 336 of 1862.

Numerous cases were decided in the Madras High Court, some of which also went before the Privy Council, dealing with diverse items of the Tanjore Palace Estate. The argument which is raised in this appeal, *viz.*, that the Government Order was not a fresh grant but only led to the restoration of the properties is not a new one, and was raised in those cases. In *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1), the High Court held that the Government Order was a grant of grace and favour to persons who had forfeited all claims to the personal properties of the Rajah by the act of State and was not a revival of any antecedent rights which they might have had but for the act of State. A similar view of the grant was taken also in a Full Bench case in *Sundaram Iyer* v. *Ramachandra Iyer* (2). The Full Bench case was concerned only with the *Mokhasa* Ullikadai village, and the question later arose whether the decision should be limited to that village in this estate or extended to others. Subsequently, in *Abdul Rahim* v. *Swaminatha* (3) it was held that the decision applied also to other villages, which must be regarded as part of the Inam Estate, which was granted by the Government Order. Earlier still, the decision of the Full Bench was relied upon in several cases, to which reference has been made in Abdul Rahim v. Swaminatha (3) as also in a recent case decided by the Madras High Court and reported in *Chidambaram Chettiar* v. *Ramaswamy Odayar* (4). In the last mentioned case is to be found a list of most of the decisions under which the Order was interpreted as a fresh grant. Indeed, the Privy Council in *Srimant Chota Raja Saheb Mohitai* v. *Sundaram Ayyar* (5) referred to the Government Order as

(1) (1868) 3 M.H.C.R. 424. (2) (1917) I.L.R 40 Mad. 389.
(3) I.L.R. [1955] Mad. 744. (4) [1957] 1 M.L.J. 72.
(5) (1936) L.R. 63 I.A. 224.

grant and to the recipients of the property in 1862 as the grantees. There are, however, cases in which a contrary note was struck. In *Maharajah of Kolhapur* v. *Sundaram Iyer*,(1) Spencer, O.C. J., appeared to doubt the decision of Scotland, C. J., in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2) that there was a grant of grace and favour in 1862. A similar discordant note was struck in *Sundaram* v. *Deva Sankara* (3); but these cases have been subsequently explained or not accepted on this point. In the judgment under appeal, the Divisional Bench has also referred to this consistent view held about the Government Order, and it must, therefore, be assumed that for nearly 100 years the Madras High Court has held the view which was first expressed by Scotland, C.J. Apart from the fact that it would not be open to us to disturb titles by reversing this long line of decisions, we are of opinion that the arguments that have now been raised are not sound.

It is contended that the act of State begun in 1856 by Mr. Forbes was not really over till 1862, and during the period, enquiries were made for the return of the private properties of the Rajah, and thus the act of State did not extinguish the original title, but it was restored without there being a fresh grant. The Government Order of 1862 was read to us to show that it was not worded as a grant but as a *communique* by which the decision to relinquish and restore the properties was conveyed. It is also argued that in the despatches, Mr. Forbes had himself said that enquiries would be made about the private properties of the Rajah, which would be scrupulously returned, and thus even at that time there was no intention to complete, so to speak, the act of State against the private properies.

(1) (1924) I.L.R. 48 Mad. 1. (2) (1868) 3 M.H.C.R 424.
(3) A.I.R. 1918 Mad. 428.

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The first question to decide is whether the act of State was directed against only the *raj* properties or against the private properties as well. Here, the decision of the Privy Council in *Kamachee Boye Sahaba's* case (1) repels the argument of the appellant completely. Kamachee Boye Sahaba filed a Bill for the return of the private properties, and the Privy Council held that as the seizure was made by the British Government acting as a Sovereign power through its delegate, the East India Company, it was an act of State, into the propriety of which the municipal courts had no jurisdiction to enquire. It pointed out that the enquiry which was to be made was not in relation to the private properties of the Rajah but in connection with certain other properties which, though belonging to third parties, were held by the Rajah. It observed, however, in respect of all the properties that were seized, as follows :

> ".....if the Company, in the exercise of their Sovereign power, have thought fit to seize the whole property of the late Rajah, private as well as public, does that circumstance give any jurisdiction over their acts to the Court at Madras ?"

and it answered that no difference was made between the private and public properties, and the Madras Supreme Court had no jurisdiction over the seizure of either. It also mentioned that the letter of Mr. Forbes, that the private properties of the Rajah would be returned after an enquiry, was wrongly construed. It pointed out (and we think quite correctly) that the distinction made in the letter between private and public properties applied not to the properties of the Rajah but to such properties which might have been seized by the officers as in the possession of, or apparently belonging the Rajah, while, in fact, they belonged

(1) (1859) 7 M.I.A. 476.

to or were subject to the claims of other persons. It was these claims which were to be investigated, and the Privy Council observed :

> "All claims which might be advanced to any part of the property seized, by institutions or individuals were to be carefully investigated, and all to which a claim might be substantiated would be restored to the owner."

It then concluded that whatever the meaning of the letter it showed that the Government intended to seize all the property which actually was seized, whether public or private, and the seizure as a whole was an act of State.

The act of State having thus materialised against all the properties, public or private, of the Rajah, no title could be said to have remained outstanding in any one. The Privy Council pointed out also that the heirs such as there were could only look to the bounty of the British Government and had no claim or right in law. In this state of affairs, it is impossible to construe the Government Order as anything but a fresh grant. It is stated that it is not worded as a grant, because it uses the words "relinquished" and "restored" and also it does not set out any terms or conditions on which the property was to be held ; nor does it give a list of the properties so granted. As regards the list of properties, it has always been felt that there must have been one, though it does not appear to have been produced in a court of law. If the properties were sorted out, it is inconceivable that the Government Order would not specify also the properties to be returned, and such a list must have accompanied it. The document in question creates, its own conditions, and indicates the line of succession. The root of title of the family was thus the

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Government Order, and it has been so observed in *Chidambaram Chettiar* v. *Ramaswamy Odayar* (1).

The next question raised is that the documentary evidence produced in the case does not disclose the grant of an entire inam village. Reference in this connection is made to the Government Order, in which in addition to the villages there is a mention of certain lands. It is argued that the suit land is neither a *Mokhasa* village nor a part of one, that it is one of three blocks which are separated from one another by rivers and distances, that there are no residential houses in any of the three blocks, and lastly that the name of the village has changed from time to time, as is evidenced by the *muchalikas* of 1875, 1882 and 1904 (Exs. D-8, D-9 and D-10). The case of the respondent was that the *Mokhasa* village, *Pattiswaram Padugai*, was a whole inam village, and it was governed by Madras Estates Land Act, 1908, that the respondent was in direct and actual possession on June 30, 1934, and therefore within the protection of that Act. The case of the appellant was that *Pattiswaram Padugai* was not a whole inam but village was included in *Thenam Padugai* which was a revenue village, and since *Pattiswaram Padugai* was not an entire village, it was neither an estate nor a part of an estate. All the three Courts have held in favour of the respondent. The question is whether the decision proceeds on no evidence. The evidence in this behalf is oral as well as documentary. P.W. 2 Venkatarama Ayyangar, claimed to be the *karnam* of *Thenam* and *Pattiswaram Padugai* for 24 years. He stated that *Pattiswaram Padugai* was a separate village with separate account and was included in the *Vattam* of *Thenam Padugai*. Rajagopala Ayyanger (P.W.4) who was the in-charge

(1) (1957) 1 M.L.J. 72.

karnam of *Pattiswaram Padugai*, his father being the karnam, claimed knowledge of the conditions for 20 years. He stated that though *Thenam Padugai*, *Pattiswaram Padugai* and *Vellapillaiyarpettai* were included in the *Thenam Padugai vattam* and not contiguous, there were separate accounts for each village. He proved Ex. P-19 (No. 12 account) and Ex.P-19 (a) (No. 12 part II account) relating to this village. Then, there is the revenue record, Ex. P-3, which, though not strictly a record of rights, is an official document of great value. It is described as Irrigation Memoir No. 7, *Tenam Padugai Thattimal* village, Kumbakoman Taluk Tanjore District. In that, it is stated as follows :

> "Tenampadugai Tattimal is an unsettled mokhasa village lying 4 miles south-west of Kumbakonan in the Cauvery Delta. It consists of three bits, the first bit lying between the Kodamurutti and the Mudikondan rivers and the second bit between the Mudikondan and the Tirumalairajan rivers and the third bit near Sundarperumalkovil Railway station. The second bit is locally known as Pattiswaram Padugai while the third as vellapilliarpettai.
>
> "The village is governed by the provisions of the Madras Estates Land Act I of 1908."

This document of the year 1935 shows that the three blocks together constituted a *Mokhasa* village of *Thenam Padugai Thattimal*. *Mokhasa* village has been defined in Wilson's Glossary as "a village or land assigned to an individual either rent-free or at a low quit rent on condition of service." This definition was accepted by the Judicial committee in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (1). Further, in the land revenue receipts, Exs. P-10, P-11, P-12 and P-22,

(1) [1905] I.L.R. 29 Mad. 52, 55.

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and in the quit rent receipt which have been filed, the village is described as a whole village and even the appellant in Exs. P-15 and P-9 described the *Pattiswaram Thattimal Padugai* as a village attached to *Mokhasa Thenampadugai Vattam.*

In view of this evidence, it is quite clear that the finding concurrently reached in the High Court and the two Court below is based on evidence. It was contended that this evidence is of modern times, and what is to be proved is the existence of an inam village in 1862, when the private properties of the Rajah were returned to his widows. There is no doubt that the evidence does not go to that early date, but the documents take it back to 1873, and there is nothing to show to the contrary. In this state of the evidence, we do not think that the High Court was in error in holding that this land is a part of an inam village, and has been so ever-since 1862. The fact that there are no houses and that the suit land is situated in three different blocks does not militate against the evidence, which has been produced on behalf of the respondent. Nor do we think that the change of name can count, if the identity of the land is properly established. It was also contended in the case in the Court of First Instance that the plaintiff was a farmer of revenue and an intermediary, because he had leased out the lands in his turn, and further that the lands were the private lands of the appellant, in which the respondent could not claim any occupancy rights. These two pleas appear to have been abandoned by the time the case reached the High Court, and were not pressed upon us.

In our opinion, the judgment under appeal is right in all the circumstances of the case.

The appeal thus fails, and is dismissed with costs.

Appeal dismissed.

T. S. PL. P. CHIDAMBARAM CHETTIAR

v.

T. K. B. SANTHANARAMASWAMI ODAYAR & ORS.

January 10, 1968

[J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.]

Madras Estates Land Act 1 *of* 1908, *ss.* 3(2)(*d*), 3(10)(*b*) *and* 3(16)—*Lands in Orathur Padugai in Tanjore Palace Estate whether fall under definition of 'estate' in s.* 3(2) (*d*)—*Tanjore Palace Estate whether created by grant—Orathur Padugai whether a whole village or part of a village—Distinction between 'private land' as defined in s.* 3(10)(*b*) *and 'ryoti land' as defined in s.* 3(16).

When the Raja of Tanjore died in 1855 without leaving male issue the East India Company took possession of all his properties including his private property. However on a memorial being presented by the senior widow of the late Raja, the Government of India in 1862 "sanctioned the relinquishment of the whole of the landed property of the Tanjore Raja in favour of the heirs of the late Raja." The Tanjore Palace Estate thus came into existence. In 1948 the appellant purchased certain lands situate in Orathur Padugai which was part of the aforesaid Tanjore Palace Estate, and thereafter instituted suits for possession of these lands from various defendants. The trial court dismissed the suits on the ground that the lands were situated in an 'estate' under s. 3(2)(d) of the Madras Estates Lands Act 1 of 1908 and they were 'ryoti lands' as defined in s. 3(16) in which the defendants had acquired occupancy rights. The Madras High Court affirmed the decree, whereupon the appellant came to this Court. It was contended on behalf of the appellant that (i) the lands did not form an 'estate' under s. 3(2)(d) of the aforesaid Act because the restoration of the land to the widows of the Raja of Tanjore did not amount to a fresh grant but only a restoration of the *status quo ante;* (ii) that Orathur Padugai was not a whole village as required by the definition of 'estate'; (iii) the widows of the Raja enjoyed both the 'warams' and the lands purchased by the appellant were 'private lands' in s. 3(10)(b) so that the defendants did not have any occupancy rights therein.

HELD : (i) The relinquishment by the Government of India in favour of the widows of the Raja in 1862 was a fresh grant as already held in several cases. In view of the authorities it could no longer be questioned that the Tanjore Palace Estate was an 'estate' within the meaning of s. 3(2)(d) of the Madras Estates Lands Act. [759 F-760 B]

Jijoyiamba Bayi Saiba v. *Kamakshi Bayi Saiba,* 3 M.H. C.R. 424, *Maharaja Sundaram Ayyar* v. *Ramachandra Ayyar,* I.L.R. 40 Mad. 389, *Deva of Kolhapur* v. *Sondaram Iyer,* I.L.R. 48 Mad. 1, *Sundaram* v. *Sankara,* A.I.R. 1918 Mad. 428 and *T. R. Bhavani Shankar Joshi* v. *Somasundara Mooppanar,* [1963] 2 S.C.R. 421, relied on.

Chota Raja Saheb Mohitai v. *Sundaram Iyer,* 63 I.A. 224, referred to.

(ii) There was sufficient material on the record to show that at least since 1830 onwards Orathur Padugai was a whole village and therefore an 'estate' within the meaning of the Act. [762 C]

(iii) The lands in suit were 'ryoti lands' and not 'private lands'.

The definition in s. 3(10) read as a whole indicates clearly that the ordinary test for 'private land' is the test of retention by the landholder

A for his own personal use and cultivation by him or under his personal supervision. No doubt, such lands may be let on short leases for the convenience of the landholder without losing their distinctive character; but it is not the intention or the scheme of the Act to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short leases. [765 H-766 B]

B In the present case there was no proof that the lands were ever directly cultivated by the landholder. The High Court had found that the same tenants continued to cultivate the lands without break or change, and the fact that there were periodical auctions of the lease rights did not necessarily deprive the tenants of the occupancy rights which they were enjoying. The appellant had not been able to adduce sufficient evidence to rebut the presumption under s. 185 of the Act that the lands in the inam village are C not private lands. [766 C-G]

Yerlagadda Malikarjuna Prasad Nayudu v. *Somayya,* I.L.R. 42 Mad. 400 (P.C.), referred to with approval.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 54 to 65, 67 and 69 to 71 of 1963.

D Appeals from the judgment and decree dated January 10, 1956 of the Madras High Court in Appeal Suit Nos. 223 and 224 of 1951, and 264 to 273, 275 and 277 to 279 of 1952.

R. Kesava Iyengar, R. Thiagarajan and *R. Ganapathy Iyer,* for the appellants (in all the appeals).

Bishan Narain and *O. P. Malhotra,* for respondent No. 1 (in E C.A. Nos. 54 and 55 of 1963).

M. R. K. Pillai, for respondent No. 2 (in C.A. No. 55 of 1963) and for the respondents (in C.As. Nos. 56 to 65, 67 to 71 of 1963).

The Judgment of the Court was delivered by

F **Ramaswami, J.** These appeals are brought against the judgment and decree in A.S. nos. 223 and 224 of 1951, 264 to 273 of 1952, 275 of 1952 and 277 to 279 of 1952 of the Madras High Court dated January 10, 1956 affirming the judgment and decree in O.S. nos. 75, 77 to 81 of 1949 and 19 to 22, 24 to 26, 28 & 30 to 31 of 1950 of the Subordinate G Judge, Tanjore.

The appellant instituted the above-mentioned suits for recovery of possession from the respective defendants of the disputed lands and for payment of damages at the rate of Rs. 50/- per annum per acre. The case of the appellant was that the disH puted lands which were purchased by him by a sale deed dated November 11, 1948 (Ex. A-145) are situated in Orathur Padugai which is attached to Pannimangalam, one of the villages comprised in what is known as the "Tanjore Palace Estate", that

the said lands are not situated in an estate as defined by the Madras Estates Land Act 1 of 1908 (hereinafter referred to as the 'Act') and in any event the said lands are 'private lands' of the appellant and not 'ryoti lands' as defined in the Act and the various defendants are trespassers in unlawful occupation of the lands and had no right to continue in possession and were therefore liable to ejectment. The appellant also claimed that the defendants were liable to pay damages at the rate of Rs. 50/- per annum per acre in respect of the lands in their unlawful occupation. The defence in all the suits was substantially the same. It was contended by the defendants that the disputed lands are situated in an estate within the meaning of s. 3(2)(d) of the Act, that the lands are 'ryoti lands' in which they have permanent right of occupancy and that they are not "private lands" as alleged by the appellant and the civil court had therefore no jurisdiction to entertain the suits and the Revenue Courts alone had jurisdiction. By his two judgments dated October 31, 1950 and February 2, 1951, the Subordinate Judge, Tanjore dismissed the suits, holding that the lands were situated in an estate and were 'ryoti lands' in which the defendants were entitled to occupancy rights. The appellant took the matter in appeal to the Madras High Court which affirmed the decision of the trial court and dismissed all the appeals.

The two principal questions which are presented for determination in these appeals are: (1) whether the suit-lands are located in an estate within the meaning of s. 3(2)(d) of the Act, and (2) if the answer to the first question is in the affirmative, whether the suit-lands are 'private lands' or 'ryoti lands' as defined in the Act.

Section 3(2)(d) of the Act, as originally enacted states:

> "3. In this Act, unless there is something repugnant in the subject or context:—
>
> ....
>
> (2) 'Estate' means—
>
> ....
>
> (d) any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village;"

The section was amended by the Madras Estates Land (Third Amendment) Act 18 of 1936 to the following effect:

A "(d) any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees, or the successors in title of the grantee or grantees.

B *Explanation* (1) :

Where an inam village is resumed by the Government, it shall cease to be an estate; but, if any village so resumed is subsequently regranted by the Government as an inam, it shall, from the date of such re-grant be regarded as an estate.

C *Explanation* (2):

Where a portion of an inam village is resumed by the Government, such portion shall cease to be part of the estate, but the rest of the village shall be deemed to be an inam village for the purposes of this sub-clause.

D If the portion so resumed or any part thereof is subsequently regranted by the Government as an inam, such portion or part shall, from the date of such re-grant be regarded as forming part of the inam village for the purposes of this sub-clause."

E By s. 2 of the Madras Act II of 1945 s. 3 of the Act was further amended as follows :

"*Section* 2 : (1)

In sub-clause (d) of clause (2) of s. 3 of the Madras Estates Land Act, 1908 (hereinafter referred to as the said Act) Explanations (1) and (2) shall be renum-

F bered as Explanations (2) and (3) respectively and the following shall be inserted as Explanation (1), namely :

Explanation (1) :

Where a grant as an inam is expressed to be of a

G named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes :

H (2) The amendment made by sub-section (1) be deemed to have had effect as from the date on which the Madras Estates Land (Third Amendment) Act,

1936 came into force and the said Amendment shall be read and construed accordingly for all purposes;"

Section 3(19) of the Act has defined a "Village" as follows :

" 'Village' means any local area situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams or which is now recognised by the State Government or may hereafter be declared by the State Government for the purposes of this Act to be a village, and includes any hamlet or hamlets which may be attached thereto."

The history of what is known as the "Tanjore Palace Estate" is well-known and will be found in various reported decisions of the Judicial Committee and of the Madras High Court : (See *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1), *Sundaram Ayyar* v. *Ramachandra Ayyar*(2), *Maharaja of Kolhapur* v. *Sundaram Iyer* (3) and *Chota Raja Saheb Mohitai* v. *Sundram Iyer*(4). In 1799, Serfoji, the then Raja of Tanjore, surrendered his territory into the hands of the East India Company, but he was allowed to retain possession of certain villages and lands which constituted his private property. When his son the last Raja died in 1855 without leaving male issue, the East India Company took possession of all his properties including his private property. Thereupon the senior widow, Kamachee Boye Sahaba filed a Bill on the Enquiry Side of the Supreme Court of Madras, and obtained a decree that the seizure of the private properties was wrong. On appeal by the Secretary of State in Council of India, the Privy Council reversed the decree, and ordered the dismissal of the Bill. Thereafter, a memorial was submitted to the Queen and in 1862 the Government of India which had succeeded the East India Company "sanctioned the relinquishment of the whole of the landed property of the Tanjore Raj in favour of the heirs of the late Raja". Under instructions from the Government of India, the Government of Madras, on August 21, 1862, passed an order the material part of which is as follows :

"In Col. Durand's letter above recorded the Government of India have furnished their instructions with reference to the disposal of the landed property of the Tanjore Raj regarding which this Government addressed them under date the 17th May last. Their decision

(1) 3 M.H.C.R. 424.
(2) I.L.R. 40 Mad. 389.
(3) I.L. 48 Mad. 1.
(4) 63 I.A. 224.

A is to the effect, that 'since it is doubtful whether the lands in question can be legally dealt with as State property, and since the plea in equity and policy, for treating them as the private property of the Raja is so strong that it commands the unanimous support of the members of the Madras Government,' the whole of the B lands are to be relinquished in favour of the heirs of the late Raja (page 228)."

The Tanjore Palace Estate came into being as a result of this grant.

C The question in these appeals is whether the property involved in the suits being a part of the Tanjore Palace Estate can be considered to be an "estate" within the meaning of the term in the Act. It was conceded by the Counsel for the appellant that if it was part of an inam it would be an 'estate' within the meaning of that Act. It was, however, D contended that the manner in which the property reverted to the widows of the Raja in 1862 after an act of State did not show that the estate was freshly granted but was restored to the widows who enjoyed both the warams, in the same way as the warams were enjoyed before. To put it differently, the argument was that the effect of restoration or re- E linquishment was only the undoing of the wrong and therefore if the villages were the private properties of the Raja at the time of the seizure then the same character is maintained when they were handed back to his widow. The contention was that what actually happened in 1862 was the restoration of the *status quo ante* rather than a fresh grant by the British Government. The F argument is not a new one but has been raised before and rejected in a number of authorities. In *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1) it was held by the Madras High Court that the Government Order, 1862 was a grant of grace and favour to persons who had forfeited all claims to the personal properties of the Rajah by the act of State and was not a revival of any antecedent rights which they might have had. A similar G opinion of the grant was expressed in a Full Bench case of the Madras High Court in *Sundaram Ayyar* v. *Ramachandra Ayyar*(2). But in *Maharaja of Kolhapur* v. *Sundaram Iyer*(3), Spencer, O.C.J., appeared to doubt the decision of Scotland, C.J., in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1) that there was a grant of grace and favour in 1862. A similar view was taken in *Sundaram* H v. *Deva Sankara*(4), but these cases have been subsequently ex-

(1) 3 M.H.C.R. 424.
(2) I.L.R. 40 Mad. 389.
(3) I.L.R. 48 Mad. 1.
(4) A.I.R. 1918 Mad. 428.

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plained or not accepted on this point. In *T.R. Bhavani Shankar Joshi* v. *Somasundra Moopanar*(1), it was held by this Court that the act of State having made no distinction between the private and public properties of the Rajah the private properties were lost by the Act of State leaving no right outstanding in the existing claimants. The Government Order, 1862 was therefore a fresh grant due to the bounty of the Government and not because of any antecedent rights in the grantees. It was pointed out that the words "relinquished" or "restored" in the Government Order did not have the legal effect of reviving any such right because no rights survived the act of State. The root of title of the grantees was the Government Order of 1862 and it was therefore held that the restoration amounted to a grant in inam by the British Government within the meaning of the Act. But the question whether with regard to any particular area what was granted in inam is a whole village or less than a whole village is a question that has to be decided with reference to the facts of each particular case.

The question therefore arises whether the area in question, *viz.*, Orathur Padugai, constitutes a whole village and therefore an estate within the meaning of s. 3(2)(d) of the Act. It was contended for the appellant that the suit-lands were not comprised in a whole inam village. The contention was rejected by both the lower courts which concurrently held that the lands were located in Orathur Padugai, a whole village by itself or a named village and therefore an estate within the meaning of the Act. It was argued on behalf of the appellant that the finding of the lower courts is vitiated in law because it is based on no evidence. In our opinion, there is no justification for this argument. On behalf of the respondents reference was made to Ex. A-64, Pannimangalam Vattam Jamabandhi Account individual-war, Fasli 1296, which shows in column no. 3 Orathur Padugai as a village. Similarly, in Ex. A-78(a), Cess account for Pannimangalam Vattam and Ex. A-79, the Village war Jamabandhi Account Fasli 1309 Orathur Padugai village is shown as a whole village. Exhibit A-82, Village war Jamabandhi Individual War, Fasli 1310, Ex. A-84, Jamabandhi Ghoshpara for the village, Fasli 1311 and Exs. A-153 to A-157 all mention Orathur Padugai as a village. All the leases, lease-auctions and receipts given for payment of rent speak of Orathur Padugai as a separate village. Even the sale deeds, Exs. B-6, B-31, B-32 and B-33 contain a recital of Orathur Padugai as a separate village. It is manifest therefore that there is sufficient material to show that at least since 1830 onwards Orathur Padugai is a whole village. On behalf of the appellant reference was made

(1) [1963] 2 S C.R. 421.

A to Ex. A-128 and Ex. A-129 dated April 6, 1800 and July 5, 1800. Exhibit A-128 is a letter from the President, Tanjore to the Secretary to the Government of Madras in which there is a reference to Pannimungalam. It is stated therein that "the fields of Pannymungalam to the westward of Tanjore which from time immemorial have been reserved for the pasture of the circar cow B do remain in the Raja's possession. There is neither village nor cultivation on these lands". In answer to this letter there is a communication from the Chief Secretary to the Government to the Resident, Tanjore, Ex. A-129. In para 5 of this letter it is stated: "The fields of Pucanymangalam containing neither village nor cultivation shall remain in the hands of Rajah for the pastur- C age of His Excellency's cows." Much reliance was placed by Counsel for the appellant on these two documents, but the High Court has rightly pointed out that the identity of the lands referred to in Exs. A-128 and A-129 is doubtful. The lands in suit are situated at least 30 miles south-east of Tanjore town in Mannargudi taluk but in Exs. A-128 and A-129 the lands are D described as westward of Tanjore. That there was Orathur village in existence even as early as 1830 is clear from Ex. A-151 because in describing certain boundaries of another village it is mentioned as to the north of assessed Orathur village *nadappu karai* (bund pathway). Exhibit A-4 of 1868 is a Debit and Credit Balance account relating to Orathur Padugai attached to E Mukasa Pannimangalam Thattimal. It is clear from this Exhibit that the entire village except the waste land was assessed. From Exhibit A-5 dated September 4, 1870, it appears that the punja lands in Orathur village were taken on lease from the Collector of Tanjore who was the receiver and manager of the estate of the Rajah of Tanjore for a period of 5 years on payment of a total sum of Rs. 122/9/3. Exhibits A-7, A-8, A-12 to A-16 and F A-18 are either *Adaiyolai muchilikas* or lease deeds for leasing the lands in Orathur padugai village for a term granted by the Collector of Tanjore. In all these documents the description is that the lands are situated in Orathur Padugai in Mokhasa Pannymangalam Thattimal. The documents range between the years 1870 to 1875. In Ex.A-63 which is the individual war G settlement register for Pannymangalam vattam for Fasli 1296 against column 6 it is stated that the income in the matter of the *amani* cultivation of sugarcane, etc., on 95 kullis is Rs. 4 and it is in Orathur padugai village, Pannymangalam vattam. Exhibit A-61 is the debit and credit balance account of Orathur padugai for Fasli 1294. Similarly, in Ex. A-64, the individual war H settlement register for Pannimangalam vattam, column 3 relating to the village of Orathur states that the Orathur padugai is a village and the vattam is Pannimangalam. There are similar des-

criptions of Orathur as a village in Ex. A-65 which is the settlement register for Pannimangalam vattam for Fasli 1297. Exhibit A-80 contains a similar description of Orathur village in Pannimangalam vattam. Exhibits A-153 to A-155 and A-157 are all lease deeds between the years from 1901 to 1906 relating to lease of lands in Orathur padugai. It is manifest that there is sufficient evidence to show that from 1868 right up to 1907 Orathur padugai was considered as a separate village. It was contended for the respondents that even after the passing of the Act Orathur padugai was treated as a separate village. Reference was made in this connection to a number of documents, Exs. A-158, A-105, A-159, A-106, A-116, A-161, B-17, A-117 to A-120, B-18, A-121, A-162 and A-163. In our opinion, the finding of the lower courts that Orathur padugai is a whole village and therefore constitutes an 'estate' within the meaning of the Act is supported by proper evidence and Counsel for the appellant is unable to make good his argument that the finding of the lower courts is in any way defective in law.

We proceed to consider the next question arising in this case, *viz.*, whether the suit-lands are 'private lands' within the meaning of s. 3(10)(b) of the Act which reads as follows :

"3. In this Act, unless there is something repugnant in the subject or context—

. . . . . .

(10) 'Private land'—

. . . . . .

(b) in the case of an estate within the meaning of sub-clause (d) of clause (2), means—

(i) the domain or home-farm land of the landholder, by whatever designation known, such as, kambattam, khas, sir or pannai; or

(ii) land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years, immediately before the first day of July 1908, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land; or

(iii) land which is proved to have been cultivated by landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years immediately before the first day of November 1933, provided that the landholder has

A retained the kudivaram ever since and has not converted the land into ryoti land; or

(iv) land the entire kudivaram in which was acquired by the landholder before the first day of November 1933 for valuable consideration from a person owning the kudivaram but not the melvaram, provided that the B landholder has retained the kudivaram ever since and has not converted the land into ryoti land, and provided further that, where the kudivaram was acquired at a sale for arrears of rent the land shall not be deemed to be private land unless it is proved to have been cultivated by the land holder himself, by his own servants C or by hired labour, with his own or hired stock, for a continuous period of twelve years since the acquisition of the land and before the commencement of the Madras Estates Land (Third Amendment) Act, 1936."

Section 3(16) of the Act defines 'Ryoti land' as follows :

D " 'Ryoti land' means cultivable land in an estate other than private land but does not include—

(a) beds and bunds of tanks and of supply, drainage, surplus or irrigation channels;

(b) threshing-floor, cattle-stands, village-sites, and other E lands situated in any estate which are set apart for the common use of the villagers;

(c) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists."

F Section 185 of the Act enacts a presumption that land in inam village is not private land and reads as follows :

"185. When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had—

G (1) to local custom,

(2) in the case of an estate within the meaning of subclause (a), (b), (c), or (e) of clause (2) of section 3, to the question whether the land was before the first day of July 1898, specifically let as private land, and

H (3) to any other evidence that may be produced :

Provided that the land shall be presumed not to be private land until the contrary is proved:

Provided further that in the case of an estate within the meaning of sub-clause (d) of clause (2) of section 3—

(i) any expression in a lease, patta or the like, executed or issued on or after the first day of July, 1918 to the effect or implying that a tenant has no right of occupancy or that his right of occupancy is limited or restricted in any manner, shall not be admissible in evidence for the purpose of proving that the land concerned was private land at the commencement of the tenancy; and

(ii) any such expression in a lease, patta or the like, executed or issued before the first day of July 1918, shall not by itself be sufficient for the purpose of proving that the land concerned was private land at the commencement of the tenancy."

Section 6 is to the following effect :

"6. (1) Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding.

Explanation (1).—For the purposes of this sub-section, the expression 'every ryot now in possession' shall include every person who, having held land as a ryot continues in possession of such land at the commencement of this Act. . . . ."

The Subordinate Judge and the High Court have concurrently come to the conclusion, upon consideration of the evidence, that the lands in suit are not private lands but ryoti lands. On behalf of the appellant Mr. Kesava Iyengar conceded that onus is on the appellant to show that the lands are 'private lands' within the meaning of the Act, but the argument was stressed that the lower courts have failed to take into account certain important documents filed on behalf of the appellant, *viz.*, A-128, A-129 and the Paimash account dated August 25, 1830, Ex. A-147 and the Land Register, Ex.A-134. In our opinion, there is no warrant for the argument advanced on behalf of the appellant. As regards Exs. A-128 and A-129 it is apparent that apart from the question as to the identity of the land, they relate to a period previous to the grant of 1862 which alone constitutes the root of title of the grantees and there is no question of restoration or revival of any anterior right. The same reasoning applies to the Paimash account dated August 25, 1830, Ex. A-147 which

A cannot, therefore, be held to be of much relevance in this connection. Reliance was placed on behalf of the appellant on Ex. A-134, the Land Register for Pannimangalam which shows that in Orathur Thattimal Padugai which consists of Punjais (dry lands) and are rain-fed, the land-holder (the Tanjore Palace Estate) owns both the warams (*Iruwaram* in vernacular). It B was argued for the appellant that the expression 'Iruwaram' means that the land was owned as Pannai or private lands. Reference was made to the record of rights and Irrigation Memoir dated January 13, 1935, Ex. B-8 which shows that the lands are *Iruwaram* and there are no wet lands. But the use of the expression "Iruwaram" in these documents is not decisive of the C question whether the land is private land of the appellant or not. Under s. 3(10) of the Act, private land comprises of two categories, private lands technically so-called, and lands deemed to be private lands. In regard to private lands technically so-called, it must be the domain or home-farm land of the landholder as understood in law. The mere fact that particular lands D are described in popular parlance as *pannai kambattam, sir, khas,* is not decisive of the question unless the lands so-called partake of the characteristics of domain or home-farm lands. In our opinion the correct test to ascertain whether a land is domain or home-farm is that accepted by the Judicial Committee in *Yerlagadda Malikarjuna Prasad Nayudu* v. *Somayya*(1), that is, whether it is land which a zamindar has cultivated E himself and intends to retain as resumable for cultivation by himself even if from time to time he demises for a season. The Legislature did not use the words 'domain or home-farm land' without attaching to them a meaning; and it is reasonable to suppose that the Legislature would attach to these words the meaning which would be given to them in ordinary English. It F seems to us that the sub-clause (b)(i) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or home-farm, that is to say, lands appurtenant to the landholder's residence and kept for his enjoyment and use. The home-farm is land which the landlord cultivates himsef, as distinct from land which he lets out to G tenants to be farmed. The first clause is, therefore meant to include and signify those lands which are in the ordinary sense of the word home-farm lands. The other clauses of the definition appear to deal with those lands which would not necessarily be regarded as home-farm lands in the ordinary usage of the term; and with reference to those lands there is a proviso that lands purchased at a sale for arrears of revenue shall not be regarded H as private lands unless cultivated directly by the landlord for the required period. It seems to us that the definition reads as a whole

(1) I.L.R. 42 Mad. 400 (P.C.).

indicates clearly that the ordinary test for 'private land' is the test of retention by the landholder for his personal use and cultivation by him or under his personal supervision. No doubt, such lands may be let on short leases for the convenience of the landholder without losing their distinctive character; but it is not the intention or the scheme of the Act to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short term leases. There must, in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard these lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Act cannot acquire occupancy rights. In the present case there is no proof that the lands were ever directly cultivated by the landholder. Admittedly, soon after the grant of 1862 the estate came under the administration of Receivers, who always let out the lands to the tenants to be cultivated. In Ex. B-8, the Record of Rights the lands are entered in column 5 as Punja or dry land. In column 4 which requires the entry to be made as private land they are not entered as private lands. It was argued for the appellant that the lands are sometimes called 'Padugai' and that the expression meant that the lands were within the flood bank and forming part of the river bed. But the description of the land as 'Padugai' is not of much consequence because they are also called as Orathur 'Thottam', thottam meaning a garden where garden crops are raised to distinguish it from paddy fields. It appears that the lands actually lie between two rivers and comprise more than 100 acres, and by their physical feature cannot be 'padugai' in the sense in which the term is normally used. The argument was stressed on behalf of the appellant that leasing rights of the land were auctioned periodically. But the High Court has observed that one and the same tenant continued to bid at the auction and there was evidence that tenants continued to cultivate the lands without break or change, and the fact that there were periodical auctions of the lease rights did not necessarily deprive the tenants of the occupancy rights which they were enjoying. We accordingly hold that the appellant has not adduced sufficient evidence to rebut the presumption under s. 185 of the Act that the lands in the inam village are not private lands and the argument of the appellant on this aspect of the case must be rejected.

For the reasons expressed we hold that the judgment of the Madras High Court dated January 10, 1956 is correct and these appeals must be dismissed with costs—one set of hearing fee.

G. C. *Appeals dismissed.*

We have already referred to the restrictions regarding the participation of the other sections of the Hindu community in the religious ceremonies during the relative times and periods in our judgment with regard to Moolkipet temple. The same would apply so far as the Mangalore temple also is concerned as also to the ceremonies mentioned by P. W. 1.

But it is urged by the learned Government Pleader that in regard to the Mangalore temple notice under S. 80 of the Civil Procedure Code is not sufficient and he relies upon the decision in *Bhaghchand Dagadusa* v. *Secretary of State for India* (1), *Vellayan Chetiiar* v. *Government of the Province oj Madras* (2), *Government of Province of Bombay* v. *Prestonji Ardeshir Wadia and others* (3). We do not think that in a case of this kind it can be held that Ex. A.10 is not proper notice which statedly refers to S. 80, Civil Procedure Code and gives intimation that a suit would be filed for setting aside the order of the Government of Madras in G. O. Ms. No. 721, dated 6th August, 1949. The learned Subordinate Judge has held following *Vellayyan Chettiar* v. *The Government of the Province of Madras* (2) and *Province of Bombay* v. *Prestonji Ardheshir Wadia* (3), that there was want of proper notice in the case. We are not inclined to hold that notice in this case is insufficient though we agree with the learned Subordinate Judge that S. 2 (1) of Act V of 1947 is applicable and that Art. 26 of the Constitution cannot refer to the entry contemplated in Act V of 1947. In this connection we may also consider the recent legislation contained in the Untouchability (Offences) Act, 1955 (XXII of 1955) which by S. 3 provides for punishment for enforcing religious disabilities. After coming into force of Act XXII of 1955, all the arguments on behalf of the appellants would be pointless when once it is found that it is a place of public worship.

Subject to the modifications mentioned in Appeal No. 145 of 1952 and the other referred to above this appeal is also dismissed. There will be a similar order with regard to costs. The costs of the State in both the appeals will come out of the suit temple.

V. C. S.

(1) (1927) I.L.R. 51 Bom. 725 at 747 =26 L.W. 809 (P.C.)
(2) I.L.R. 1948 Mad. 214, 217, 219 =60 L.W. 630 (P.C.)
(3) I.L.R. 1949 Bom. 110 at 116 =62 L.W. 444 (P.C.)

TS. PL. P. CHIDAMBARAM CHETTIAR *v.* T. K. B SANTANA RAMASWAMI ODAYAR and others.

Govinda Menon and Ramaswami, JJ.

Appeals Nos. 223 and 224 of 1951 and 264 to 280 of 1952.

Appeals (disposed of on 10—1—1956) against the decree of the Court of the Subordinate Judge of Tanjore, dated 31—10—1950 and passed in O. S. Nos. 75 of 1949, 77 of 1949, 79 of 1949, 80 of 1949, 81 of 1949, 19 to 22 of 1950, 24 to 31 of 1950, and 78 of 1949 and the decree dated 2—2—1951 and passed in O. S. No. 23 of 1950 respectively.

Madras Estates Land Act (I of 1908) as amended by Act XVIII of 1936, S. 3 (2) (d) —Estate, what is—Padugai lands—Burden of proof—Scope.

Where in certain suits brought for ejectment of the respective tenants and for damages for use and occupation from the suit lands which formed part of a padugai comprised in one of the villages forming the Tanjore Palace Estate, the plaintiff contended that these villages formed the private properties of the Raja's family and that on relinquishment by the East India Company in 1862, they assumed the character of private property and as such, they cannot be an estate within the meaning of the Estates Land Act, while the defendants contended that even if the original villages constituted private or separate property of the Raja, the giving back all of them to the heirs of the Raja would not be any relinquishment by which the original rights in the property were restored but that the grant constituted a fresh inam by the then Government and if that be so, the villages would come under the provisions of the Estates Land Act, at least as amended in 1936,

Held; the plaintiff's suits would have to fail as the suit lands would amount to an 'estate' within the meaning of that term in the Madras Estates Land Act.

Merely because the Tanjore Palace Estate consisted of a number of villages it is not right to treat the entire estate itself for the purpose of the definition of the Madras Estates Land Act as one single inam village falling within the provisions of S. 3 (2) (d) of the Act so that whatever land is situated within any of the villages comprised in the estate would necessarily be land situated within the estate under the Estates Land Act. One thing is clear and that is, that none of the decisions regarding any of the villages comprised in the Tanjore Palace Estate has so far, decided that the entire area comprising the 199 villages belonged to the Rajah as his private property, that is property, situated in the ryotwari area paying land revenue to the Government.

Therefore, though there are expressions of opinion here and there in some of the judgments to the effect that the lands were originally the property of the Rajah, still we have to take it that the restoration or relinquishment or re-grant should be considered to be the root of a new title. Such being the case, the issue has to be decided on the evidence as to whether the plaintiff in each of these suits is entitled to both the warams.

What has to be considered is whether in the circumstances of the case the burden of proof is on the plaintiff or not. But, in the present case it is not necessary to rest the Court's decision merely on the principle of the burden of proof. Elaborate evidence has been let in on both sides and the conclusion will be based on the analysis of that evidence and not merely on the academic question regarding the burden of proof, or as has been remarked very often by the Courts of the highest authority, when once the entire evidence is before the Court the onus of proof is only a matter of minor interest as the case has to be decided mainly on the evidence.

Messrs. *R. Kesava Ayyangar*, *E. A. Viswanathan* and *T. V. Satagopachari* for Appts.

Messrs. *T. M. Krishnaswami Ayyar G.R. Jagadisan*, *S. Tyagaraja Ayyar*, *V. S. Venkatarama Ayyar*, *M. Ranganatha Sastri* and *S. Somasundaram* for Respts.

JUDGMENT

(Delivered by Govinda Menon, J.)

These nineteen appeals arise out of suits tried together by the learned Subordinate Judge of Tanjore in all of which the plaintiff was the same while the defendants in the various suits were different. Since the questions for trial and decision were identical in all the suits, by consent of parties, evidence both oral land documentary was recorded only in one of the suits, *viz.*, O. S. No. 75 of 1949 and the same was treated as evidence in the other suits as well. The learned Subordinate Judge delivered a common judgment in all the suits. With the consent of the parties the same procedure is adopted in this Court also and hence we propose to deliver a common judgment in all these appeals.

The appellant in these appeals was the plaintiff in the Court below who aggrieved by the dismissal of his suits by the trial Court has come up here questioning the correctness of the learned Judge's conclusions. Appeal No. 223 of 1951 arises out of O. S. No. 77 of 1949, and Appeal No. 224 of 1951 arises out of O. S. No. 77 of 1949. Against the dismissal of the above two suits appeals have been preferred directly to this Court where as the remaining seventeen appeals which had been preferred to the District Court, West Tanjore, have been transferred to this Court to be heard along with Appeals Nos. 223 and 224 of 1951. Reference to the plaintiff in this judgment would mean the appellant in all the appeals and the defendant should be understood as the respective defendant or defendants in the several suits.

The properties in dispute in Appeal No. 223 of 1951 consist of seventeen items of an area of 56 acres and 10 cents in inam Pannimangalam village, Mannargudi taluk, West Tanjore District as is seen from Ex. B. 8. Record of Rights Register relating to inam Pannimangalam village, and these seventeen items are admittedly part of Orathur padugai (படுகை) which is either a whole inam village or a minor inam forming part of 199 villages popularly known as the Tanjore Palace Estate. Likewise the items of properties comprised in the other suits also are included in the Orathur padugai. The suits were for ejectment of the respective defendants from the suit lands and for damages for use and occupation for a period of four years before the date of the suit at the rate of Rs. 50, per acre on the ground that the plaintiff is the

absolute owner of the lands and hence entitled to recovery of possession. It is stated in the plaint that under Ex. A. 145 dated 11th November, 1948 the plaintiff purchased these items from one S. S. Chockalingam Chettiar who in his turn acquired title to them as a result of a sale certificate issued to him when these items were sold under E. P. No. 63 of 1937 in O. S. No. 3 of 1919 on the file of the District Court, West Tanjore. Ex.A. 146 dated 14th April, 1945 is the sale certificate issued in favour of the plaintiff's vendor, S. S. Chockalingam Chettiar. Under Ex. A. 167 dated 7th August, 1946, the plaintiff's vendor took delivery of the properties. The contention on behalf of the defendants is that what was sold in execution of the decree in O. S. No. 3 of 1919 was only the melvaram right which a landlord under the Madras Estates Land Act has and that the defendants in the various suits are kudivaramdars not liable to be ejected. In other words, the lands in question are parts of an estate as contemplated by the Madras Estates Land Act in which case the plaintiff's suits will have to be dismissed. The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to discharge the burden that lay upon him to prove that the lands in question are private lands and since that onus has not been discharged and as the defendants are entitled to occupancy rights, the Court had no jurisdiction to entertain the suits and hence all the suits were dismissed.

That the disputed lands are part of Orathur padugai comprised in one of the villages forming the Tanjore Palace Estate has not been questioned in these appeals and what has now to be considered is whether they lie in an estate or not. The main allegations in the plaint are : that the defendant is a trespasser having no right to remain in possession as the lands are not governed by the Madras Estates Land Act, and they do not come within the definition of the Estate, and they lie in a minor inam. It was further alleged that there has been no letting of the plaint lands to the defendant and there has been no relationship of landlord and tenant between the plaintiff or his predecessors-in-title and the defendants. It is also alleged that the lands are private lands in which no right of occupancy can be claimed by any length of possession. The defendant is a fugitive occupant and not being a cultivating tenant has no right of occupancy. The lands are padugai lands forming part of the river bed or bund and cannot become ryoti lands. On the other hand, the plea raised on behalf of the defendants is that the suit lands along with other lands formed part of Tanjore Palace Estate which is said to be an inam and is governed by the Madras Estates Land Act ; they cannot be private lands of the plaintiff or his predecessor-in-title; neither the plaintiff nor his predecessor-in-title had ever cultivated the lands either by hired labour or by themselves, nor did they exercise any act of possession or enjoyment. The melvaram in the suit lands alone was enjoyed by the successive receivers who were in charge of the Tanjore Palace Estate and after division by the owners thereof. The defendant further submitted that the suit lands being ryoti lands situate within an estate, the Court had no jurisdiction to entertain the suit for ejectment.

The village where the lands in question are situate is a separate village for which separate revenue accounts are maintained with a record of rights prepared for it. In any event it is contended that the village in question is an estate under the extended meaning of the term defined in Madras Act VIII of 1934 and XVIII of 1936 and, if that is so, the Court had no jurisdiction to entertain the suits. The allegation in the plaint that the lands lie in a minor inam is denied and even granting that it is a minor inam, it is nevertheless an estate. The decision of the appeals has, therefore, to depend upon the question whether the lands are included in an estate as defined in the Madras Estates Land Act or whether they are private lands as claimed by the plaintiff. It

is no body's case that there is an intermediary stage.

The main issue framed in all the suits by the trial Court was

"whether the suit lands are either minor inams or private lands as alleged by the plaintiff or whether they are ryoti lands in an estate as contended by the defendant?"

The learned Subordinate Judge held this issue in favour of the defendants.

The history of what is ordinarily known as the Tanjore Palace Estate has been described in decisions by the highest judicial authority and they are found in the various reported decisions of the Madras High Court and the Privy Council, beginning with *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1). A recent decision of the Privy Council in *Secretary of State for India* v. *Thinnappa Chettiar* (2), gives a succinct description of the same at pages 233 and 234.

In 1799 the then Raja of Tanjore Sarabhoji consented to resign the Government of the country wholly into the hands of the East India Company provided they made a suitable provision for the maintenance of his rank and dignity and a treaty was entered into between the Raja and the East India Company. Under this treaty Tanjore became a British province and the Raja had ensured to him a fixed annual allowance of one lakh of pagodas or three and a half lakhs rupees with a fifth of the net revenues of the country; Raja Sarabhoji enjoyed his rank and dignity with the pecuniary benefits attached to it for thirty four years and on his death in 1832, the same honours and privileges were continued to his son Sivaji until his death in 1855. No reservation was made in the treaty as to any territory except the Fort of Tanjore being retained by the Raja in his possession; it so happened that Raja Sarobhoji was permitted to retain a number of villages and lands with the palaces situated in the different parts of the country. The landed property thus retained by him at the cession of the country, with certain additions subsequently made to it by purchase by Rajas Sarabhoji and Sivaji are stated to constitute the 199 villages, the nature of which is now in dispute.

After Sivaji's death in 1855 these villages were taken over by the East India Company and they remained in the possession of the company for nearly seven years when in 1862 the possession of the same was made over to the widows of the last Raja. One of the questions for decision in these appeals is with regard to the character of the lands in the possession of the heirs of the last Raja. Whereas on the side of the plaintiff, it is contended that these villages formed the private properties of the Raja's family and that on relinquishment by the East India Company in 1862 assumed the character of private property and as such, it cannot be an estate within the meaning of the Estates Land Act, the respondents contend that even if the original villages constituted private or separate property of the Raja giving back all of them to the heirs of the Raja would not be any relinquishment by which the original rights in the property were restored but that the grant constituted a fresh inam by the then Government and if that is so, the villages would come under the provisions of the Estates Land Act at least as amended in 1936. It may be mentioned that at page 825 of the Tanjore District Manual, 1871, these villages are stated as constituting the private property of the Raja's family.

In the Gazetteer of the Tanjore District, Volume I, at page 192, published in 1906, the following description is found:

"The private estate of the late Raja is still enjoyed by his family and is managed by a receiver subordinate to the District Judge. These mokasa villages are chiefly to be found in the Tanjore and Kumbakonam taluks but there are also a fair number in Mannargudi and a few in all the taluks except Nannilam. There are 199 villages so classified as well as some detached pieces of land amounting in all to over 35,000 acres. The only items of revenue paid by these are a small police

(1) (1859) 7 M.I.A. 476.
(2) I.L.R. 1944 Mad. 222=56 L.W. 669 (P.C.).

fee, the water rate for irrigating dry lands with Government water and cess."

Such being the case, we have to find out how the judicial decisions have dealt with the nature of these estates. On behalf of the appellant, as stated, it is argued that the properties of the last Raja of Tanjore which had been seized by the East India Company as an act of State but were restored to his heirs did not constitute an inam as there was no grant at all but amounted only to a relinquishment by the East India Company in favour of the heirs with the result that the properties did not assume the character of an inam but retained the character of private property in the hands of the heirs of the last Raja of Tanjore. If the properties are not inams, then it is not possible to apply the Amending Act XVIII of 1936, to the lands in question.

We propose, therefore, to review as succinctly as possible the various decided cases on the subject and then proceed to discuss the evidence in the case.

The decision in the *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1), arose out of an appeal from the decree on the equity side of the Supreme Court at Madras by which it was declared that the eldest widow of the late Raja of Tanjore who, as stated already, was without issue became entitled to inherit and possess his private and particular estate, real and personal, left by him at the time of his death and which the East India Company, representing the British Crown, had seized on 18th October, 1856. The Secretary of State for India appealed against that decision and their Lordships of the Judicial Committee, by their judgment delivered by the Right Hon'ble Lord Kingsdown, held that as the seizure was made by the British Government acting as a sovereign power through its delegate, the East India Company, it was an act of State, and a municipal Court had no jurisdiction to enquire into its propriety. The 199 villages which later on came to be known as the Tanjore Palace Estate were among the properties seized by the East India Company. The nature of these villages did not come up for decision but from the statement of facts reported at page 482 it is seen that in the letter from the Chief Secretary to the Government of Madras to the Government of India there was the following statement :

"Thirdly there are some valuable villages belonging to the Raja in different parts of the province, some retained by the Sivajee when the country was assumed by the British Government and some subsequently acquired by purchase. These should be examined and any claims to or liens upon them considered. Fourthly some dues by the late Raja to private parties or claims on behalf of the members of the family still remain to be settled."

The distinction between public and private property of a Hindu sovereign was noticed in the sense that upon his death his private property goes to one set of heirs and the Raja and the public property to the succeeding Rajah. At page 495 from the extracts of the judgment of the Chief Justice, Sir Christopher Rawlinson, it is seen that Rajah Sivajee died possessed of both private and self-acquired property both real and personal. Then again at page 503 in the same judgment with regard to the seizure, it has been described as an indiscriminate seizure both of public and private property and at page 504 the learned Chief Justice observes :

" that an order having been issued to take possession of public property, private property was taken, and is now detained and that such detention cannot be considered an act of State."

The Privy Council did not differentiate between the kind of properties seized and it only expressed the opinion that since the seizure was an act of State the municipal Courts could not entertain any action regarding that and therefore reversing the decision of the Supreme Court of Madras the suit by the plaintiffs was dismissed. Thereafter there were certain proceedings in India.

On receipt of the judgment of the Privy Council the minute by the

(1) (1859) 7 M.I.A. 476.

Honourable the President Sir Charles E. Trevelyan, dated 8th November, 1859, was appended to that. There is some discussion about the nature of the landed property seized in paragraph 14, at page 546 :

" The bulk was retained by the Rajah contrary to the provisions of the Treaty by which the Province was ceded to the East India Company in 1779 ; but according to my view as expressed in the early part of this minute, it matters not in what manner the property came into the possession of the Rajah. Whatever actually belonged to the Rajah at the time of his death is included in the escheat, and now belongs to the Government."

There is still further discussion regarding the 14 villages claimed by the mother of the late Rajah as having been granted to her by her late husband, Rajah Sarabhoji and the minute showed that since the villages were not only managed but their proceeds were appropriated by the Rajah they were treated after 1827 entirely as his own property and therefore the question of these villages should form the subject of the escheat. We need not refer more to this decision because it was after 1862 that there was a re-grant or restoration of the villages to the Rajah's heirs.

The next decision relating to this estate is in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1), which arose out of a suit by two widows of the late Rajah against the senior widow and an alleged adopted son of the late Rajah for a division of the immoveable properties which had been made over by the Government of Madras to the senior widow and for cancellation of the adoption, made after the death of the Rajah. The High Court held that during the time the Government held the estate, that is, during the interval between the death of the Rajah until the restoration of the estate by an act of State, it was held in absolute ownership in the Government and therefore, the suit by the two widows could not be maintainable. Evidence regarding restoration or relinquishment is extracted in the statement of facts at page 428 which is as follows :

" In Colonel Durand's letter above recorded, the Government of India have furnished their instructions with reference to the disposal of the landed property of the Tanjore Raj regarding which this Government addresssd them under, date the 17th May, last. Their decision is to the effect that since it is doubtful whether the lands in question can be legally dealt with as State property and since the plea in equity and policy for treating them as the private property of the Rajah is so strong that it commands the unanimous support of the members of the Madras Government, the whole of the lands are to be relinquished in favour of the heirs of the late Rajah."

In the judgment of the Court we find at page 445 the following expression of opinion :

" For these reasons we are of opinion that this Court is bound to consider the transfers under the order as a grant of grace and favour by the Government in right of their absolute sovereign ownership, just as if it had been thought proper to make the disposition in favour of persons who were not the nearest representatives and consequently that the widow's and daughter's proprietary rights are derivative from the Government and have no relation back to inheritance on the death of the Rajah. It is only on the ground that the Government had confessed themselves completely in the wrong in regard to possession of the property and passed the order as a reparation that the Court could hold differently, and we think the contrary of that inconsistent and most unlikely position appears."

An argument is put forward on behalf of the appellant that the effect of the restoration or relinquishment is only the undoing of a wrong and therefore if the villages were the private properties of the Rajah at the time of the seizure then the same character is maintained when they were handed back to his widow.

There does not seem to have been any judicial pronouncement regarding the nature of these villages for nearly fifty years untill the matter came up for discussion before a Full Bench in *Sundaram Iyer* v. *Ramachandra Iyer* (2), where the order of reference to the Full Bench was in very wide terms as to whether the Tanjore Palace Estate is an "Estate" within the meaning of S. 3 (2) of Act I of 1908. The Civil Revision Petitions out of which the Full Bench reference arose were filed against the returning

(1) (1868) 3 M.H.C.R. 424.

(2) I. L. R. 40 Mad. 389=5 L.W. 789 (F.B.).

of the plaints filed in the Court of the Revenue Divisional Officer, Kumbakonam, under S. 77 of the Madras Estates Land Act, I of 1908, on the ground that the Revenue Court had no jurisdiction. Ayling, J., in formulating the question for reference to the Full Bench did not express any opinion on the point. Seshagiri Aiyer, J., in a more elaborate discussion referred to S. 3 (2) of Act I of 1908 in order to find out under what provision of the sub-sections to the main section the villages came in. During the arguments before the Full Bench, Sir John Wallis, Chief Justice, stated that it was not possible to go back on the decision in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1), which stated that there was a grant and that resumability was not the essential *sine qua non* of an inam. It was also argued before the Full Bench that since inams were registered under Regulation XXXI of 1802 and the Palace Estate was not registered as such, it could not be considered to be an inam within the meaning of the definition 'Estate' under the Act. In his judgment, Sir John Wallis, C.J., traced the history of these 199 villages and referred to the earlier decisions to which we have already alluded and since it was admitted before him that the kudivaram right in the village which was the subject-matter of the appeal and in almost all the other villages, did not belong to the estate he came to the conclusion that the villages should be deemed to be inams within the definition in S. 3 (2) (*d*) of the Act, and therefore answered the question in the affirmative. He was of the opinion that the nature of the inam was a peculiar one and though commonly known as mokhasa grant it cannot be said to have been granted on what is known as mokhasa but was intended to be regarded as an inam of a dignified character. He held the view that S. 3 (2) (*d*) of Act I of 1908 brought within its ambit inams which were irresumable in character. In the end the learned Chief Justice came to the conclusion that all the villages constituting the Tanjore Palace Estate came within the definition of the "Estate" in S. 3 (2) (*d*) of the Act. Seshagiri Ayyar, J., agreed with the learned Chief Justice while Sadasiva Ayyar, J., in assenting to the proposition that the particular village, namely, Mokhasa Ullikadai village was an estate restricted the scope of the reference to that village alone and did not want that the decision should be understood to cover all the villages comprised in the Tanjore Palace Estate.

Mr. Kesava Ayyangar for the appellant commented upon the decision by contending that it could not be that the decision of the Full Bench is applicable to the entire estate by supposing that resumability is necessary in all the inams and that because it was conceded in that case that the kudivaram right in Mokhasa Ullikadai village did not belong to the estate the scope of the Full Bench decision should be restricted to that particular village only. He also contended that the correct way of interpreting the decision in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1), is by stating that the original nature of the properties was restored by the relinquishment or restoration and if that is so, what was the private property of the Rajah retained its character as such and they became the private properties of the grantees after 1862. It cannot be disputed that the adjudication in *Sundaram Iyer* v. *Ramachandra Iyer* (2), can apply only to the parties to that litigation and any question regarding the nature of any of the other villages could not be *res judicata* by reason of the Full Bench decision. Such being the case the Full Bench decision can only be a source of great authority.

Let us now see how this case was understood in subsequent judicial pronouncements and also how later decisions have discussed the nature of the other villages comprised in the Tanjore Palace Estate. In S. A. No. 1413 of 1924 Phillips, J., came to the conclusion that the Full Bench

(1) (1868) 3 M.H.C.R. 424.

(2) I.L.R. 40 Mad. 389=5 L.W. 789 (F.B.)

decision in *Sundaram Iyer* v. *Ramachandra Iyer* (1), did not mean to decide and in fact did not decide that the whole of the Tanjore Palace Estate was an "estate" within the meaning of S. 3 (2) (d) of Act I of 1908 because the Full Bench did not definitely say that their answer to the reference should refer to all the villages comprised in the Tanjore Palace Estate but that it should be confined to the particular village in question. The finding of the lower appellate Court in that case was that the Palace Estate had both melvaram and kudivaram rights in the lands comprised in the litigation. The learned Judge understood the Full Bench decision as not being conclusive with respect to other villages forming part of the Tanjore Palace Estate. There was a Letters Patent Appeal against that decision wherein the view taken by Phillips, J., was confirmed.

In an earlier judgment reported in *Raja Ram Rao* v. *Sundaram Iyer* (2), Sankaran Nair, J., had to consider the nature of Vennur Ramaswami Thottam which formed part of the Tanjore Palace Estate. Accepting the finding of the lower Court that both the warams have been admittedly in the enjoyment of the Ranees who were the grantees under the grant of 1862 he held that the lands in question could not come within the definition of "estate" in S. 3 (2) of Act I of 1908.

Krishnan, J., in an observation in *Nallauthu Padayachi* v. *Srinivasa Iyer* (3), seems to have interpreted the Full Bench decision as laying down that the whole of the Tanjore Palace Estate was an estate under the definition in S. 3 (2) (d) of the Estates Land Act but there is no discussion about the merits of the question.

Succession to the Tanjore Palace Estate had been the subject of liligation which came up to the High Court in the case reported in *Maharaja of Kolhapur* v. *Sundaram Iyer* (4), and there are observations in the judgment of both the learned Judges with regard to the nature of the holding of these 199 villages. Though the point in dispute in that litigation related to the claims of rival heirs the history of the Tanjore Palace Estate had been considered by the learned Judges. Spencer, Offg. C.J., at page 25, remarks that he was unable to follow the learned Judges in *Sijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5), in their conclusion that what was relinquished at the time in 1862 was a grant of grace and favour than a restoration of the property to those entitled to it by right of succession. The learned Judges seemed to think that the re-grant meant to restore to the parties the rights which were in the property at the time of seizure. This case is important only in this respect, that is, that it was not definitely taken for granted that the relinquishment was a regrant. The other learned Judge, Kumaraswami Sastri, J., at page 98, after quoting the letter from the Secretary to the Government of India, Foreign Department, to the Chief Secretary to the Government of Madras, dated 23rd June, 1862, discussed the matter at pages 113 and 114 and expressed the opinion that though the relinquishment made by virtue of the seizure in the professed exercise of the sovereign rights may have the effect of a fresh grant, still the position when the Government resolved to relinquish the property was to give it back to the heirs of the Rajah, that is to say, to the persons who would have taken the property on the death of the Rajah had there been no seizure. There is a definite pronouncement as regards the rights conferred by the letter of relinquishment. The decision of their Lordships of the Judicial Committee in *Chota Raja Saheb* v. *Sundaram Iyer* (6), which confirmed the decision in *Maharajah of Kolhapur* v. *Sundaram Iyer* (7), does not contain any specific opinion regarding the nature of the regrant.

(1) I.L.R. 40 Mad. 389=5 L.W. 789 (F.B.).
(2) (1910) 8 M.L.T. 350.
(3) 1924 M.W.N. 378=19 L.W. 369.
(4) (1924) 48 Mad. 1.
(5) (1868) 3 M.H.C.R. 424.
(6) I.L.R. 59 Mad. 633=43 L.W. 734 (P.C.).
(7) I.L.R. 48 Mad. 1.

After the decision in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1), the next time when the nature of the estate was considered in the reported decisions was in *Srinivasa Iyer* v. *Nallamuthu Padayachi* (2), by Waller and Madhavan Nair, JJ., and in their order calling for a finding the learned Judges stated that the lower appellate Court in that case misunderstood the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer* (3), as referring to the whole of the Palace Estate and not to one village alone and directed the Subordinate Judge to submit a finding whether the disputed lands were a village as contemplated in S. 3 (2) (d) of the Estates Land Act or whether apart from the Act the defendant had any occupancy rights. The reasoning of that case shows that the relinquishment in 1862 restored the anterior rights of the parties and since at the time of seizure the Rajah was entitled to both the warams the lands in question did not form an estate within the meaning of S. 3 (2) (d). The impression that can be gathered from this judgment is that if both the warams vested in the Rajah with regard to any particular village then the relinquishment or re-grant would not deprive the landlord of those rights. Though, therefore, they understood the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer* (3), as referring only to a particular village it was considered necessary to find out the nature of the rights in each of the villages separately. Venkataramana Rao, J., delivering the judgment of the Bench in the case reported in *Jagannatha Pillai* v. *Ramanathan Chettiar* (4), understood the Full Bench decision as containing a general finding with regard to the whole estate. After referring to the earlier judgments it was observed that if the Full Bench decision is to be given full effect there could only be one answer and that is, the village in question was an estate. Despite that expression of opinion the learned Judge discussed the evidence regarding it for coming to the conclusion that it was an estate. One thing is clear and that is that despite a disposition on the part the learned Judges to take the view that the Full Bench decision laid down a general proposition that the villages comprised in the Tanjore Palace Estate would be 'estate' within the meaning of S. 3 (2) (d) of the Estates Land Act, still they considered it necessary to discuss the evidence regarding each village as and when it came up for consideration to find out whether the Full Bench decision can correctly be applied to that. The learned Judges also relied on the fact that the Full Bench decision will not be binding upon the parties other than those who were before the Court in that case. The Privy Council had to consider the nature of the properties in *Secretary of State for India* v. *Thinnappa Chettiar* (5), with regard to the village of Someswarapuram comprised in the Tanjore Palace Estate when considering the applicability of the Madras Irrigation Cess Act (VII of 1865) to that village. Sir Madhavan Nair, who delivered the judgment of the Judicial Committee, referred to the history of the grant at pages 233 and 234 in *extenso* and formulated the question whether the Tanjore Palace Estate which came into being as a result of the grant by the Government on 21st August, 1862, constituted an engagement with the Government entitling the grantees to take water for free irrigation. The contention put forward on behalf of the Government was that the grant of the village conveyed to the holders of Tanjore Palace Estate only the right to collect full land revenue, that is, melwaram due on the lands and that it did not constitute an assignment of the land. The discussion at pages 239 to 241 of this judgment indicates that the relinquishment in 1862 restored to the grantee full proprietary rights over the properties but their Lordships held that they were not called upon to express on opinion as to whether

(1) (1868) 3 M.H.C.R. 424.
(2) A.I.R. 1928 Mad. 1245.
(3) I.L.R. 40 Mad. 389=5 L.W. 789 (F.B.).
(4) (1938) M.W.N. 1284.
(5) I.L.R. 1944 Mad. 227=56 L.W. 669 (P. C.).

the villages are estates within the meaning of the Madras Estates Land Act. Though the decision in *Sundaram Iyer* v. *Raamchandra Iyer* (1), was cited before them the correctness of it had not been adjudicated upon in the judgment. The word 'relinquishment' has been interpreted as restoration of the private property of the Rajah to his heirs in all its integrity and without any reservation of any kind of right in favour of the Government. That the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer* (1), had not even the implicit approval of their Lordships is sufficiently obvious and it seems to us that if it were necessary to decide whether the 199 villages are estates within the meaning of S. 3 (2) (d) of the Estates Land Act the Judicial Committee might have taken a different view. They refer to the decision in *Sundaram Iyer* v. *Ramachandra Iyer* (1), for the purpose of remarking that the grant was an irresumable one and conclude that having regard to the nature of the grant of 1862 the Tanjore Palace Estate, if treated as an inam must be treated as a peculiar kind of inam ard the estate appears commonly to have been spoken of as a Mokhasa grant which it is not. There was also an underlying implication to treat these villages as the private property of the Rajah. But one thing is abundantly clear and that is having in more than one place referred to the decision in *Sundaram Iyer* v. *Ramachandra Iyer* (1) and also having considered the question as to whether the land revenue alone had been granted without the kudiwaram rights by the grant of 1862, the Privy Council has expressly refrained from approving of the correctness of the decision in *Sundaram Iyer* v. *Ramachandra Iyer* (1).

Then again the history of the nature of the Tanjore Palace Estate has been noticed by Wadsworth, Offg. C.J., in *Jagadeesam Pillai* v *Kuppammal* (2) when considering whether Kaduveli village forming part of the Tanjore Palace Estate had become an estate by reason of the Madras Estates Land (Third Amendment) Act XVIII of 1936. Adverting to the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer* (1), the learned Judge observed that it was not necessary to determine whether or not the village of Kaduveli formed an estate within the definition of the Estates Land Act as it stood before the amendment of 1936. The learned Judge observed at pages 700 and 701 as follows :

"The Full Bench which decided *Sundaram Iyer* v. *Ramachandra Iyer* (1), answered in the affirmative the question whether the Tanjore Palace Estate was an estate under the Madras Act I of 1908. This decision has in some cases been distinguished on the ground that only one village was then under the consideration of the Court ; but in terms the answer of the Full Bench appears to include the of whole of the estate. There is much to be said for the view that, when the grant is considered as a whole, it must be regarded as a grant of the land revenue to a person not owning kudiwaram in the lands although it can be shown that in the case of individual lands in the estate the kudiwaram interest which had been previously owned by the Rajah was included in the rendition to his heirs. Whatever be the effect of the application of the Madras Act I of 1908 to this estate all doubt is removed by the passing of the Amending Act in 1936."

In regard to Nadhupadugai Melpathi one of the villages forming part of the Tanjore Palace Estate this Court decided following *Sundaram Iyer* v. *Ramachandra Iyer* (1), that it was an estate under the Madras Estates Land Act for the reason that all the villages pertaining to the Tanjore Palace Estates were granted in inam by the Government to the heirs of the Rajah of Tanjore. The learned Judges, Subba Rao and Panchapakesa Ayyar, JJ., in *Abdul Rahim* v. *Swaminatha* (3), interpreted the Full Bench decision as direct authority for the conclusion that the entire body of the villages pertaining to the Tanjore Palace Estate should be held as inams. They refer to the earlier decisions which we have considered above in which this question came up for consideration including *Jagadeesam Pillai* v. *Kuppammal* (2), and dis-

(1) I.L.R. 40 Mad. 389=5 L.W. 789 (F.B.)

(2) I.L.R. 1946 Mad. 687 at 699 and 690=59 L.W. 151.

(3) I.L.R. 1955 Mad. 744.

tinguished *Nallamuthu Padayachi* v. *Srinivasa Iyer* (1), and *Srinivasa Iyer* v. *Nallamuthu Padayachi* (2), followed *Jaganathan Pillai* v. *Ramanathan Chettiar* (3), and held affirmatively that the Full Bench decision was authority for holding that the entire Tanjore Palace Estate is an estate within the meaning of S. 3 (2) (*d*) of the Act. It has to be noticed that though this judgment was pronounced on the 4th February 1954, no reference has been made in the judgment to the decision in *Secretary of State for India* v. *Thinnappa Chettiar* (4). The decree and judgment of Subba Rao and Panchapakesa Ayyar, JJ., are now pending in appeal before the Supreme Court as a result of leave granted by Panchapakesa Ayyar and Basheer Ahmed Sayeed, JJ., in S. C. C. M. P. Nos. 6623 and 6625 of 1954 by their order, dated 25th February, 1955, in which Panchapakesa Ayyar, J., has observed that the ruling in *Secretary of State for India* v. *Thinnappa Chettiar* (4) was not cited before Subba Rao and Panchapakesa Ayyar, JJ., and therefore the question involved is of sufficient importance to be taken to the Supreme Court.

A Bench to which one of us (Govinda Menon, J.) was a party noticed the conflicting decisions as considered above in S. A. No. 1513 of 1948 and observed that in the state of authority it was unnecessary to express any opinion regarding the entire estate and confined the decision only to the question as to whether the hamlet under consideration Pattiswaram Thattimalapadugai, a part of Thenampadugai, is an estate within the meaning of Act XVIII of 1936 and on the evidence it was found that it was an estate. In his order calling for a finding in S. A. No. 2465 of 1948 on the 19th March, 1953, Satyanarayana Rao, J. has also discussed all the cases and he was inclined to take the view that the decision in *Secretary of State for India* v. *Thinnappa Chettiar* (4) has not, in fact, cast a doubt on the wide proposition laid down in *Sundaram Iyer* v. *Ramachandra Iyer* (5) and in regard to lands which were under consideration in that litigation, he held that it was an estate within the meaning of the Estates Land Act. A finding was called for from the lower appellate Court as to whether the lands in question were private lands and not ryoti lands and the Deputy Collector, Kumbakonam, submitted a finding that the lands were not ryoti and hence the plaintiff was not entitled to get any patta under S. 55 of the Estates Land Act. That finding was accepted by this Court by one of us (Govinda Menon, J.). Raghava Rao, J., in S. A. No. 2343 of 1947 took the view while agreeing with the decision in *Srinivasa Iyer* v. *Nallamuthu Padayachi* (6) that it cannot be said that every piece of land situated in any village in the Tanjore Palace Estate can be regarded as an estate within the meaning of the definition and that evidence must be gone into to decide whether any particular village had both the warams or not. It is pertinent to remember that the land in question in that second appeal was situated in the Pannimangalam village which has been considered as a whole inam village by the learned Judge. The disputed lands in these appeals which we are now considering are in Orathur padugai which is also a part of Pannimangalam village.

Mr. T. M. Krishnaswami Iyer for the respondents urges that even if at the time of the seizure the 199 villages formed part of the private estate of the Rajah of Tanjore in which he held both the warams by the very nature of the relinquishment or re-grant it has not revived the old state of things and, therefore, the rights of the parties should be decided as and from the grant itself which according to the learned

(1) (1924) M.W.N. 378=19 L.W. 369.
(2) A.I.R. 1928 Mad. 1245.
(3) (1938) M.W.N. 1284.
(4) I.L.R. (1944) Mad. 227=56 L.W. 669 (P.C.).
(5) I.L.R. 40 Mad. 389=5 L.W. 780.
(3) A. I. R. 1928 Mad. 1245.

Counsel can only be that when the sovereign makes a grant it is only in respect of the right to collect revenue and, therefore, the grantee is entitled only to melwaram right alone. It is argued that since the restoration of the lands was a grant by the Crown a construction most strictly against the grantee and more beneficial to the Crown should be adopted and if so nothing will pass to the grantee but by clear and express words. He relies upon certain pronouncements which show that after there has been a confiscation, seizure or exchange or regrant either to the heirs of the original owner or to third parties the only inference that can be drawn is that the grant conveyed nothing but the right to collect the revenue and the new title conferred should naturally be deemed to be on the terms of the grant. The question which their Lordships of the Judicial Committee had to consider in *Nawab Nalka Jahn Sahiba* v. *Deputy Commissioner of Lucknow* (1) was with respect to the effect of confiscation of certain properties as a result of the Mutiny in 1857 and the consequent re-grant to the former owners. Their Lordship held that the effect of Lord Canning's Proclamation of the 15th March, 1858, was to divest all the landed property from the proprietors in Oudh and to transfer it to and vest it in the British Government. Consequently all who since that day claimed title to such property must claim through the Government. Where the regrant is made to a former owner the new title will depend entirely on the terms of the re-grant and if such re-grant is made for life only no suit can be maintained to rectify the alleged mistake. There cannot be any resuscitation or revival of the old things. At page 74 we find the following observations :

"Those rights, whatever they were, were confiscated and the sole question is what interest, if any was re-granted to her. Looking at the whole of the proceedings which have been concluded, it appears to their Lordships abundantly clear that no more was granted to her than a permission to occupy the palace for her life. If the acts which she seeks to impugn on the part of the officers of the Government were nullities it would follow she has no interest at all but that her property remains in the British Government to which it was confiscated."

From this it is urged that we have to look at the substance of the re-grant and nothing more. Another case on which great reliance was placed was *Sirdhar Bhagwan Singh* v. *Secretary of State for India* (2), which held that seizure by right of conquest must be regarded as an act of State and is not liable to be questioned in a municipal Court, following *The Secretary of State in Council of India* v. *Kamachee Boye Sahiba* (3). The observation at page 44 regarding the effect of certain directions to the East India Company after the conquest of Punjab which was contemplated to make what may be called a *tabula rasa* of tenures of a particular kind and to re-grant them upon terms entirely at the discretion of the British Government were relied upon. It is no doubt, true that in more than one place the judgment refers to the effect of re-grant but we are not able to find much analogy between that case and what we have to consider. Learned Counsel also brought to our notice the decision in *Vajesingji Joravrarsingji* v. *Secretary of State for India in Council* (4), which also dealt with the question of seizure of certain lands. The next case cited was the well-known case *Cook* v. *Sprigg* (5), where the Judicial Committee held that where the British Crown annexed certain lands such annexations being an act of State any obligation assumed under a treaty to that effect either to the ceding sovereign or to individuals is not one which municipal Courts are authorised to enforce, following *The Secretary of State in Council of India* v. *Kamachee Boye Sahiba* (3).

The other cases on which the learned Counsel relies are : *Secretary of State* v. *Bai Raj Bai* (6), and *Rahas Behari Lal* v. *Kanhaiya Lal* (7). In

(1) (1879) L. R. 6 I. A. 63 (P.C.).

(2) (1874) L.R. 2 I.A. 38 (P. C.).
(3) (1859) 7 M.I.A. 476.
(4) I.L.R. 48 Bom. 613=21 L.W. 28. (P.C.).
(5) L.R. (1899) A.C. 572.
(6) L.R. 42 I.A. 229=I.L.R. 39 Bom. 625=2 L.W. 731 (P.C.).
(7) A.I.R. 1940 Oudh 289.

the earlier case it was held that if before the ceding of any territory to the British Crown by a feudatory prince there had been any legal subsidiary rights created in others by such a prince such rights cannot exist after the cession. The only legal enforcible rights are those which by agreement express or implied or by legislation the new sovereign chose to confer upon them, following the *Secretary of State in Council of India* v. *Kamachee Boye Sahiba* (1), and *Cook* v. *Sprigg* (2). There are observations in *Rahas Behari Lal* v. *Kanhaiya Lal* (3), in practically the same strain. It is not necessary to discuss that case in great detail. We may also refer to *Secretary State* v. of *Rustom Khan* (4).

Mr T.M. Krishnaswami Iyer further contends that according to certain observations in *Sundaram Iyer* v. *Ramachandra Iyer* (5), the 199 villages could not have been the private estate of the Rajah but must have been the adjuncts of his sovereignty and whatever might be the reason for his retention of these villages after the cession of the Tanjore Raj when once they are seized by the East India Company on behalf of the British Crown all the previous tenures and rights that existed must be deemed to have been wiped out and that the grant of 1862 should be considered as opening a new chapter and writing on a clean slate. If that is so, it could not be that by the re-grant both the warams could in any event have been granted to the successors of the Rajah. He particularly refers to the concession made by the Counsel in *Sundaram Iyer* v. *Ramachandra Iyer* (5), that the kudivaram interest did not belong to the estate at all. This is made clear from the arguments of the learned Counsel in that case. Sadasiva Iyer, J., at page 399 in *Sundaram Iyer* v. *Ramachandra Iyer* (5), refers to the new grant as of Government revenue alone. In these circumstances the learned Counsel contends that the kudiwaram rights could never have passed to the grantees. In our view, *Sundaram Iyer* v. *Ramachandra Iyer* (5), cannot be understood as laying down a conclusive decision that all the villages constituting the Tanjore Palace Estate are estates within the meaning of S. 3 (2) (d) of the Estates Land Act in that only melwaram alone vested in the Rajah. Even in all those cases where the Full Bench decision is understood as laying down a general law evidence was gone into to find out whether the kudivaram right vested in the tenants. *Jagannatha Pillai* v. *Ramanathan Chettiar* (6), *Abdul Rahim* v. *Swaminathan* (7), and S.A. No. 2465 of 1948 reveal the fact that the learned Judges who decided each one of them did not proceed to base their conclusion on the Full Bench decision alone.

It is, therefore, clear that because the Tanjore Palace Estate consisted of a number of villages it is not right to treat the entire estate itself for the purpose of the definition of the Madras Estates Land Act as one single inam village falling within the provisions of S. 3 (2) (d) of the Act so that whatever land is situated within any of the villages comprised in the estate would necessarily be land situated within the estate under the Estates Land Act. But one thing is clear and that is, that none of the decisions regarding any of the villages comprised in the Tanjore Palace Estate has so far, decided that the entire area comprising the 199 villages belonged to the Rajah as his private property, that is property, situated in the ryotwari area paying land revenue to the Government. In *Secretary of State for India* v. *Thinnappa Chettiar* (8), their Lordships of the Judicial Committee treated the grant as an inam of a peculiar kind and there was no question of treating the same as the private property of the

(1) (1859) 7 M.I.A. 476.
(2) L.R. (1899) A.C. 572.
(3) A.I.R. 1940 Oudh 289.
(4) I.L.R. (1941) Kar. P.C. 94= 2 L.W. 731 (P.C.).
(5) I.L.R. 40 Mad. 389=5 L.W. 789.
(6) (1938) M.W.N. 1284.
(7) I.L.R. (1955) Mad. 744.
(8) I.L.R. (1944) Mad. 227=56 L.W. 669 (P.C.).

Rajah. Though therefore, there are expressions of opinion here and there in some of the judgments to the effect that the lands were originally the property of the Rajah, still we have to take it that the restoration or relinquishment or regrant should be considered to be the root of a new title.

Such being the case, the issue has to be decided on the evidence as to whether the plaintiff in each of these suits is entitled to both the warams. Learned Counsel for the appellant brought to our notice that the lands in question are not comprised in a whole inam village as there has been no grant as such but that they are grazing fields or padugais without any human habitation and without any village site and argued that such being the case, it cannot be said that there was a grant of the village. We shall deal with this aspect of the case later on.

But before doing so, it is necessary to advert to the argument that the lower Court has thrown the onus of proof wrongly in putting the burden on the plaintiff to show that he has a right to eject the tenant. The complaint is that in more than one place the learned Subordinate Judge has proceeded on the footing that the plaintiff has not discharged that onus that lies on him to prove that the lands in question are private lands. See the beginning of paragraphs 29 and 35 and the end of paragraphs 40 and 41 of the lower Court's judgment. It is no doubt true, that the learned Subordinate Judge has dealt with the question of the burden of proof in the manner stated but he has also gone into the evidence before coming to the conclusion though not as elaborately as should have been the case. According to Mr. Kesava Iyengar, under S. 9 of the C. P. C., a civil Court has got the right to adjudicate a civil dispute which is within the pecuniary and territorial jurisdiction of that Court and any party that denies that jurisdiction should affirmatively prove it. Learned Counsel suggests that the view taken by the learned Subordinate Judge on the question of burden of proof is tantamount to a denial of the jurisdiction of the civil Court to hear the suits. We do not think that there is any question of jurisdiction involved in these cases. What has to be considered is whether in the circumstances of the case the burden of proof is on the plaintiff or not. A large body of case-law has been cited at the Bar but in our view there is no such cut and dry element of proof. It is urged that if the lands in question are part of an estate then since under the Madras Estates Land Act a suit for ejectment is not maintainable in a civil Court, the defence put forward amounts to an ouster of jurisdiction and, therefore, the party seeking to oust the jurisdiction of the civil Court must establish his right to do so. In that case the burden will be on the defendant. See the decision in *Srimath Jagannathacharyalu* v. *Kutumbarayudu* (1). The observations in the well-known case in *Naina Pillai Maracair* v. *Ramanathan Chettiar* (2), where their Lordships held that it is for the defendants, tenants, to prove that they had the right of occupancy under the Estates Land Act where the title of the landlord had been admitted was specifically relied upon. Various passages from that judgment where the matter is discussed were brought to our notice. The decision in *Srimath Jagannathacharyalu* v. *Kutumbarayudu* (1), was accepted by the Judicial Committee in *Ramayya* v. *Lakshminarayana* (3). At page 452 their Lordships say that the burden is on the party who maintains that the general rule namely, S. 9, Civil Procedure Code, is not applicable. Our attention was also drawn to the decision of the Supreme Court in *The District Board, Tanjore* v. *Noor Mohomeed Rowther* (4), were Mahajan, J., refers to the fact of the late Mr. Somayya, learned Counsel for the tenants in that case conceding that the burden of proof that certain lands constituted an estate is upon the

(1) I.L.R. 39 Mad. 21 and 24.
(2) I.L.R. 47 Mad. 337=19 L.W. 259 (P.C.).
(3) I.L.R. 57 Mad. 443=39 L.W. 329 (P.C.).
(4) (1952) 2 M.L.J. 586=65 L.W. 98, 99 and 104 (S.C.).

party who sets up that contention. At page 104, Chandrasekhara Aiyar, J., also considers that the burden is on the tenant to establish that what was originally granted was an estate. Raghava Rao, J., refers with regard to the burden of proof in similar terms in *Ramamurthi Sastri* v. *Ammanna* (1). Moreover in *The District Board, Tanjore* v. *Noor Mahomed Rowther* (2), their Lordships cited with approval the judgment of this Court in *Janikirama* v. *Gopalan* (3), *Ramayya* v. *Lakshmi Narayana* (4), and *The District Board Tanjore* v. *Noor Mahomed Rowther*(2) were relied upon by Satyanarayana Rao, J., for holding that the burden of establishing the nature of the occupancy rights is undoubtedly on the tenants who claim them.

On the other hand we were pressed with the authority of the Privy Council in *Lakshmanna* v. *Venkateswaralu* (5), where the Judicial Committee held that in a suit by a holder of a minor inam to evict the tenant from the holding the burden is on the plaintiff to make out the right to evict by proving that the grant included both the melwaram and the kudivaram interests or that the tenant or his predecessors were let into possession by the inamdar under a terminable lease. Their Lordships distinguished the case in *Naina Pillai Maracair* v. *Ramanathan Chettiar* (6), by stating that the decision does not contravene the principle that in a suit for ejectment the burden lies on the inamdar as plaintiff to prove his right to evict and is not inconsistent with the decision in *Chidambara* v. *Veerama Reddi* (7). Their Lordships further held that the judgment in *Naina Pillai Maracair* v. *Ramanathan Chettiar* (6), read as a whole does not support the conclusion that the proposition of law laid down therein as regards the burden of proof is a general proposition. The discussion at pages 577 and 578 was specifically relied on.

In the present case we do not wish to rest our decision merely on the principle of the burden of proof. Elaborate evidence has been let in on both sides and our conclusion will be based on the analysis of that evidence and not merely on the academic question regarding burden of proof for as has been remarked very often by the Courts of the highest authority when once the entire evidence is before the Court the onus of proof is only a matter of minor interest as the case has to be decided mainly on the evidence. If the village in question is a minor inam then the decision of the Privy Council in *Lakshmanna* v. *Venkateswaralu* (5), will be applicable. If on the other hand it is an estate as claimed by the defendants the Supreme Court decision in the *District Board, Tanjore* v. *Noor Mahomed Rowther* (2), will be applicable. Under these circumstances the question we have to decide is whether the village of Orathur padugai is an estate or not.

The question of the nature of the lands in dispute has to be viewed in two aspects and they are firstly whether Orathur padugai is an estate and secondly even assuming that the lands are situated in an estate whether they are private lands and not ryoti lands. If it is the former, the plaintiff is entitled to succeed and if it is the latter, the suits will have to be dismissed.

In order to establish that the lands lie in an estate which admittedly is in the nature of an inam, we have to find out firstly whether there is a grant of an inam and thereafter whether such a grant is a grant of the whole village. In this case there is no documentary evidence in regard to the grant. Nor is there anything to show the nature of the inam. But from certain earlier documents a contention is put forward that there was no grant of the lands as such. Exhibit A-128 dated 6th April, 1800 is a

(1) (1950) 2 M.L.J. 442 at 447 =63 L.W, 809.
(2) (1952) 2 M.L.J. 586=65 L.W. 98 99 and 104 (S.C.)
(3) (1951) 2 M.L.J. 272=64 L.W. 732.
(4) I.L.R. 57 Mad. 443 =39 L.W. 323 (P.C.)
(5) I.L.R. (1950) Mad. 567=62 L.W. 684 (P.C.).
(6) I.L.R. 47 Mad. 337=19 L.W. 259 (P.C.).
(7) I.L.R. 45 Mad. 586=16 L.W. 102 (P.C.).

letter to the Secretary to the Government, Madras, from the Resident of Tanjore with regard to the arrangement for the case and comfort of the Rajah who had ceded his territory to the East India Company. There is reference to Pannimangalam in which according to the plaintiffs the present Orathur padugai is situate. The statement there is that the fields of Pannimangaam to the westward of Tanjore which from time immemorial have been reserved for the pasture of circar cows (Rajah of Tanjore) remained in the Rajah's possession. There is neither village nor cultivation on these lands. In answer to this letter a communication the Chief Secretary to the Government to the Resident of Tanjore, Exhibit A-129, dated 5th July, 1800, was sent and in paragraph 5 of that letter it is stated that the fields of Pannimangalam containing neither village nor cultivation shall remain in the hands of the Rajah for the pasturage of His Excellency's cows. From this, it is argued that whatever might be the present condition of the lands in question, in 1800 they were merely pasture lands without any kind of habitation, intended for the grazing of the Rajah's cattle. On the other hand, Mr. T. M. Krishnaswami Iyer contends that in Exhibits A-128 and 129 Pannimangalam is described as situated to the westward of Tanjore whereas the exact location of these lands is admittedly not westward of Tanjore town and the cattle belonging to the Rajah could not have been grazed in the lands which are situate at least thirty miles away from Tanjore town, in Mannargudi taluk.

Even with regard to the name given to the fields there seems to be some difference between Exhibits A-128 and A-129, in the former document the description is Pannimangalam whereas in the latter it is Pucanyamangalam. It is, therefore, difficult so contends the learned Counsel for the respondents, to fix the identity of the properties referred to in Exhibits A-128 and A-129 as the disputed lands. Moreover, the fact that the Rajah was allowed to keep the Strotrium village and adjust two hundred pagodas being the income from that village towards Mokhasa, one-fifth of the revenue due to him, shows that the fields of Pannimangalam were not considered as productive of any income for, if that had been the case, some deduction should have been made towards that also. Learned Counsel for the respondents urges that the fields of Pannimangalam or Pucanyamangalam referred to in Exhibits A-128 and A-129 could not, therefore, be padugai lands in Mannargudi taluk but may refer to the high level pasture lands now seen to be situated to the west of Tanjore town through which the railway lines pass. That there was Orathur village in existence even as early as 1830 is clear from Exhibit A-151 because in describing certain boundaries of another village it is mentioned as to the north of assessed Orather village Nadappukarai (bund pathway). It is clear that there was a village by the name of Orathur and that was assessed. That being the case as early as 1830, it seems that the village was not a grazing ground. The other documents in the case show that from 1880 upto the present day there is no doubt, that Orathur padugai village in Pannimangalam vattam is an independent entity paying assessment and has never been considered as pasture ground. That the word vattam refers to a group of villages is now clear and Pannimangalam vattam, therefore, consists of a number of villages of which Orathur padugai is one. If, therefore, these lands were never considered as pasture lands it could not be that the properties referred to in Exs. A-128 and A-129 are identical with the disputed lands. Emphasis is laid on the fact that the Orathur village had been assessed as early as 1830 and that it is situate in Mannargudi taluk and not to the west of the Tanjore town. The inference is, therefore, possible that the fields referred to in Exs. A-128 and A-129 do not refer to these lands. In this connection it has to be mentioned that these two documents are printed sheets of paper containing no signa-

tures nor even stating that they are true copies of the originals certified as such by anyone. We have examined these documents in question, with a view to find out their nature and, though there is no reason to cast any suspicion upon the genuineness of these documents from a strictly legal point of view, it would seem that they cannot be admitted in evidence as there is no certification of the true nature of the copies. From the very nature of things, these documents cannot be the originals and it is not pretended that they are such. We, therefore, feel that Exs. A-128 and A-129 cannot help the case of the appellant to show that the lands in question are the private lands of the Rajah. If even they are considered as assessed lands as early as 1830, they should have become the public property belonging to the sovereign state of Tanjore over which the Rajah exercised his suzerainty and could not be his private property and if the entire Raj had been handed over to the East India Company under the treaty they continued to have the same features attached, such as liability to pay Government revenue out of which one-fifth was paid over to the Rajah. There is, nothing, therefore, to show that the character of these lands as Raj would not have continued till 1855 when seizure took place.

We shall discuss the point regarding whether Orathur padugai was at least from 1830 recognised as a whole inam village at a later stage, but before doing so, it is necessary to refer to various documents on which Mr. Kesava Ayyangar relied to show that the lands in question were lands over which the Tanjore Palace Estate had absolute domain. What he contends is that because there is no entry in the Huzur inam register relating to Orathur Thottam of Pannimangalam vattam, Mannargudi taluk, as is seen from Ex. A-150, it must be taken that the padugai in question is not a village and, if that is so, what was granted was not a whole village but only a block of lands, and therefore, according to the decision of *Bavanarayana* v. *Venkatadu* (1), they cannot form an estate. Great reliance is placed upon Ex. A-147 dated 25th August, 1930 which is an abstract showing the paimash land measurement in Orathur Thottam, Sithamalli Keelpathi vattam, Nidamangalam firka, Mannargudi taluk, for fasli 1240. In considering the measurements the description is given as Orathur thottam dittam. There are recitals to the effect that in the thottam, there are forests and that by way of grass tax, mattu thotti, ilandai fruit lease and fire wood the palace gets an annual income of Rs. 50. In the above thottam natham kudiyeruppu (village site, residential quarters do not exist). The four boundaries are also given and the thottam is described as *ekhabhogam thottam*, that is, thottam in which the proprietorship vests in the owner. According to the appellant this document would show that the Rajah was the sole owner of the lands and there was no grant whatever of a village. We are asked to say that by a combined reading of Exs. A-128, A-129 and A-147 the Orathur thottam was the private estate of the Rajah. We have already stated that Exs. A-128 and A-129 do not refer to the suit lands and with regard to Ex. A-147 the recitals there are not conclusive.

That, up to 1875, there was no cultivation as such in Orathur padugai is sought to be established from Exs. A 8 to A-10 of which Ex. A-8 dated 17th August, 1872 is a lease muchilika executed by a tenant for having taken these lands for the purpose of grazing cattle and for cutting grass for a term of five years from fasli 1282 to 1286. The description of the leased property is Periakadu Orathur Siddhamalli padugai attached to Mokhasa Pannimangalam Thattimal and the lessee agrees to surrender the property after a period of five years. Exs. A-9 and A-11 are D. C. B, accounts for Orathur Periakadu attached to Mokhasa Pannimangalam Thattimal and it is stated therein that the lands are padugai waste and the *beris* for cutting grass

(1) I.L.R. 1954 Mad. 116
=66 L.W. 1087 (F.B.).

for a period of five years is Rs. 63 and there are other indications there to show that the lands were waste. Ex. A-11 is also a similar D. C. B. account showing that the Orathur padugai was tharisu (waste). Similarly Ex. A-10 is the Jamabhandhi account for Orathur Periakadu attached to Pannimangalam Thattimal and that shows that it was waste land leased out for cutting grass for a period of five years. In all these documents there are indications to show that other than grass, by sale of certain kinds of fruits and withered trees, etc., smaller sums of monies were realised. No doubt these four documents show that between 1872 and 1875 Orathur padugai consisted of waste lands also but in view of what is found in Ex. A-151 that as early as 1830 some portions of the lands in Orathur village were assessed, nothing conclusive can be gathered from the fact that the other portions nearly half a century later were let out for pasture purposes.

Whether the Orathur padugai was an estate according to the definition of the term in S. 3 (2) (*d*) of the Estates Land Act as it originally stood or whether it becomes an estate by reason of the amendment introduced by the Madras Act XVIII of 1896 by which *Explanation* (1) was added will have to be considered next. According to the operative part of the section as it originally stood

"any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government or any separated part of such village."

is an estate.

The amended section lays down

"that any inam village of which the grant has been made, confirmed or recognised by the Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees."

is an estate.

By the *Explanation*, what is meant by a whole inam village is made clear and it is this :—

"Where a grant is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes."

The argument advanced on behalf of the respondents is that Orathur padugai is a whole inam village according to unamended S. 6 and in any event after the amendment by the Madras Act XVIII of 1936 the village is an estate under S. 3 (2) (*d*) and the *Explanation* thereto. In regard to the assessed nature of the lands in 1830 reference was already made to Ex. A-147 and until 1880 it is alleged that Orathur padugai was regarded as a village in Pannimangalam Thattimal. Ex. A-4 of 1868 which is a D. C. B. account relating to Orathur padugai attached to Mokhasa Pannimangalam Thattimal shows that there are irrigation areas under tank and thottam, nanja and punja lands. It is clear from this that the entire village except the waste lands was assessed. From Ex. A-5 dated 4th September, 1870 it is seen that the punja lands in Orathur village were taken on lease from the Collector of Tanjore who was the receiver and manager of the Estate of the Raja of Tanjore for a period of five years on payment of a total sum of Rs. 122-9-3. Exs. A-7, A-8, A-12, A-13, A-14, A-15, A-16 and A-18 are either adaiyolai muchilikas or lease deeds for the leasing of the lands in Orathur padugai village for a term granted by the Collector of Tanjore from which it is seen that they are agricultural lands on which crops were raised, and in all these documents the description is that the lands are situate in Orathur padugai in Mokhasa Pannimangalam Thattimal. They range between years 1870 to 1875. Ex. A-16 contains a recital that for plantain cultivation one mah of land was assessed at Rs. 4-2-1 in addition to the other details of cultivation. That the tenants themselves were residing in Orathur village as such can be gathered from the description of the executants of the various Adaiyolais. See the description of the tenants in Exs. A-21, A-22, A-23, A-30 and A-33

and all these were between 1874 and 1877. It is clear, therefore, that even at that period, the village contained human habitation. In Ex. A-63 which is the individual-war settlement register for Pannimangalam vattam for fasli 1296 against column 6 it is stated that the income in the matter of the *amani* cultivation of sugarcane, etc., on 95 kulis is Rs. 4 and it is in Orathur padugai village, Pannimangalam vattam. That *amani* cultivation is waram cultivation has been laid down in *Varada Reddi* v. *Srinivasa Mudaliar* (1), Ex. A-61 is the D.G.B. account of Orathur padugai, Mokhasa Pannimangalam Thatimal vattam for fasli 1294 and the entries there show the lands cultivated, *amani* income and various other details just like any other inhabited and cultivated village. Similarly in Ex.64 the individual-war settlement register for Pannimangalam vattam, Mannarguđi taluk, column 3 relating to the village of Orathur states that the Orathur padugai is a village and the vattam is Pannimangalam. Ex. A-65 is the settlement register for Pannimangalam vattam for fasli 1297 wherein Orathur is described as a padugai and the total assessment remission for the previous fasli is Rs. 356-12-9. There can be no doubt that during all these years Orathur padugai was treated as a separate village. Paragraph 8 of Ex. A-152 speaks about the repairing of the channell, etc., by the lessee stated to be residing in Orathur and the lease was for a period of seven years. Among the villages constituting the Pannimanglam vattam which is a group of villages the first place is given to Orathur padugai as is seen from Ex. A-78 (a) the village-war settlement register of Pannnimangalam vattam. In Ex. A 79 the village-war settlement register for Pannimangalam vattam for fasli 1309 the village of Orathur is described as Orathur padugai and is styled as a village and the particulars contained in column 2 speak of the lands as being to the north of Orathur limits. Ex. A-80 is the individual-war jamabandhi register for Pannimangalam vattam for fasli 1309 and herein, Orathur padugai is described as a village. Exs. A-80, A-82 and A 84 contain similar descriptions of the Orathur village in Pannimangalam vattam. Exs. A 153, A-155 and A-157 are all lease deeds between the years from 1901 to 1906 relating to lease of lands in Orather padugai. They contain a clause to the effect that in case the tenant plants any trees and rears them on the expiry of the lease they shall belong to the estate. Transactions such as lease entries in revenue accounts as well as other deeds referred to above and discussed show that the Orathur padugai is a separate village in a group of villages or vattam called Pannimangalam vattam. It will be noticed that from 1868 right up to 1907 Orathur padugai was considered as a separate village. The contention of the respondents is that prior to the Estates Land Act the village was considered as a separate one. That the same continued to be a separate village even after the passing of the Estates Land Act can be gathered from a number of other documents. The description of the lands as set out in Orathur padugai village, Mokhasa Pannimangalam vattam in Ex. A-158 and in a number of other documents such as Exs. A-98, A-104, A-105, A-159, A-106, A-116, A-161, B-17, A-117, A-118, A 119, A-120, B-18, A-121, A-162 and A 163 are strongly relied upon by the Counsel for the respondents as justifying that even after the Estates Land Act, Orathur padugai was treated as a separate village. Ex. B-20 series are receipts granted by the Receiver, Tanjore Palace Estate to the father of the defendants ranging from 1930 to 1935 for having received payment of rent in respect of lands in Orathur village in Pannimangalam vattam. Ex. B-27 series, B-22 series and B-10 series are similar receipts where description in the above manner that the village of Orathur is situated as a village in Pannimangalam vattam are contained. B-9 series and B-11 series contain similar descriptions. The other receipts are, Exs. B-19, B 25 and B-28. The Receiver of the Tanjore Palace Estates executed conveyances of kudivaram rights after the passing of

(1) (1923) 45 M.L.J. 199
=18 L.W. 169.

the Amending Act XVIII of 1936 to the various tenants and in those documents Orathur padugai is treated as a separate village. They are Exs. B-6 and B-31 to B-33.

Under the decree in O. S. No. 44 of 1932 on the file of the Sub-Court, Madurai, a receiver had been appointed for the management of the Tanjore Palace Estate and that receiver auctioned out to the highest bidder permission to cultivate the lands in the various villages and thereafter muchilikas had been executed by the highest bidders for permission to cultivate. Notice of auction sale of lease had been printed and published. Ex. A-130 is the list of proclamation of sale of lease of lands conducted by the receiver and in that document Orathur padugai is treated as a separate village. The names of the old lessees are also given in the last column. Similar auction notices are Exs. A 132, A-135, A-138, A-137, A-140 and A-139. In some of these sale notices Orathur padugai is shown as a separate village situate in Pannimangalam vattam. The lease granted by the receiver in O. S. No. 44 of 1932 on the file of the Sub-Court, Madurai, dealt with this particular village in the same manner. In Exs. B-7 and B-12 Orathur padugai is treated as a separate village. Subsequent notices of auction sale of lease, bidders' list as well as receipts where the village of Orathur padugai is treated as a separate village are Exs. A-142, which is the bidders' list in the auction sale of lease, Ex. B-29 which is a receipt granted by the receiver, Tanjore Palace Estate to the defendant in O. S. No. 30 of 1950, Saminatha Pandaryar and Ex. A-141 which is the notice of sale, Ex. A-143 which is the list of sale proclamation of sale of lands for fasli 1354, Ex. A-144 which is the bidders' list, Ex. A-146 the sale certificate and Ex. B-5 deed of absolute sale of kudivaram rights—all these documents treated Orathur padugai as a distinct village. It is, therefore, contended on behalf of the respondents that during the earlier periods the Adaiyolai muchilikas and subsequently the leases from the Collector of Tanjore as Receiver of the Tanjore Palace Estates and thereafter from the Court receiver show that Orathur was a separate village. We have also receipts from 1917, the D.C.B. accounts, the jamabandi accounts and the individual-war accounts showing that the village of Orathur was treated as a distinct village. From this the inference is possible that even the original grant was of a single village as is seem from the muchilikas. Water cess was always collected from the tenants which is a decisive factor in considering whether the kudivaram right vested in the tenants.

As against this line of argument the appellant has invited our attention to a large body of documents, mainly leases taken from the Receiver of the Tanjore Palace Estates wherein the lessees admit that they are bound to surrender the property at the expiration of the lease period. If the kudivaram right had vested in the tenants there could be no such agreement that the lands would be surrendered at the end of the lease period. So argues the learned Counsel for the appellant. There are also recitals in the lease deeds that the lands in question did not form an estate within the meaning of Act I of 1908. As a typical instance reference may be made to Ex. A-158 dated 7th October, 1909, which is a counter lease by one of the parties to the present litigation to the Receiver of Tanjore Palace Estates for a period of seven years from fasli 1319 to 1325 at the rate of Rs.55-8-0 per fasli. Paragraphs 12, 16 17, 21 and 23 of this document are important. In paragraph 21 it is stated that the lease does not come within the definition of the word "Estate" under the Madras Act I of 1908. Recitals in similar leases such as Ex. A-159 paragraph 22, paragraph 25 in Ex. 119 dated 24th July, 1919 paragraphs 16, 17, 25, 28, 29, 31, 33 of Ex. A-162 dated 9th February, 1923 and paragraphs 16, 17, 25 28 and 31 of Ex. A-163 dated 25th September, 1923 are relied on for showing that the lessees agreed to surrender their leasehold rights at the expiry of the stipulated period

and also for showing that they contained expressions that both the warams are vested in the landlord. In Ex. A 131 the description of the property is to the effect that the land belongs to the Tanjore Palace Estate which possesses both the warams and that it does not come within the definition of an estate under Act I of 1908. Particular stress is laid on the fact that the lessees are some of the defendants in the suits. There are other exhibits wherein the tenants admit that both the warams are vested in the Tanjore Palace Estate and also that the lands do not come within the purview of Act I of 1908. They are Exs. A-135, A-137, A-139, A-141, A-143 and A-144. Learned Counsel for the appellant points out that special importance should be attached to the agreements contained in documents subsequent to 1936 wherein the tenants have admitted that the lands do not come within the ambit of Act I of 1908 for the reason that if in fact they had occupancy rights at least after the passing of the Amending Act XVIII of 1936 it would be impossible to have such recitals in the various documents. The answer given by the respondent's Counsel is that in most of these sales the bidders are the old tenants and they would not have cared about what recitals were contained in the lease deed so long as their possession on lease was not disturbed. In this connection Mr. T. M. Krishnaswami Iyer has analysed the various documents to show that one and the same individuals continued to be the purchasers at the various auctions; for example Ganes Iyer defendant in O. S. No. 78 of 1949 and respondent in A. S. No. 279 of 1952 is a party to Exs. B-10, B-11 and B-12 and he has proved Exs. A-130, A-132, A-135 A-137, A-139, A-141, A-143 and A-144 as D. W. 2. Similarly Sevu Servai defendant in O. S. No. 79 of 1949 and respondent in A. S. No. 264 of 1952 is connected with Exs. B-18 and B-19 and is a purchaser in auction-sale evidenced by Exs. A-130, A-132, A-135, A-137, A-139, A-141 and A-143 and it has to be remembered that Kathan Ambalagaran is the elder brother of Sevu Servai whose name appears in some of these transactions. Similarly Singara Solagar defendant in O. S. No. 80 of 1949 and respondent in A. S. No. 265 of 1952 is connected with Exs. B-20 and B-21 and is the auction-purchaser of the leases in Exs. A-130, A-132, A-137 A-139, A-141, A-143 and A-144. He was examined as D. W. 4. Nataraja Pillai and others, defendants in O. S. No. 81 of 1949, respondents in A. S. No. 266 of 1952 are connected with Exs. B-22 and the auction sales evidenced by Exs. A-130, A-132, A-135, A-137, A-139, A-141 and A-143. Nataraja Pillai was examined as D. W. 3. Srinivasan Pillai defendant in O. S. No. 21 of 1950 and respondent in A. S. No. 269 of 1952 is a lessee of one acre 10 cents of land in S. No. 38 and is the purchaser in auction evidenced by Exs. A-130, A-132, A-135, A-137, A-139, A-141 and A-143. Sivasami Thevar and Vadivelu Thevar are defendants in O. S. No. 25 of 1950, respondent in A. S. No. 272 of 1952 and are connected with the auction sales evidenced by Exs. A-130, A-132, A-135, A-137, A-139, A-141 and A-143. Kumaraswami Manniar defendant in O. S. No. 24 of 1950 and respondent in A. S. No. 271 of 1952 is connected with the auction sales evidenced by Exs. A-137, A-139 and A-141 and A-148. Sivasankara Udayar and Ramu Pillai defendants in O. S. No. 77 of 1949 and respondents in A. S. No. 224 of 1951 are connected with auction sales evidenced by Ex. A-144. Thus it will be seen from the above enumeration of the bidders' list that at one and the same auction any of these tenants had bidden and purchased portions of the lands for cultivation on lease but the important factor to be noticed is that for a long time either the same individual or his predecessors have been purchasing the same lands at the auction. There is therefore some justification for the arguments of the learned Counsel that the tenants did not care what the recitals in the lease deeds they were executing were so long as the lands continued to be in their possession and cultivation. As can be gathered from the judgment of the Judicial Committee in

Buchayya v. *Raja Parthasarathy Appa Rao* (1) which confirmed the decision of this Court such admissions by the tenants should not be taken to be absolutely binding on them. The documents referred to above also show the continuous occupation of the lands by the defendant.

The next argument of Mr. T. M. Krishnaswami Iyer is that assuming Orathur padugai is not a complete village in itself but is part of a bigger village still under the amendment of 1936 it is an estate. Ex. B-8 is the Record of Rights Register relating to Inam Pannimangalam village prepared in the year 1935 and according to that there can be no doubt that the entire Pannimangalam is a whole inam village. Under the heading " Situation of the village and its hamlets " it is stated that the village lies in the Vennar Delta, ten miles north east of Mannargudi and that it has no hamlets. Though in the second paragraph it is stated that the village is not governed by the provisions of the Madras Estates Land Act such a description was given before the Amending Act of 1936 came into force. Items 32 to 38, 41, 42, 43, 46 48 and 75 to 81 in Ex. B-8 are the suit lands and it is seen from the entries in column 8 *viz.*, " name of the landholder " that except a very few items, the entire land is owned and held by the Tanjore Palace Estate. With regard to the remaining lands some are held by a temple to which they have been dedicated, and the rest by the owners who are the purchasers from the Receiver of the Tanjore Palace Estate. In C.M.P. No. 8435 of 1955 we have admitted a sale deed dated 29th March 1932 executed by one of the claimants to the Tanjore Palace Estate in favour of the Daivasigamani Udayar. The vendor is described as landlord. That being the case it must be deemed that the whole village was a whole inam village at the time of the grant. We have also to remember that the East India Company could have granted only the melwaram right for it could not be imagined that the Company would have cultivated the lands as such. So whatever might have been the nature of the holding prior to 1862 the grant during that year could not be anything but only of the melwaram. Ex. B-35 is the proceeding of the Settlement Officer IV Tiruchirapalli and it relates to inam Pannimangalam village. The opening sentence in the order of the Settlement Officer is :—" This is an entire inam village in Mannargudi Taluk, Tanjore District " and in paragraphs 4 and 5 of the Order the Settlement Officer discusses the question *in extenso* and comes to the conclusion that the village is an estate under S. 3 (2) (*d*) of the Estates Land Act. In the concluding portion of the order it is stated that the oral and documentary evidence in the case clearly proves that this village has become an estate by virtue of the amended Act of 1936. It is also seen that the customary rents alone were collected from the tenants and not the actual rents even from very early times. See the rent fixed in Ex. A-12.

The argument of the learned Counsel for the appellant is that the grant is of a minor inam to which the Amending Act of 1936 will not apply because according to him only portions of the 199 villages were given and that there was no grant of the whole inam as such. If that is so, S. 3 (2) (*d*) of the 1908 Act cannot apply. We have already dealt with the question regarding the existence of other land holders in Ex. B-8. In our view Ex. B 8 relates to the whole inam village.

As an alternative argument learned Counsel for the appellant puts forward the contention that assuming that Orathur padugai may be termed to be an estate under S. 3 (2) (*d*) of the Act still the question has to be decided as to whether the lands in question are ryoti lands or private lands. According to him the preponderance of documentary evidence showing the course and conduct and the dealings for over a hundred years can point only to one inference and that is that at no time were the lands considered as ryoti

(1) 44 Mad. 856=14 L.W. 168 (P.C.).

lands. Reference was made to Ex. A-147 in this connection. It has already been stated that Ex. A-128 and A-129 cannot refer to the suit lands and in regard to Ex. A-147 though the words *Ekabogam thottam* and proprietor appear, one has to remember that the estate formed part of the Raj and the subsequent course of conduct indicates no such conclusion. In *Naina Pillai Maracair* v. *Ramanathan Chettiar* (1), the expressions *rokhaguthagai miras* and *ekabogam* villages are stated to mean that it was a *rokhaguthagai* village and that all the lands in the village were the property of one proprietor. Founding his argument on these expressions in that judgment, Mr. Kesava Ayyangar wants the Court to infer that because *ekabogam thottam* is used in Ex. A-147, the entire lands must be deemed to be under the sole proprietorship of the land-holder. There may be something to be said for this argument but Ex. A-147 is a century and a quarter old and even though there were some recitals of that kind in 1830, subsequent to 1862 there is nothing to show that such a proprietorship vested in the grantees from the Crown. It is next urged that in Ex. B-8 under column 8 "name of the land-holder" while the name of Kalidasa Iyer who was the Receiver of the Tanjore Palace Estate is given, in column 9 "name of the ryot and where there is no ryot, name of the occupier" there are no entries at all. That being the case we are asked to say that at least with respect to such lands both the warams vested in the owner. But with regard to other lands where the name of the land-holder is given as Raja Sri Pratapa Simha Raja Sahib in column 9 the names of the ryots have been given. The contrast according to the appellant is significant, and what is urged is that under S. 167 of the Estates Land Act there must be a presumption as to the correctness of the record-of-rights. It is also argued that in the Land Register, Ex. A-134 in column 7, "Whether Tanjore Palace Estate has melwaram right only or both the melwaram and the kudiwaram the entry is both the warams and the entry against the column, "Number and name of Pattadar or inamdar" is

"The cases in which the Tanjore Palace Estate has not kudiwaram rights shall be entered as the Tanjore Palace Estate."

We do not think that these documents are of any use in considering the question whether the lands in question are private lands. There is a distinctive difference between the owner having both the warams vested in him and the zamindar keeping some of the lands as his domain or private lands the nature of which has been described in the judgment of Wadsworth, J., in *Jagageesam Pillai* v. *Kuppammal* (2), where despite similar indications it was held that after 1936 the village became an estate.

We may now note the various documents on which the appellant's Counsel attempted to lay the foundation for his arguments regarding the private character of the lands in question. But in our opinion they do not afford any basis for a definite conclusion. A group of documents such as Exs. A-5, A-8, A-12 to A-60 ranging over a period from 1870 to 1879 styled as Adaiolai muchilikas containing agreements were prominently brought to our notice to show that the transactions in those documents were such as would be between an ordinary lessor and a lessee. Of them in Ex. A-6, dated 4th September 1870, recitals as those contained in an ordinary lease regarding payment, of rent, ownership of the lessor and the liability of the lessee to surrender the lands at the expiry of the lease period are contained. In Ex. A-7 also there are similar provisions. Ex. A-8 shows that the lands were taken on lease for the purpose of grazing cattle and cutting grass for a period of five years. In a like manner there are recitals in Exs. A-12 and A-13. It may be that to some extent the recitals in these leases support the

(1) I.L.R. 47 Mad. 337=19 L.W. 259 (P.C.).

(2) I.L.R. 1946 Mad. 687=59 L.W. 151.

case of the appellant but the fact remains that the grant was of the whole inam village and viewed in that light there will be great difficulty in accepting the contention that the lands in question are private in nature. None of these arguments show that if the village is an estate the lands in question are private lands.

We are then called upon by the learned Counsel for the appellant to consider the various leases ranging from 1895 till 1945 evidenced by Exs. A-160, A-152, A-153, A-154, A-155, A-158, A-99, A-104, A-159, A 106, A-109, A-110, A-161, A-170, A-118, A-119, A-162, A-163 and A-130. Of these leases Exs. A-116, A-152, A-153, A-154 and A-155 are between 1895 and 1908 and therefore prior to the Estates Land Act of 1908 containing covenants and agreements that are found in an ordinary lease with reference to private property. Ex. A-158, dated 7th October, 1909, which came into existence very soon after the passing of the Estates Land Act (I of 1908) contains a statement in paragraph 21 that the lands leased do not come within the definition of the word "estate" under the Madras Act I of 1908. In Ex. A-99 there is a condition that at the expiry of the lease period the lessee shall put the estate in possession of the landholder. Ex. A 104 is a lease which was granted after obtaining the orders of the Court regarding the granting of the lease and at the bottom of this document there is an endorsement by the receiver addressed to the Karnam, Pannimangalam vattam. There is also the direction of the Subordinate Judge that the lease of the land may be resold by the Revenue Inspector after the Court was appraised of the fact that the sale may be confirmed in the name of one Rasoo Udayan the highest bidder. In Ex. A-159, Cl. 22 is to the effect that the lease land did not come under the definition of the word 'Estate' under the Madras Act I of 1908. The sale to the highest bidder as is seen from the bidder's list in Ex. A-104 is confirmed and there is also the order of the Subordinate Judge at the foot of the document. See also Ex. A-109, sale proclamation and sale account of lease of lands. The auction-sales of the lease-hold rights similar in character are mentioned in Ex. A-116, dated 12th February, 1916, Ex. A-161, dated 16th July, 1917, Ex. A-117, dated 21st April, 1919, Ex. A-118, dated 30th December, 1919 (with regard to the right to fish in the Palaya Koranjara), Ex. A-119 dated 24th July, 1919 (where the land is described as private punja). In some of them there are clauses to the effect that the lease lands do not come within the definition of 'Estate' in the Madras Estates Land Act I of 1908 and there are also agreements to surrender the leasehold rights after the expiry of the term of the lease. Some of the bidders' lists contain endorsements by the Court confirming the bid. The preamble portion of Ex. A-162, dated 9th February, 1923, states that the land belongs to the Tanjore Palace Estate with rights to both the warams both previously and also at the time of the leasing of the land. Particular stress is laid on such a recital to show the conduct and consciousness of the landlord and the tenants in 1923 to the fact that no occupancy rights vested in the tenant at all. Ex. A-163, dated 29th September, 1923, is another lease containing clauses relating to the surrender of the land after the expiry of the lease period and also to the non-applicability of the provisions of the Estate Land Act. There are also other clauses in this document such as would be found in an ordinary lease under the Transfer of Property Act. In addition to these even after the Madras Act XVIII of 1936 was passed there have been leases: Ex. A-130, dated 8th Marth 1938, which is the notice of auction sale of lease by the receiver. When the receiver applied to the Court on the 7th of November, 1936, for permission to recognise certain tenants as kudiwaramdars the District Judge of West Tanjore passed an order on 18th November, 1936, that before granting occupancy rights the receiver should satisfy himself thoroughly in each case an application is made, that the

tenant is entitled to such rights under the law and that the previous permission of the Court should also be obtained. Permission to the receiver to confer kudiwaram rights on certain tenants was accorded only on these conditions. The only inference that can be drawn according to the learned Counsel for the appellant from the above documents is that prior to the Act of 1936 no kudiwaram right had vested in the tenant at all but it was considered necessary by the receiver to get permission of the Court to grant kudiwaram rights to the tenants. Therefore, there was no question of Orathur padugai being considered an estate under Act I of 1908. Subsequent dealings by the receiver were also pointed out as explanatory of the way in which the rights existed prior to 1936 and a number of documents relating to them were referred to. It is not necessary to consider in any detail the relevant portions of the various documents relating to transactions subsequent to 1936 except to note that in some of them there are statements to the effect that the Tanjore Palace Estate has right to both the warams, and that the lands do not come within the definition of the word 'Estate' under the Estates Land Act (I of 1908). Exs. A-135, dated 27th February, 1940, A-136, 137, A-138, A-139, A-140, A-141, A-142, A-143, A-144 and A-143 evidence transactions after 1936 where recitals are contained to that effect. Learned Counsel for the appellant strenuously argues that there is no question of any occupancy rights being vested in the tenants at all. As stated already, Exs. B-2 to B-29 are receipts granted to the various tenants during a long period and though some of them relate to years prior to 1936 a large majority of them are acknowledgments of payments of rent subsequent to 1936. It is seen that Exs. B-1 is dated 18th January, 1936 and Ex. B-29, is of the year 1945. How payments of rent on the conditions mentioned in these receipts could be justified if lands in question are part of an estate could not be properly explained according to the learned Counsel for the appellant, except on the hypothesis that the tenants had during this period admitted that both kudiwaram and melwaram vested in the owner of the land. The respondent's Counsel counters by inviting our attention to the fact that in Ex. A-160 which is as early as 6th May, 1895 and the subsequent lease-deeds Exs. A-161 and A-162 the tenant has agreed to repair the channels which irrigate the lands, he has taken on lease and maintain them in good condition always and also pay water cess if necessary. Such a state of things would not be explainable unless it be that the tenant has kudiwaram right. The observations of Satyanarayana Rao, J., in *Periannan v. A. S. Amman Kovil* (1), where the learned Judge says at page 106 that if the lands are private lands repairs would be effected by the landlord are relied on. That not being the case here the contrary position should be accepted here. That padugai lands cannot be treated as ryoti land is evidence from the statements contained in the decision in *Sethu Chettiar v. Sarangapani Ayyangar* (2), where Chandrasekhara Aiyar, J., expressed the opinion that even though such lands may not be part of the river bed they may form part of the river bank in which case also as in the case of river beds the lands cannot come within the definition of ryoti lands. The respondent also contends that the fact that in some of the lease deeds and receipts both the warams are mentioned as belonging to the landlord does not necessarily mean that such lands are private lands though in all private lands the landholder may own both melwaram and kudiwaram but it is possible to have ayan lands having such descriptions: *Vide* the observations of Viswanatha Sastri, J., in *Periannan v. A. S. Amman Kovil* (1) (at page 110). It has also to be remembered that conveyancing in these areas has not reached that level of perfection where terms can be understood in a scientific manner. We are inclined to think that there is some force in

(1) (1952) 1 M.L.J. 71=64 L.W. Suppt. 1 (F.B.).
(2) (1945) 2 M.L.J. 380.

this contention. See also the observations of Krishnaswami Nayudu, J., in *Govindaswami Naidu* v. *T. P. Devasthanam* (1).

It is next urged that under Ex. B-6 the receiver himself transferred the kudiwaram right to the tenants which could not be the case if no such right vested in the landlord and the appellant purchased the properties subject to the sale made by the receiver and pattas granted as evidenced by Exs. B-30, B-31 and B 33. The receiver himself has made a distinction between lands where the occupancy rights existed and those in which there were no such rights. We are not much impressed by these arguments for unless it be as a basis for estoppel any acquiescence by the tenants in certain actions of the landlord would not take away from the tenants the benefit conferred on them by Act XVIII of 1936. The fact that susequently the villages were treated as estates within the meaning of the term under the Act even if some of the documents justify that conclusion, would not make them an estate because the subsequent treaty cannot put an end to the nature of the lands under the original grant. So argues the learned Counsel for the appellant and relies upon *Janakirama* v. *Gopalan* (2), and *Chinna Basavayya* v. *Satya Bhigna Theerthaswamulu Varu* (3), and also the observations of the Supreme Court in *The District Board, Tanjore* v. *Noor Mahmed Rowther* (4). We do not think that these decisions help us in any manner for any conclusion to be arrived at on the facts of the case.

Learned Counsel for the appellant points out that in examination-in-chief, P. W. 1 states that the lands were iruwaram lands and that Orathur padugai land was divided on iruwaram basis. We do not think that this statement of P. W. 1 carries the case of the appellant any further. On the other hand Mr. T. M. Krishnaswami Iyer for the respondents has referred to S. 3, Sub-Cl. 10 (b) of the Estates Land Act where private lands is defined and what is private land within the meaning of Sub-Cl. (d) of S. 3 (2) is contained in Sub-Cl. (b) of Cl. 10 and under S. 185 of the Act the presumption is that the lands in an inam village are not private lands and the case has to be decided on evidence adduced to hold whether a particular land is private land or not. What is private land is explained in the headnote of the Full Bench decision *Periannan* v. *A. S. Amman Kovil* (5), which is to the effect that mere proof, that the landholder is the owner of both warams does not necessarily mean that it is private land. Passages at pages 81, 89, 90, 97, 105 and 108 were also relied upon. We are satisfied that on the evidence there is no question of the lands being private.

We have already referred to the fact that though the leasing rights were auctioned periodically, one and the same tenant continued to bid at the auction and become the lessee and it did not matter to him so long as he was allowed to occupy the lands whether an annual auction was held or not. This is evident from the evidence of the Karnam of Pannimangalam village examined as D. W. 1. His testimony is to the effect that Orathur padugai is an inam village and that the tenants continued to cultivate the land without break or a change and that some of them resided in the village itself while the rest lived in neighbouring villages. D. W. 2, defendant in O. S. No. 78 of 1949 speaks to the continuous possession of himself and his father from a very long time. P. W. 7, T. N. Kalidasa Iyer, who was receiver of certain lands belonging to the 31st defendant in O. S. No. 3 of 1919 is not able to give any specific explanation and P. W. 2 states that except defendants in O. S. No. 75 of 1949 no one used to bid at the auction. P. W. 4's evidence is also significant. In these circumstances we are inclined to agree

(1) (1954) 2 M.L.J. 702 at 706 =67 L.W. 1000.
(2) (1951) 2 M.L.J. 272=64 L.W. 732.
(3) (1950) 2 M.L.J. 607=69 L.W. 921.
(4) (1952) 2 M.L.J. 586=65 L.W. 98 at 102 (S.C.).
(5) (1952) 1 M.L.J. 71=64 L.W. Suppt. 1 (F.B.).

with the learned Counsel for the respondent that the fact that there were periodical auctions of the right to cultivate lands on lease and that some of the tenants purchased that right did not necessarily deprive the tenants of the occupancy rights which they were enjoying.

The above discussion disposes of almost all the points elaborately argued on both sides and our conclusion, therefore, is that with regard to the nature of the lands in question prior to 1856 no definite conclusion is possible but that the grant of 1862 so far as the village of Pannimangalam is concerned, is of the whole inam village which became an estate under the Madras Act XVIII of 1936. Exhibit B 8 is a very important document evidencing that no acceptable explanation has been or could be offered by the appellant's Counsel about that. In addition the proceeding of the Settlement Officer, Tiruchirapalli, evidenced by Exhibit B-35 treating Pannimangalam as an entire inam village cannot seriously be disputed. We have, therefore, to hold that the plaintiff's suits are not maintainable.

With regard to the onus of proof a distinction has to be made as regards eviction and the jurisdiction to maintain the suit. This distinction is brought out in the decisions in *Venkatarama* v. *Venkayya* (1), *Virabhadrayya* v. *Sonti Venkanna* (2), *Ramamurthi Sastri* v. *Ammanna* (3) and *Lakshmanna* v. *Venkateswaralu* (4). We are not satisfied that the learned Judge has erred in thinking that the onus has not been discharged. If we hold that the grant of 1862 was with regard to a whole inam village and that in any event by the Madras Act XVIII of 1936 the village became an estate within the meaning of the Act there is no necessity to deal separately with the four survey numbers, S. Nos. 34, 1, S. Nos. 35, 37 and 43 as with regard to these items the case of the plaintiff stands on a more slender footing.

In the result the appeals fail and are dismissed with costs. Advocate's fee of Rs. 75 in each appeal.

V. C. S.

(1) I.L.R. 1954 Mad. 715=67 L.W. 354 (F.B.).
(2) (1913) 24 M.L.J. 659.
(3) (1950) 2 M.L.J. 442 at 443, 447 =63 L.W. 809.
(4) I.L.R. 1950 Mad. 567=62 L.W. 684 (P.C.)

V. D. YESUDASAN and others v. GURUSAMY.

Somasundaram and Ramaswami Gounder, JJ.

Crl. R. C. No. 724 of 1956.

(Crl. Rev. Petn. No. 678 of 1956).

Petition (disposed of on 14—2—1957) under Ss. 435 and 439 Crl. P. C., 1898 praying the High Court, to revise the order of the Sub-Divl. Magistrate, Koilpatti, dated 11—7—1956 in Crl. M. P. No. 87 of 1956 in C. C. No. 96 of 1956.

Crl. P. C., S. 132—Complaint against Police Officials for offences under Ss. 143 and 144, I. P. C.—Preliminary objection of sanction under S. 132, Crl. P. C.—Scope.

Where in a complaint against certain police officials for offences under Ss. 143, 144 and 225-B, I. P. C., a preliminary objection was raised that S. 132 Crl. P. C., would be a bar to the prosecution against them since they were acting in discharge of their duties, namely dispersing an unlawful assembly, while it was contended for the complainant that till it was proved that there was an unlawful assembly the question of sanction would not arise and therefore the onus would be on the accused to show that they were acting in the discharge of their duties in dispersing an unlawful assembly,

Held, The allegations in the complaint read with what is stated in the complainant's sworn statement really suggest that the police officers must have come there for the purpose of dispersing the members of the unlawful assembly. It is, therefore, clearly established that the petitioners were acting under Chapter 9, Crl. P. C. and therefore, they are entitled to the protection under S. 132 Crl. P. C., as the allegations in the complaint itself show that the police officers had come there in discharge of their duties to disperse an unlawful assembly.

Mr. *A. S. Sivakaminathan* for Messrs. *V. T. Rangaswami Aiyangar* and *R. Santanam* for Petrs.

Messrs. *S. Mohan Kumaramangalam* and *K. V. Sankaran* for Respt.

ORDER.

(Delivered by Somasundaram, J.):—

Petitioners 1 to 3 in Crl. M. P. No. 87 of 1956 (A. 5 to 7 in C. C.

(1981) 4 Supreme Court Cases 226

(BEFORE Y. V. CHANDRACHUD, C. J. AND S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.)

VINODKUMAR SHANTILAL GOSALIA .. Appellant;

Versus

GANGADHAR NARSINGDAS AGARWAL AND OTHERS .. Respondents.

Civil Appeals Nos. 1440-1443 (N) of 1970†, decided on August 26, 1981

Act of State — Conquest, annexation or cession — Rights accruing under laws prevailing in the conquered, annexed or ceased State — Held, become enforceable only on, and from the date of, recognition of the same by the new State — Continuation of old laws itself not significant for recognition unless adopted by the new State — Period between the dates of annexation and recognition is one of interregnum — Old laws and rights accruing therefrom, if falls within the period of interregnum, would lapse being in absence of recognition — International Law — Goa, Daman and Diu (Administration) Act (1 of 1962), Section 5(1) — Goa, Daman and Diu (Laws) Regulation (12 of 1962), Section 4 — Portuguese Colonial Mining Laws, Articles 119 and 120 — Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957), Sections 4 and 21 — Mineral Concession Rules, 1960, Rules 24(3) and 38 — Constitution of India, Article 240

In 1959, when Goa was under Portuguese rule, respondent purchased right to mineral concession (Titles of Manifest) in certain area in Goa from the original grantee of the Manifests. On September 4, 1959 respondent 1 made applications in respect of the Manifests to the Governor-General of Portugal for the grant of mineral concession and paid the prescribed fees. However, the territories of Goa, Daman and Diu under the Portuguese rule were annexed by the Government of India by conquest on December 20, 1961 and these territories became a part of India with effect from the date of their annexation. Thereafter, the Goa, Daman and Diu (Administration) Act (1 of 1962) was enacted and enforced w.e.f. March 5, 1962. By virtue of the Goa, Daman and Diu (Laws) Regulation, 1962, the Mines and Minerals (Regulation and Development) Act, 1957 and Mineral Concession Rules, 1960 were also made applicable to Goa, Daman and Diu with effect from October 1, 1963. At that time the applications of respondent 1, as also of others, were pending consideration for the grant of mineral concessions. In 1964 the Mining Engineer, Department of Goa, Daman and Diu informed respondent 1 as well as other applicants that since the applications had not been granted prior to October 1, 1963 when the Mineral Rules came into force, those applications were deemed to have lapsed but they could submit fresh applications in accordance with the Mines and Minerals Act and the Mineral Rules which would be considered on merits. Subsequently, the appellant applied to the Government of Goa for a prospecting licence in respect of the areas covering the area for which respondent 1 had applied for. In pursuance of the Central Government's recommendation the Government of Goa granted the appellant a prospecting licence on February 26, 1966.

†From the Judgment and Order dated February 20, 1970 of the Delhi High Court in Civil Writs Nos. 712, 712-A, 712-B and 712-C of 1968

On August 16, 1966 respondent 1 made fresh applications for mining leases in respect of the very same area for which he had applied during the Portuguese regime and in respect of which the Government of Goa granted a prospecting licence to the appellant. The question for determination was whether, prior to the annexation of Goa by the Government of India, respondent 1 had acquired the right to obtain a mining lease from the Portuguese Government and, if so, whether after the annexation of Goa, the Government of India recognised that right and is therefore bound to grant a mining lease to respondent 1 in terms of the applications made by him in that behalf to the Portuguese Government. Deciding against respondent 1 the Supreme Court

Held:

In cases of acquisition of a territory by conquest, rights which had accrued under the old laws do not survive and cannot be enforced against the new Government unless it chooses to recognise those rights. In order to recognise the old rights, it is not necessary for the new Government to continue the old laws under which those rights had accrued because, old rights can be recognised without continuing the old laws as, for example, by contract or executive action. On the one hand, the mere continuance of old laws does not imply the recognition of old rights which had accrued under those laws. Something more than the continuance of old laws is necessary in order to support the claim that old rights have been recognised by the new Government. That "something more" can be found in a statutory provision whereby rights which had already accrued under the old laws are saved. Insofar as the continuance of old laws is concerned, as a general rule, they continue in operation after the conquest, which means that the new Government is at liberty not to adopt them at all or to adopt them without a break in their continuity or else to adopt them from a date subsequent to the date of conquest. (Para 28)

Neither Section 5 of the Administration Act nor Section 4(2) of the Regulation amounts to recognition by the new sovereign of old rights which arose prior to December 20, 1961 under the laws which were in force in the conquered territory, the only rights protected under Section 4(2) aforesaid being those which accrued subsequent to the date of enforcement of the Administration Act, namely, March 5, 1962. The period between December 20, 1961 when the territories comprised in Goa, Daman and Diu were annexed by the Government of India, and March 5, 1962 when the Administration Act came into force, was a period of interregnum. During that period, the old laws of the Portuguese regime were not in operation in the conquered territory of Goa. Secondly, the rights recognised under sub-section (2) of Section 4 of the Regulation did not extend any protection to the rights which had accrued prior to December 20, 1961 but envisaged only such rights which had come into being after March 5, 1962 by reason of the laws continued by the Act and the Regulation.
(Paras 27 and 29)

Apart from that position, the Government of India never recognised, either during the interregnum or thereafter, any rights on the basis of titles of manifest obtained by any person during the Portuguese rule. Far from there being any recognition, there is a clear indication that the Government decided not to recognise those rights. For two years after the order of the Government of India dated September 16, 1964 stating that all applications for mining concessions made to the Portuguese Government on the basis of

titles of manifests shall lapse, respondent 1 did not take any steps at all for the recognition or re-assertion of his rights and ultimately he made fresh applications after the appellant had obtained a mining lease. Thus, no right had accrued in favour of respondent 1 under the Portuguese law and correspondingly, no liability or obligation was incurred by the Portuguese Government which the Government of India would be under a compulsion to accept by reason of the provisions contained in Section 4 of the Regulation. (Para 29)

The applications for mineral concessions made by respondent 1 on the basis of Title of Manifests of 1959, therefore, had lapsed. Even assuming that those applications were pending when the Mines and Minerals Act and the Mineral Rules were extended to Goa on October 1, 1963, respondent 1's applications could only be decided in conformity with the Act and the Rules. Section 4 of the Act and Rule 38 of the Rules support this view. The Act and the Rules having been made applicable to the territory of Goa on October 1, 1963, and the supposedly pending applications of respondent 1 not having been granted within a period of nine months, they must be deemed to have been refused under Rule 24(3) of the Mineral Rules. (Para 32)

Pema Chibar v. *Union of India*, (1966) 1 SCR 357: AIR 1966 SC 442: (1967) 1 SCJ 35, *followed*

Vajesingji Joravarsingji v. *Secretary of State*, AIR 1924 PC 216: 51 IA 357; *Secretary of State* v. *Sardar Rustam Khan*, 68 IA 109, 124: AIR 1941 PC 64; *Dalmia Dadri Cement Co. Ltd.* v. *C. I. T.*, 1959 SCR 729: AIR 1958 SC 816: 1958 SCJ 1041; *State of Saurashtra* v. *Memon Haji Ismail Haji*, (1960) 1 SCR 537: AIR 1959 SC 1383; *Jagannath Agarwala* v. *State of Orissa*, (1962) 1 SCR 205: AIR 1961 SC 1361; *State of Saurashtra* v. *Jamadar Mohamad Abdulla*, (1962) 3 SCR 970: AIR 1962 SC 445: (1962) 2 SCJ 70; *Promod Chandra* v. *State of Orissa*, 1962 Supp 1 SCR 405: AIR 1962 SC 1288: (1963) 1 SCJ 1 and *State of Gujarat* v. *Vora Fiddali*, (1964) 6 SCR 461: AIR 1964 SC 1043, *relied on*

Virendra Singh v. *State of U. P.*, (1955) 1 SCR 415: AIR 1954 SC 447: 1954 SCJ 705, *overruled*

J. Fernundes & Co. v. *Deputy Chief Controller of Imports and Exports*, (1975) 1 SCC 716: (1975) 3 SCR 867: AIR 1975 SC 1208, *explained*

Mayor of the City of Lyons v. *East India Company*, (1836-37) 1 Moore's IA, 175; *R.* v. *Vaughan*, (1558-1774) All ER Rep 311; *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, 1953 SCR 1188: AIR 1953 SC 394; *Sree Rajendra Mills* v. *I. T. O.*, AIR 1958 Mad 220 and *Sebastlao* v. *State*, AIR 1968 Goa 17, *referred to*

Practice and Procedure — Court cannot take a hypertechnical view of self-imposed limitations when important rights are involved — Constitution of India, Article 226 (Para 29)

Appeals allowed R-M/5481/C

Advocates who appeared in this case:

S. N. Kacker, Senior Advocate (*Santosh Chatterjee*, *A. K. Panda*, *K. C. Parija* and *G. S. Chatterjee*, Advocates, with him), for the Appellant;

G. L. Sanghi, Senior Advocate (*Vinod Bobde*, *B. R. Agarwala*, *P. G. Gokhale* and *Miss Vasudha Sanghi*, Advocates, with him), for Respondent 1;

M. M. Abdul Khader, Senior Advocate (*Mrs. Shobha Dikshit* and *M. N. Shroff*, Advocates, with him), for Respondents 2 & 3.

The Judgment of the Court was delivered by

Chaudrachud, C. J.—These appeals are by certificates granted by the Delhi High Court under Article 133(1)(*a*) and (*c*) of the Constitution in regard to its judgment dated February 20, 1970 in C. W. No. 712 of 1968.

2. The dispute in these appeals relates to the grant of mining rights in respect of an area situated in the villages of Karanzol and Sonaulim in Goa, the rival claimants being the appellant and respondent 1. Respondent 1 claims preference over the appellant by reason of certain events which happened prior to the conquest and annexation of Goa by the Government of India on December 20, 1961. Before we turn to those events, it would be useful to notice the relevant provisions of the mining laws which were in force in Portuguese Goa.

3. During the Portuguese rule, matters relating to grant, transfer and vesting of mining rights in Goa, Daman and Diu were governed by the "Portuguese Colonial Mining Laws". Under those laws a person could, in stated circumstances, make a "declaration" in writing stating that "he has discovered a mineral deposit". Such a declaration was called a "Mining Manifest" and the person making the declaration was called a "Manifestor". The object of making a Mining Manifest was to acquire mining rights from the Government in respect of the area covered by the Manifest. On verification of the facts stated in the Manifest, the concerned authorities would prepar a "Notice of Manifest", by which was meant "the record in a special book of prospector's declaration, which in a fixed term will ensure the exclusive right to 'concession' of a manifested mining property when such property contains minerals and the manifested land is free". The Notice of Manifest was thus an acknowledgment by public authorities of the authenticity of the Mining Manifest. It was a step-in-aid to the grant of mining rights, since the particular entry in the special book maintained for keeping the record of mining manifests ensured the exclusive right of the manifestor to mineral concession or rights. The Notice of Manifest was followed by the grant of "Title of Manifest" which meant "a certificate in terms of the note of manifest, pertaining to the legal right to concession". The Title of Manifest entitled the manifestor to a "mining concession" under which he was permitted "to explore a mining property and to enjoy thereon all mining rights". The mining concession was "unlimited in duration as long as the concessionaire complied with the conditions which the law and title of concession imposed on him". Article 119 of the Portuguese Colonial Mining Laws provided that a "prospecting licence" was not transferable but by Article 120, a Title of Manifest was transferable by simple endorsement on the original title, duly executed in terms of Article 60.

4. On September 5, 1958 one V. J. Keny of Goa had obtained four Titles of Manifest from the Portuguese Government, being Manifests Nos. 31, 33, 34 and 35 of 1958, in respect of an area admeasuring about 400 hectares. Sometime in 1959, Keny sold those manifests to respondent 1 for Rs. 33,000. The sale was in conformity with the Portuguese laws and was duly attested by a Notary Public in Goa. On September 4, 1959, which was one day before the expiry of a period of one year from the date on which Keny had obtained the Titles of Manifest from the Portuguese Government,

respondent 1 made four applications, one in respect of each manifest, to the Governor-General of Portugal, attaching with each application the relative Title of Manifest, a challan evidencing payment of the prescribed fee for the grant of mineral concession and a challan evidencing deposit of the prescribed mileage fee for demarcation of the area in respect of which the mineral concession was sought. On September 17, 1959 respondent 1 presented four applications attaching to them certain other documents and on September 24, 1959 he paid the balance of the fee prescribed for the grant of mineral concessions.

5. The territories comprised in Goa, Daman and Diu under the Portuguese rule were annexed by the Government of India by conquest on December 20, 1961. By virtue of Article 1(3)(*c*) of the Constitution of India, these territories became a part of India. For the purpose of making provision for the administration of the said territories, the President of India, in exercise of the powers conferred upon him by Article 123(1) of the Constitution, promulgated on March 5, 1962, Ordinance 2 of 1962, called the Goa, Daman and Diu (Administration) Ordinance. On March 27, 1962 the Indian Parliament enacted the Goa, Daman and Diu (Administration) Act, 1 of 1962, replacing the aforesaid Ordinance with effect from March 5, 1962. On the same date, the Parliament enacted the Constitution (Twelfth Amendment) Act, 1962, whereby Goa, Daman and Diu were added as Entry 5 in Part II of the First Schedule to the Constitution, and as clause (*d*) in Article 240 of the Constitution, with retrospective effect from December 20, 1961. Thus, Goa, Daman and Diu became a part of the Union Territories of India with effect from the date of their annexation by conquest.

6. On November 28, 1962 the President, in exercise of the powers conferred by Article 240 of the Constitution, promulgated the Goa, Daman and Diu (Laws) Regulation 12 of 1962. The various Acts specified in the Schedule to the Regulation were extended to Goa, Daman and Diu, one of such Acts being the Mines and Minerals (Regulation and Development) Act, 1957. Section 4 of the Regulation provided for the repeal and saving of laws. By a notification issued by the Lieutenant-Governor of Goa, Daman and Diu under Section 3 of the Regulation, the Mines and Minerals (Regulation and Development) Act, 1957, and the Mineral Concession Rules, 1960, were made applicable to Goa, Daman and Diu with effect from October 1, 1963. We will refer to these as "the Act" and "the Rules" respectively.

7. On the date on which the Act was extended to Goa, Daman and Diu, the applications made by respondent 1 on September 4 and 17, 1959 to the Governor-General of Portuguese Goa were pending consideration for the grant of mineral concessions. Similar applications filed by other persons were also pending on that date. On September 16, 1964, the Mining Engineer, Department of Mines, Goa, informed respondent 1 that since his applications for mineral concessions had not been granted prior to October 1, 1963 when the Rules came into force, the said applications were deemed to have lapsed.

Respondent 1 was asked, if he so desired, to submit fresh applications for grant of mineral concessions in accordance with the provisions of the Act and the Rules which, it was stated, would be considered on merits. It was added that the Government held forth no assurance that the concessions would be granted. Similar communications were sent by the Department of Mines to 55 other persons whose applications were pending before the Portuguese Government when the Act and the Rules came into force. On October 5, 1964, the Secretary of the Goa Mineral Ore Exporters Association made a representation to the Secretary, Industries and Labour Department, Government of Goa, Daman and Diu, requesting that all cases in which applications were made and mineral concession fees were paid prior to October 1, 1963, should be treated by the Government sympathetically and mineral concessions should be granted.

8. On October 17, 1964 the appellant applied to the Government of Goa for a prospecting licence in respect of a total area of 2600 hectares, which included the four areas for which respondent 1 had applied for a mining concession during the Portuguese rule. In September 1965, the Government of Goa decided to grant a prospecting licence to the appellant in respect of the whole area for which he had applied and sought approval of the Central Government to its proposed action, under Section 5(2) of the Act. Since the appellant's application was not granted within the time prescribed by the Rules, it was deemed to have been rejected. But on February 10, 1966 the Central Government, acting under Section 30 of the Act, restored the application of the appellant suo motu and made a recommendation to the Government of Goa that a prospecting licence should be granted to him in respect of an area of 2425 hectares, which included the area in respect of which respondent 1 had applied for a mineral concession to the Portuguese Government in September 1959. In pursuance of the Central Government's recommendation, the Government of Goa granted to the appellant a prospecting licence on February 26, 1966 over an area admeasuring 2425 hectares.

9. On August 16, 1966 respondent 1 made four applications for mining leases in respect of the very same area for which he had applied for mineral concessions during the Portuguese rule and in respect of which the Government of Goa had, as stated above, granted a prospecting licence to the appellant on February 26, 1966. Those applications having been rejected by the Government of Goa on September 29, 1966, respondent 1 filed revision applications to the Central Government which were also rejected in September 1967.

10. In pursuance of the prospecting licence granted to him on February 26, 1966, the appellant applied for a mining lease on May 8, 1967. The State Government having delayed the grant of a mining lease to the appellant, he filed a revision application to the Central Government under Rule 54 of the Rules against the deemed refusal of his application. On

April 20, 1969, the revision application was allowed by the Central Government which directed the State Government to grant a mining lease to the appellant in respect of an area of 918·6050 hectares. This area covers the areas in respect of which respondent 1 was agitating his right to obtain a mining lease ever since the Portuguese rule.

11. In between, upon the rejection of his revision application by the Central Government in September 1967, respondent 1 had filed a writ petition (C. W. No. 712 of 1968) in the Delhi High Court on July 23, 1968 challenging the orders of the Government refusing to grant a mining lease to him in respect of the four areas for which he had applied on August 16, 1966. It was contended in the High Court on behalf of respondent 1 that by virtue of the four Titles of Manifest duly transferred in his favour, he had acquired an indefeasible right to obtain concessions over the four areas in question even prior to the annexation of Goa, that he had presented applications and paid the necessary fees prior to the said annexation and that therefore, the right which had accrued in his favour could not be considered as having lapsed on the annexation of Goa by the Government of India. It was stated on behalf of respondent 1 that it was out of abundant caution that he made fresh applications for mining leases to the Government of Goa after the annexation of Goa. These contentions were refuted on behalf of the appellant on the ground that the applications filed by respondent 1 to the Portuguese Government had lapsed on the annexation of Goa by the Government of India, that no right had accrued in favour of respondent 1 which the Government of Goa, after the annexation of Goa, was under an obligation to recognise and that since the appellant's application for a mining lease was granted, respondent 1 had no right to ask for a lease in respect of the areas which were included in the appellant's lease. The High Court allowed respondent 1's writ petition and quashed the orders dated September 16, 1964, September 18, 1967 and September 29, 1967 whereby respondent 1's applications for mining leases and his revision applications were rejected by the Government. The High Court also quashed the order dated February 26, 1966 whereby a prospecting licence was granted to the appellant and directed the Government of Goa to treat the applications of respondent 1 dated September 4 and September 17, 1959 as still subsisting and to dispose them of in accordance with the findings and observations contained in the judgment. The correctness of the High Court's judgment is questioned in these appeals.

12. The main question which arises for consideration in these appeals is whether, prior to the annexation of Goa by the Government of India, respondent 1 had acquired the right to obtain a mining lease from the Portuguese Government and, if so, whether after the annexation of Goa, the Government of India recognised that right and is therefore bound to grant a mining lease to respondent 1 in terms of the applications made by him in that behalf to the Portuguese Government. The question of recognition of

respondent 1's right by the Government of India will, of course, depend initially upon whether, as a matter of fact, he had acquired the right to obtain a mining lease from the Portuguese Government, which in turn will depend upon the provisions of the Portuguese Mining Laws. The question as to whether the Government of India is bound to grant a mining lease to respondent 1 will depend upon the effect of the laws passed by the Indian legislature after the annexation of Goa, in the matter of continuance of laws which were in force in Portuguese Goa and in the matter of protection of the rights arising under those laws. It, therefore, becomes necessary to notice the relevant provisions of the Goa, Daman and Diu (Administration) Act, 1 of 1962, and of the Goa, Daman and Diu (Laws) Regulation, 12 of 1962, to which we will refer respectively as "the Administration Act" and "the Regulation".

13. The Administration Act replaced Ordinance 2 of 1962, which had come into force on March 5, 1962. The Administration Act, though passed on March 27, 1962, was given retrospective effect from the date of the Ordinance, namely, March 5, 1962. The Administration Act makes provisions relating to appointment of officers, continuance of existing laws until amended or repealed, extension of enactments in force to Goa, Daman and Diu and for allied matters. Section 2(*b*) of the Administration Act provides that "appointed day" means December 20, 1961. That is the date on which the territories comprised in Goa, Daman and Diu under the Portuguese rule were annexed by the Government of India by conquest. Section 5(1) of the Administration Act reads thus:

> *Continuance of existing laws and their adaptation.*—All laws in force immediately before the appointed day in Goa, Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority.

14. The object of passing the Regulation was to extend certain laws to the Union Territory of Goa, Daman and Diu. Section 2(*a*) of the Regulation defines the "Act" to mean an Act or the Ordinance specified in the Schedule to the Regulation. Section 3(1) of the Regulation provides that the Acts, as they are generally in force in the territories to which they extend, shall extend to Goa, Daman and Diu, subject to the modifications, if any, specified in the Schedule. Sub-section (2) of Section 3 provides that the provisions of the Acts referred in sub-section (1) shall come into force in Goa, Daman and Diu on such date as the Lieutenant-Governor may, by notification, appoint. Section 4 of the Regulation, which bears directly on the point at issue, reads thus:

> 4. *Repeal and Saving.*—(1) Any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in Section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area, as the case may be.
>
> (2) Nothing in sub-section (1) shall affect—

(*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder; or

(*b*) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(*d*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Regulation had not been made:

Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction or direction issued, form, bye-law or scheme framed, certificate obtained, patent, permit or licence granted, or registration effected) under any such law, shall be deemed to have been done or taken under the corresponding provision of the Act extended to Goa, Daman and Diu and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act.

15. Shri Kacker, who appears on behalf of the appellant, contends that there was an interregnum between December 20, 1961 when the Government of India annexed Goa, and March 5, 1962 when the Administration Act was brought into force, as a result of which, laws which were in force in Portuguese Goa immediately before the annexation of Goa ceased to apply to that territory with effect from December 20, 1961 until March 5, 1962. It is urged by counsel that by reason of Section 5(1) of the Administration Act, it is only with effect from March 5, 1962 that such laws continued in force in the annexed territory. Since respondent 1 had made his applications for mining leases or mining concessions under the Portuguese law and since that law itself ceased to apply to the conquered territory with effect from the date of conquest, the applications lapsed on that date. Respondent 1, not having made any application after March 5, 1962 under the Portuguese Mining Laws, forfeited his right to ask for mining leases on the basis of those laws. According to Shri Kacker, not only did the applications made by respondent 1 prior to the annexation of Goa cease to have existence on December 20, 1961, but the Manifests of Title which were granted to respondent 1 under the previous mining laws, which might have formed the basis for applying for mineral concessions under the same laws, also came to a termination. This, according to counsel, was much more so with effect from October 1, 1963, on which date the Mines and Minerals (Regulation and Development) Act, 1957, and the Mineral Concessions Rules, 1960 were extended to Goa. In regard to the nature of the right which respondent 1 claimed under the Portuguese law, it is argued by Shri Kacker that the "Titles of Manifest" obtained by respondent 1 under those laws conferred upon him no vested right to obtain the mineral concessions or mining leases. They only enabled him to apply for concessions, since the Title of Manifest under the Portuguese

law was no more than what a prospecting licence is under the Indian law of mining.

16. The argument of Shri G. L. Sanghi in answer to the points made by Shri Kacker runs thus: By virtue of the four Titles of Manifest which were duly transferred in his favour, respondent 1 acquired the right to obtain mineral concessions in respect of the four areas, prior to the annexation of Goa. He had presented the necessary applications within the prescribed period and he had also paid the necessary fees for obtaining mineral concessions. Since respondent 1 was entitled to obtain mineral concessions or mining leases from the Portuguese Government, he would be entitled to obtain such concessions or leases from the Government of Goa also. Though, on the extension of the Act and the Rules to Goa with effect from October 1, 1963, the Portuguese Mining Laws stood repealed by reason of Section 4(1) of the Regulation, the previous operation of the Portuguese Mining Laws so repealed was saved by reason of Section 4(2) of the Regulation. Sub-section (2) also saved anything duly done or suffered under the Portuguese laws, as also the right, privilege, obligation or liability acquired, accrued, or incurred under those laws. Not only that, but sub-section (2) also preserved any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability, which could be instituted, continued or enforced as if the Regulation had not been passed. The applications filed by respondent 1 for the grant of mining concessions were "legal proceedings" within the meaning of Section 4(2) of the Regulation. Since those proceedings were instituted in accordance with the Portuguese Mining Laws on the basis of the right possessed by respondent 1 to obtain mining concessions, he was entitled to continue the proceedings as if the Regulation had not been passed, that is to say, as if the Portuguese Mining Laws continued to be in force in the conquered territory of Goa.

17. Before considering the merits of the respective contentions bearing on the effect of the provisions of the Administration Act and the Regulation, it is necessary to reiterate a well-settled legal position that when a new territory is acquired in any manner — be it by conquest, annexation or cession following upon a treaty — the new "sovereign" is not bound by the rights which the residents of the conquered territory had against their sovereign or by the obligations of the old sovereign towards his subjects. The rights of the residents of a territory against their State or sovereign come to an end with the conquest, annexation or cession of that territory and do not pass on to the new environment. The inhabitants of the acquired territory bring with them no rights which they can enforce against the new State of which they become inhabitants. The new State is not required, by any positive assertion or declaration, to repudiate its obligation by disowning such rights. The new State may recognise the old rights by re-granting them which, in the majority of cases, would be a matter of contract or of executive action; or, alternatively, the recognition of old rights may be made by an

appropriate statutory provision whereby rights which were in force immediately before an appointed date are saved. Whether the new State has accepted new obligations by recognising old rights, is a question of fact depending upon whether one or the other course has been adopted by it. And, whenever it is alleged that old rights are saved by a statutory provision, it becomes necessary to determine the kind of rights which are saved and the extent to which they are saved.

18. In *Vajesingji Joravarsingji* v. *Secretary of State*[1], Lord Dunedin said in an oft-cited passage:

> . . . when a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing . . .

The decision of the Privy Council in *Vajesingji*[1] and the decisions in similar other cases like *Secretary of State* v. *Sardar Rustam Khan*[2] were followed by this Court in *Dalmia Dadri Cement Co. Ltd.* v. *C. I. T.*[3], *State of Saurashtra* v. *Memon Haji Ismail Haji*[4], *Jagannath Agarwala* v. *State of Orissa*[5], *State of Saurashtra* v. *Jamadar Mohamad Abdulla*[6], *Promod Chandra* v. *State of Orissa*[7] and *Pema Chibar* v. *Union of India*[8]. A discordant note was struck by Bose, J. who spoke for the Court in *Virendra Singh* v. *State of Uttar Pradesh*[9], but a 7-Judge Bench held by a majority, Subba Rao, J. (dissenting), in *State of Gujarat* v. *Vora Fiddali*[10] that *Virendra Singh* case[9] was decided wrongly. Five considered judgments were delivered in that case, four of which, on behalf of six learned Judges, affirmed the view of the Privy Council. Mudholkar, J. who delivered a separate judgment concurring with the majority on the point at issue before us, said:

> The rule of international law on which the several Privy Council decisions as to the effect of conquest or cession on the private rights of the inhabitants of the conquered or ceded territory are founded has become a part of the common law of this country. (page 590)

19. We must accordingly proceed on the basis that the right, if any, which respondent 1 had against the Portuguese Government to obtain a mineral concession or a mining lease came to an end with the conquest of

1. 51 IA 357: AIR 1924 PC 216: 48 Bom 613
2. 68 IA 109, 124: AIR 1941 PC 64: 195 IC 769
3. 1959 SCR 729: AIR 1958 SC 816: 1958 SCJ 1041
4. (1960) 1 SCR 537: AIR 1959 SC 1383
5. (1962) 1 SCR 205: AIR 1961 SC 1361
6. (1962) 3 SCR 970: AIR 1962 SC 445: (1962) 2 SCJ 70
7. 1962 Supp 1 SCR 405: AIR 1962 SC 1288: (1963) 1 SCJ 1
8. (1966) 1 SCR 357: AIR 1966 SC 442: (1967) 1 SCJ 35
9. (1955) 1 SCR 415: AIR 1954 SC 447: 1954 SCJ 705
10. (1964) 6 SCR 461: AIR 1964 SC 1043

Goa by the Government of India on December 20, 1961. In the absence of any allegation that the right was re-granted either by a private agreement or by executive fiat, the sole question for our consideration is whether the Government of India is under an obligation to recognise the right, if any, of respondent 1 by reason of a statutory provision which saves that right.

20. The first limb of Shri Sanghi's argument on behalf of respondent 1 is that the laws which were in force in the annexed territory continued to be in force therein even after the annexation of that territory by the Government of India. According to the learned counsel, nothing was required to be done by the Indian legislature to continue those laws in force inasmuch as they continued to operate on their own force despite the annexation of Goa by the Government of India. It is urged that Section 5(1) of the Administration Act provides for the continuation of all laws which were in force immediately before the appointed day, that is, before December 20, 1961, and a plain and necessary implication of that provision is that all laws which were in force in the annexed territory before the appointed day continued to be in force in that territory after the appointed day. There was, therefore, no hiatus between the appointed day and March 5, 1962 when the Administration Act came into force. This implication is read by counsel in the provision of Section 5(1) on the reasoning that it could not possibly have revived something which had already died a natural death on the date of annexation. He contends that the expression "continue to be in force" used in Section 5(1) presupposes that the laws which were in force in the annexed territory prior to the date of annexation were still in force and all that was required was the expression of a legislative will to continue those laws in force until they are amended or repealed by a competent legislature or other competent authority. Counsel illustrated his argument by taking the example of the penal laws of Goa. Those laws, says he, could not be deemed to have come to an end with the conquest of Goa for, otherwise, its inhabitants would have got a free licence to commit any crime that they choose like murder, arson and rape.

21. In support of this submission learned counsel relies on the decisions in *Mayor of the City of Lyons* v. *East India Company*[11], *R.* v. *Vaughan*[12], *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*[13], *Sree Rajendra Mills* v. *I. T. O.*[14] and *Sebastlao* v. *State*[15].

22. In *Mayor of Lyons*[11] Lord Brougham said:

> It is agreed, on all hands, that a foreign settlement, obtained in an inhabited country, by conquest, or by cession from another Power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited country.
>
> In the latter case, it is said, that the subjects of the Crown carry

11. (1836-37) 1 Moore's IA 175 : 1 Sar 107
12. (1558-1774) All ER Rep 311
13. 1953 SCR 1188 : AIR 1953 SC 394 : 1953 Cri LJ 1480
14. AIR 1958 Mad 220 : (1957) 32 ITR 439
15. AIR 1968 Goa 17 : 1968 Cri LJ 316

> with them the laws of England, there being, of course, no lex loci. In the former case, it is allowed, that the law of the country continues until the Crown, or the legislature, change it. This distinction, to this extent, is taken in all the books. (pages 270-71)

The decision in *Mayor of Lyons*[11] was referred to by Jagannadha Das, J. in his judgment in *Rao Shiv Bahadur Singh*[13]. Observing that the various component States became the United State of Vindhya Pradesh on March 18, 1948, the learned Judge said :

> In the normal course and in the absence of any attempts to introduce uniform legislation throughout the State, the pre-existing laws of the various component States would continue to be in force on the well-accepted principle laid down by the Privy Council in *Mayor of Lyons* v. *East India Company*[11].

It was held that by virtue of the Orders of the Regent of Rewa of 1921 and 1922, the Indian Penal Code and the Criminal Procedure Code with the necessary adaptations were in force in the Rewa State and either became extended to the entire Vindhya Pradesh State from August 9, 1948, by Ordinance 4 of 1948, or continued to be in force in the Rewa portion of that State by virtue of the principle laid down in *Mayor of Lyons*[11] and were the penal law in force in the relevant area when the criminal acts in question were committed by the appellants.

23. *R.* v. *Vaughan*[12] was a unique case in which a person in Jamaica had attempted to bribe a Privy Councillor in order to procure an office. Lord Mansfield, C. J. observed : "If Jamaica was considered as a conquest, they would retain their old laws until the conqueror had thought fit to alter them."

24. In *Sree Rajendra Mills*[14], Rajagopala Ayyangar, J., speaking for a Division Bench of the Madras High Court, quoted a passage from Hyde's *International Law* at page 397, which is to the effect that "Law once established continues until changed by some competent legislative power. It is not changed by mere change of sovereignty." Quoting Beale, the learned Author says in a footnote in his book that :

> There can be no break or interregnum in law. Once created it persists until a change takes place and when changed, it continues in such a changed condition until the next change and so on for ever. Conquest or colonization is impotent to bring law to an end ; in spite of change of Constitution the law continues unchanged until a new sovereign by legislative act creates a change.

On this consideration the Court rejected the contention that the right to claim arrears of tax due to the Central Government under the Government of India Act, 1935, did not pass or vest in the government of the Indian Union under the Constitution.

25. The decision of the learned Judicial Commissioner of Goa in *Sebastiao*[15], rejecting the contention advanced on behalf of a Portuguese citizen that the sovereignty of Goa before the appointed day "was Portugal, is Portugal and remains Portugal" and that after the conquest of Goa, India

was exercising a mere de facto sovereignty over the erstwhile Portuguese territory for the purpose of international law, need not detain us.

26. These decisions on which Shri Sanghi relies may be considered as authority for the proposition that, as a general rule, laws which are in force in the annexed or conquered territory continue to remain in force after the conquest or annexation until they are altered or repealed. But the real question which will determine the controversy in these proceedings is whether the continuance, ipso facto, of old laws after the conquest or annexation is tantamount to a recognition, without more, of the rights and privileges accruing under those laws. Secondly, the general rule is naturally subject to any specific provision to the contrary which the new Government may make. These questions are directly covered by the decision of this Court in *Pema Chibar* v. *Union of India*[8] and are no longer res integra.

27. In *Pema Chibar*[8], the petitioner who was a resident of Daman, a former Portuguese territory, had obtained licences between October 9 and December 4, 1961 for the import of various goods. Those licences were valid for a period of 180 days. On December 20, 1961 the Portuguese territories of Goa, Daman and Diu were conquered by the Government of India, whereupon on December 30, 1961 the Military Governor of the conquered territory issued a proclamation recognising only certain kinds of import licences, amongst which were not included the licences granted to the petitioner. Having failed to obtain recognition for his import licences, the petitioner filed a petition in this Court under Article 32 contending firstly that under the Administration Act, the previous laws in the Portuguese territories continued in force from March 5, 1962, which amounted to recognition by the Government of India of all rights flowing from the previous laws which were in force in the Portuguese territories; and secondly, that Section 4(2) of the Regulation preserved all rights and privileges acquired or accrued under the Portuguese law, as a result of which his right under the import licences which were issued to him under the Portuguese law stood preserved. These contentions were rejected by a Constitution Bench of this Court consisting of Gajendragadkar, C. J. and Wanchoo, Hidayatullah, Shah and Sikri, JJ. It was held by the Court that the mere fact that the old laws were continued did not mean that the rights under those laws were recognised by the Government of India and, therefore, the petitioner was not entitled to seek recognition of his import licences from the Government of India. Having held that in the face of the proclamation issued by the Military Governor on December 30, 1961, it was impossible to hold that the Government of India had adopted the laws of the Portuguese Government the Court, speaking through Wanchoo, J., observed:

> But this is not all. The Ordinance and the Act of 1962 on which the petitioner relies came into force from March 5, 1962. It is true that they provided for the continuance of old laws but that could only be from the date from which they came into force i.e., from March 5, 1962. There was a period between December 20, 1961 and March 5,

1962 during which it cannot be said that the old laws necessarily continued so far as the rights and liabilities between the new subjects and the new sovereign were concerned. So far as such rights and liabilities are concerned, (we say nothing here as to the rights and liabilities between subjects and subjects under the old laws), the old laws were apparently not in force during this interregnum. That is why we find in Section 7(1) of the Ordinance, a provision to the effect that all things done and all action taken (including any acts of executive authority, proceedings, decrees and sentences) in or with respect to Goa, Daman and Diu on or after the appointed day and before the commencement of this Ordinance, by the Administrator or any other officer of Government, whether civil or military or by any other person acting under the orders of the administrator or such officer, which have been done or taken in good faith and in a reasonable belief that they were necessary for the peace and good Government of Goa, Daman and Diu, shall be as valid and operative as if they had been done or taken in accordance with law. Similarly we have a provision in Section 9(1) of the Act, which is in exactly the same terms. These provisions in our opinion show that as between the subjects and the new sovereign, the old laws did not continue during this interregnum and that is why things done and action taken by various authorities during this period were validated as if they had been done or taken in accordance with law.

The argument based on the saving clause contained in sub-section (2) of Section 4 of the Regulation was repelled by the Court thus:

> As for Regulation 12 of 1962, that is also of no help to the petitioner. The laws repealed thereby (as between the sovereign and the subjects) were in force only from March 5, 1962. Section 4(2) on which reliance is placed would have helped the petitioner if his licences had been granted on March 5, 1962 or thereafter. But as his licences are of a date even anterior to the acquisition of the Portuguese territories, Section 4(2) of the Regulation cannot help him. The contention under this head must also be rejected.

28. The decision in *Pema Chibar*[8] is an authority for four distinct and important propositions: (*1*) The fact that laws which were in force in the conquered territory are continued by the new Government after the conquest is not by itself enough to show that the new sovereign has recognised the rights under the old laws; (*2*) The rights which arose out of the old laws prior to the conquest or annexation can be enforced against the new sovereign only if he has chosen to recognise those rights; (*3*) Neither Section 5 of the Administration Act nor Section 4(2) of the Regulation amounts to recognition by the new sovereign of old rights which arose prior to December 20, 1961 under the laws which were in force in the conquered territory, the only rights protected under Section 4(2) aforesaid being those which accrued subsequent to the date of enforcement of the Administration Act, namely, March 5, 1962; and (*4*) The period between December 20, 1961 when the territories comprised in Goa, Daman and Diu were annexed by the Government of India, and March 5, 1962 when the Administration Act came into force, was a period of interregnum. These propositions afford a complete answer to the contentions raised by Shri Sanghi. The judgment in *Pema Chibar*[8] was

brought to the attention of the High Court and was argued upon but surprisingly, it has not referred to the judgment at all. We have no doubt that if the High Court were alive to the position laid down in *Pema Chibar*[8], it could not have possibly come to the conclusion to which it did.

29. The true position then is that in cases of acquisition of a territory by conquest, rights which had accrued under the old laws do not survive and cannot be enforced against the new Government unless it chooses to recognise those rights. In order to recognise the old rights, it is not necessary for the new Government to continue the old laws under which those rights had accrued because, old rights can be recognised without continuing the old laws as, for example, by contract or executive action. On the one hand, old rights can be recognised by the new Government without continuing the old laws; on the other, the mere continuance of old laws does not imply the recognition of old rights which had accrued under those laws. Something more than the continuance of old laws is necessary in order to support the claim that old rights have been recognised by the new Government. That "something more" can be found in a statutory provision whereby rights which had already accrued under the old laws are saved. Insofar as the continuance of old laws is concerned, as a general rule, they continue in operation after the conquest, which means that the new Government is at liberty not to adopt them at all or to adopt them without a break in their continuity or else to adopt them from a date subsequent to the date of conquest.

30. In the instant case there was in the first place, on the authority of *Pema Chibar*[8], an interregnum between December 20, 1961 and March 5, 1962. During that period, the old laws of the Portuguese regime were not in operation in the conquered territory of Goa. Secondly, the rights recognised under sub-section (2) of Section 4 of the Regulation did not extend any protection to the rights which had accrued prior to December 20, 1961 but envisaged only such rights which had come into being after March 5, 1962 by reason of the laws continued by the Act and the Regulation. Apart from that position, the Government of India never recognised, either during the interregnum or thereafter, any rights on the basis of titles of manifest obtained by any person during the Portuguese rule. On September 16, 1964 the Government of India issued an order stating expressly that all applications for mineral concessions made to the Portuguese Government on the basis of titles of manifest shall be deemed to have lapsed. Thus, far from there being any recognition by the Indian Government of rights accruing from titles of manifest, there is a clear indication that it decided not to recognise those rights. It is significant that for two years after the order of the Government of India dated September 16, 1964, respondent 1 did not take any steps at all for the recognition or re-assertion of his rights. He obtained an order of refund of the amount which he had paid to the Portu-

guese Government on the applications which were made by him for obtaining mineral concessions. It was on August 16, 1966 that he applied for a mining lease under the Indian law. He did so after the appellant had obtained a mining lease in his favour on February 26, 1966 and he applied for a lease in respect of the very same areas over which the appellant was granted a mining lease. On September 20, 1967 the Central Government rejected the application of respondent 1 for a mining lease and it is eleven months thereafter that he filed a writ petition in the Delhi High Court challenging the various orders passed against him and the order by which a mining lease was granted to the appellant. We do not rely on these later facts for the purpose of showing any laches on the part of respondent 1 because the Court cannot take a hypertechnical view of self-imposed limitations when important rights are involved. We have referred generally to the course of events, only in order to show how no right had accrued in favour of respondent 1 under the Portuguese law and how, correspondingly, no liability or obligation was incurred by the Portuguese Government which the Government of India would be under a compulsion to accept by reason of the provisions contained in Section 4 of the Regulation.

31. Shri Sanghi tried to distinguish the decision in *Pema Chibar*[8] by contending that whereas in that case the dispute was between the Government on the one hand and a citizen on the other, the dispute in the instant case is between two individuals, namely, the appellant and respondent 1. It is contended by the learned counsel that the ratio of *Pema Chibar*[8] cannot apply to a dispute of the present nature, especially since Wanchoo, J. in his judgment in that case has stated expressly that the decision was confined to the matter in which the dispute was not between two private citizens but between the State on the one hand and a citizen on the other. We may assume for the sake of argument that the ratio of *Pema Chibar*[8] may be confined to cases in which the dispute is between the State and a citizen and not between two or more citizens. But it is fallacious to say that the dispute in the instant case is between two private individuals. The case undoubtedly involves the consideration of competing claims made by the appellant and respondent 1 to a mining lease but the true question is whether the Government of India is under an obligation to grant a lease to respondent 1 by virtue of the fact, as alleged by him, that a right had accrued in his favour under the Portuguese laws and that, by reason of the fact that those laws were continued by Section 5(1) of the Administration Act and further, that the rights which had accrued under those laws were saved by Section 4(2) of the Regulation, the Government of India was bound to recognise his right. If the appellant was not in the field and the Government of India were yet to reject the application of respondent 1, the self-same question would have arisen, which shows that the interposition of the appellant cannot take away the present case out of the ratio of *Pema Chibar*[8], any more than the presence of a competing applicant for an import licence would have made a difference to the ratio of that decision.

32. Yet another attempt was made by Shri Sanghi to distinguish the decision in *Pema Chibar*[8] by saying that whereas there was no law as such regulating the grant of import licences, there is in the instant case a law which governs the grant of mining leases. We are unable to appreciate this distinction. The decision in *Pema Chibar*[8] does not rest on the presence or absence of a law governing a particular subject-matter. Nor indeed does the decision say that there was no law at all governing the grant of import licences. In fact, the reference to the time-limit of 180 days and to the restriction that no import can be made without a valid licence shows that there was in existence a law which regulated the grant of import licences. Counsel relied on the decision in *J. Fernandes & Co.* v. *Deputy Chief Controller of Imports and Exports*[16], in order to show that during the Portuguese regime there was no law in existence governing the grant of import licences. We are unable to deduce any such conclusion from the said decision. The judgment does not say that there was no law governing the grant of import licences. It only says that the petitioner therein had failed to show that he possessed any right under the law. That would rather show that there was in existence a law governing the grant of import licences but that the petitioner was unable to show that he had any right under that law. We may mention incidentally that *J. Fernandes & Co.*[16] reiterated the position which has been treated over the years as well settled that rights available against the old sovereign can be enforced after conquest against the new sovereign, only if they are recognised by the new sovereign.

33. It is clear from the facts on the record of the case that the applications for mineral concessions made by respondent 1 on the basis of Title of Manifests of 1959 had lapsed. Even assuming that those applications were pending when the Act and the Rules were extended to Goa on October 1, 1963, respondent 1's applications could only be decided in conformity with the Act and the Rules. Section 4 of the Act and Rule 38 of the Rules support this view. Section 21 of the Act makes it penal to do any prospecting or mining operation otherwise than in accordance with the Act or the Rules. The Act and the Rules having been made applicable to the territory of Goa on October 1, 1963, and the supposedly pending applications of respondent 1 not having been granted within a period of nine months, they must be deemed to have been refused under Rule 24(3) of the Rules.

34. For these reasons, we set aside the judgment of the High Court, allow the appeals and dismiss the writ petition filed by respondent 1 in the Delhi High Court.

35. The appellant will get his costs here and in the High Court from Respondent 1. Hearing fee one set only.

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16. (1975) 3 SCR 867, 876 : (1975) 1 SCC 716, 724

Court was correct in the answer given to the question. This appeal, therefore, fails and is dismissed. There will be no order as to costs.

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(BEFORE N.M. KASLIWAL AND K. RAMASWAMY, JJ.)

Civil Appeal No. 931 of 1977

VATTICHERUKURU VILLAGE PANCHAYAT .. Appellant;

Versus

NORI VENKATARAMA DEEKSHITHULU AND OTHERS .. Respondents.

And

Civil Appeal No. 200 of 1978

NORI MADHUSUDAN AND OTHERS .. Appellants;

Versus

VATTICHERUKURU VILLAGE PANCHAYAT .. Respondent.

Civil Appeal Nos. 931 of 1977 and 200 of 1978†, decided on April 26, 1991

Tenancy and Land Laws — A.P. (Andhra Area) Inams (Abolition and Conversion into Ryotwari) Act, 1956 (37 of 1956) — Sections 3 and 7 — Nature of grant — Determination of — Entries in Inams Fair Register and survey and settlement records have great evidentiary value — Construction of such entries is a question of law — Having regard to such entries, held, grant was for preservation and maintenance of a public tank — Grant was thus in favour of an institution viz. tank though it was made in the name of individuals — Presumption to the contrary can be made only in absence of unimpeachable evidence like the entries in Inams Fair Register — Hence despite the colour of title obtained by the individual grantees, they were not entitled to enjoy usufruct for their personal use — Evidence Act, 1872, Section 35 — Specific Relief Act, 1963, Section 6

Evidence Act, 1872 — Sections 110 and 114 — Presumption of ownership from possession — Nature of — Longer the possession, stronger the presumption — Old grant

Statute Law — 'Presumptions' — Nature of — Can be raised to fill the gaps in absence of evidence — Cannot be used to contradict evidence — Evidence Act, 1872, Sections 111-A to 114-A — Words and Phrases

A Zamindar granted 100 acres of land in inam village in favour of one 'NLS' for construction, preservation and maintenance of a tank. In 1700 AD i.e. 1190 Fasli, the tank was dug by the villagers and ever since the villagers had been using the fresh water tank for their drinking purposes and they perfected

† Appeal by Certificate from the Judgment and Decree dated April 1, 1976 and from the Judgment and Decree dated June 19, 1975 of the Andhra Pradesh High Court in A.S. No. 71 of 1973 and Appeal No. 259 of 1972

their right by prescription. In course of time the tank was silted up and grass and trees are grown thereon and only in and around 30 acres of the water spread area, fresh water survived. No repairs were effected by the descendants of 'NLS'. On July 7, 1965, the Gram Panchayat took unilateral possession of the tank and ever since was exercising possession, supervision and control over it. After expiry of three years from the date of dispossession, the descendants filed suit (out of which C.A. No. 200 of 1978 arose) for possession based on title. The trial court found that the tank was a 'public trust', the descendants would be hereditary trustees and could be removed only by taking action under Section 77 of the A.P. Hindu Charitable and Religious Institutions and Endowments Act, 1966. It also held that the descendants acquired title by adverse possession. Accordingly the suit for possession was decreed. On appeal the High Court reversed the decree and held that the tank was a public tank and the tank and the lands stood vested in the Gram Panchayat under A.P. Gram Panchayat Act 2 of 1964. Since the Gram Panchayat was alrea 'y in possession from July 7, 1965, though by dispossessing the descendants forcibly, the court held that no interference with such possession was called for when the suit of the descendants was not under Section 6 of the Specific Relief Act but one based on title and the descendants had failed to show a better title than the Gram Panchayat.

Earlier the Gram Panchayat had also filed a suit (out of which C.A. No. 931 of 1977 arose) against the descendants of 'NLS' for possession. The descendants therein inter alia pleaded that the Gram Panchayat unlawfully took possession of the tank on July 7, 1965, that they acquired title by grant of ryotwari patta under Section 3 of the A.P. Inams (Abolition and Conversion into Ryotwari) Act and that the Gram Panchayat had no right to interfere with their possession and enjoyment. The trial court found that the land was endowed to NLS for the maintenance of the tank and the descendants obtained ryotwari patta under the Inams Act and were entitled to remain in possession and enjoyment as owners subject to maintaining the tank. Accordingly, the suit was dismissed. On appeal the High Court confirmed the decree on further finding that by operation of Section 14 of the Inam Act, the civil suit was barred. Hence the two appeals before the Supreme Court. Dismissing the appeals

Held :

The entries in the Inam Fair Register are great acts of the State and coupled with the entries in the survey and settlement record furnish unimpeachable evidence. Construction of the relevant entries in the IFR is a question of law. In the entries the lands in the tank were classified as village 'poramboke' and the tank as 'village tank'. In the village map also the same remarks were reiterated. On construction of the entries it is clear that the original grant was made for the preservation and maintenance of the tank and tax free inam land was granted for that purpose though it was in the name of the individual grantee. Thus the inam land in an inam village was held by the institution, namely, the tank. Ryotwari patta shall, therefore, be in favour of the institution. A presumption to the contrary cannot be drawn when the documentary evidence in the IFR and the survey and settlement records furnish the unerring evidence. (Paras 13 and 14)

A.R.R.M.V. Arunachallam Chetty v. *Venkatachalapathi Guruswamigal,* AIR 1919 PC 62: 43 Mad 253: 46 IA 204; *K.V. Krishna Rao* v. *Sub-Collector, Ongole,* AIR 1969 SC 563: (1969) 1 SCR 624, *relied on*

Krishan Nair Boppudi Punniah v. *Lakshmi Narasimhaswamy Varu,* (1963) 1 Andh WR 214, *distinguished*

A presumption of an origin in lawful title can be drawn in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming. It is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law. A presumption should be allowed to fill in gaps disclosed in the evidence. The presumption, not to supplement but to contradict the evidence would be out of place. It is not a presumption to be capriciously made nor is it one which a certain class of possessor is entitled to, de jure. In a case such as the one in question where it was necessary to indicate what particular kind of lawful title was being presumed, the court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. It is the completion of a right to which circumstances clearly point where time had obliterated any record of the original commencement. The longer the period within which and the remoter the time when first a grant might be reasonably supposed to have occurred the less force there is in an objection that the grant could not have been lawful. (Para 14)

Syed Md. Mazaffaralmusavi v. *Bibi Jabeda Khatun,* AIR 1930 PC 103: 57 IA 125: 1930 ALJ 377; *Bhojraj* v. *Sita Ram,* AIR 1936 PC 60: 38 Bom LR 344: 1936 ALJ 755, *relied on*

Though the pattas were obtained in the individuals' name, the trustees of an institution cannot derive personal advantage from the administration of the trust property. Though the original grant was not produced, the grant was for the institution and not to the individuals. Therefore, the colour of title though enabled them to enjoy the usufruct for personal use, once the tank and the appurtenant land was found to be public tank, the descendants acquired no personal right over it. (Paras 13 and 14)

Nori Venkatarama Dikshitulu v. *Ravi Venkatappayya,* (1959) 2 Andh WR 357: AIR 1959 AP 568; *M. Srinivasacharyulu* v. *Dinavahi Pratyanga Rao,* AIR 1921 Mad 467: 30 MLT 101: 64 IC 816, *approved*

Bhupathiraju Venkatapathiraju v. *President, Taluq Board, Narsapur,* (1913) 19 IC 727 (Mad) (DB): 13 MLT 419, *distinguished*

Panchayats — A.P. Gram Panchayat Act, 1964 (2 of 1964) — Section 64 — Applicability — Land or income used for communal purpose of villagers should belong to or be administered by Gram Panchayat — In absence of any finding to that effect, Section 64 is not attracted (Para 8)

Panchayats — A.P. Gram Panchayat Act, 1964 (2 of 1964) — Section 85 — Vesting of water works and appurtenant land in Gram Panchayat — 'Vesting' — Meaning of, in the context — Absolute or full title not conferred on Gram Panchayat — Vesting is subject to prescriptive right of villagers and overriding title of Government — It is for the purpose of possession, supervision and control and for common use of villagers — Words and Phrases

Held :

The word 'vest' bears variable colour taking its content from the context in which it came to be used. The word 'vesting' in Section 85 would signify that the water courses and tanks, lands etc. used by the public to such an extent as to give a prescriptive right to their use, are vested in the Gram Panchayat, and placed them under the control and supervision of the Gram Panchayat. It confers no absolute or full title. It was open to the government, even after vesting, to place restrictions upon the Gram Panchayat in the matter of enjoyment and use of such tanks, and appurtenant lands etc. Sub-section (3) of Section 85 expressly makes the matter clear. It empowers the government to assume the administration of any such tank or lands or to define or limit the control which is vested in the Gram Panchayat. Gram Panchayat being a statutory body is bound by the restrictions imposed by sub-section (3) of Section 85. The assumption of management by the government would be subject to the prescriptive right of the villagers, if any. (Paras 10 and 11)

Gram Panchayat, Mandapaka v. *Distt. Collector, Eluru*, AIR 1982 AP 15: (1981) 2 Andh WR 468: (1981) 2 Andh LT 377, *approved*

Anna Narasimha Rao v. *Kurra Venkata Narasayya*, (1981) 1 Andh WR 325: AIR 1982 AP 386, *overruled*

Port of London Authority v. *Canvey Island Commissioners*, (1932) 1 Ch 446; *Fruit and Vegetable Merchants Union* v. *Delhi Improvement Trust*, AIR 1957 SC 344: 1957 SCR 1, *referred to*

Chamber's Mid-Century Dictionary, p. 1230; *Black's Law Dictionary*, 5th edn., p. 1401; *Stroud's Judicial Dictionary*, 4th edn., Vol. 5, p. 2938, *referred to*

Panchayats — A.P. Gram Panchayat Act, 1964 (2 of 1964) — Section 85 — Vesting of public tank — Grant of land burdened with dashabandam service of public nature made in the name of individuals at a time when maintenance of water sources and water courses to the benefit of the villagers was left to the villagers themselves — Villagers digging tank for their common benefit — Descendants of the grantees rendering the tank disused and abandoned — Held, as a result of default in service the tank and the appurtenant land would vest in Gram Panchayat — Even though Gram Panchayat not justified in unilaterally taking into possession the property but a decree for possession in favour of the Gram Panchayat would be redundant when the descendants failed to establish a better title

Tenancy and Land Laws — A.P. (Andhra Area) Inams (Abolition and Conversion into Ryotwari) Act, 1956 (37 of 1956) — Section 7 — Dashabandam grant of land burdened with service of a public nature — Such land inalienable being opposed to public policy

Held :

In the case of dashabandam inams situated in ryotwari villages, the government has the right of resumption on default of service. The lands burdened with dashabandam service which is a service of public nature, are inalienable as being against public policy. The descendants of the grantee, though enjoyed the income from the properties, did not effect the repairs and neglected the maintenance and upkeep of the tank. They rendered the tank disused and abandoned. By operation of Section 85 of the Gram Panchayat Act the lands and tank stood vested in the Gram Panchayat for control, management and supervision. (Para 14)

Ravipati Kotayya v. *Ramasami Subbaraydu,* (1956) 2 Andh WR 739: AIR 1957 AP 182, *approved*

Though within six months from the date of dispossession no suit under Section 6 of the Specific Relief Act was laid and therefore, the Gram Panchayat was not justified to take law into its own hands to take unilateral possession without due course of law, but since the suit filed by the descendants was based on title, they had to establish their better title which they could not. The need to grant decree for possession in favour of the Gram Panchayat thus becomes redundant. (Paras 12 and 29)

The suit of the descendants would have normally been decreed on the finding that ryotwari patta under Section 3 of the Inams Act was granted in their favour and that they were unlawfully dispossessed. But since the grant of ryotwari patta, though in the name of individuals, was to maintain the public tank which stood vested under Section 85 of the Act in the Gram Panchayat, the descendants are divested of the right and interest acquired therein. Thus the suit of the descendants is liable to be dismissed. (Para 29)

Endowments — A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1966 (17 of 1966) — Section 77 — Land with public tank, dug by villagers for their common benefit, granted to certain persons — Grant burdened with service of public nature of preservation and maintenance of the tank by the grantees — Descendants of the grantees rendering the tank disused and abandoned — Tank being not a public trust, held, Section 77 not attracted — Hence action for removal of the descendants of the grantees cannot be taken under the Act (Para 15)

Tenancy and Land Laws — A.P. (Andhra Area) Inams (Abolition and Conversion into Ryotwari) Act, 1956 (37 of 1956) — Sections 14, 14-A and 15 and 3 and 7 — Exclusion of civil court's jurisdiction — Object — Decision of revenue court on the question of grant of ryotwari patta under Section 3 read with Section 7 is final and civil court's jurisdiction to retry the issue once over is barred — Civil Procedure Code, 1908, Section 9 — Constitution of India, Articles 38 & 39-A and 323-B

Civil Procedure Code, 1908 — Section 9 — Exclusion of civil court's jurisdiction — Rationale behind — Administrative Law — Administrative Tribunals

***Held*:**

Inams Act is a self-contained code. It expressly provided rights and liabilities; prescribed procedure, remedies of appeal and revision, excluded the jurisdiction of the civil court and gave it primacy notwithstanding anything inconsistent with any law or instrument having force of law. The jurisdictional findings are an integral scheme to grant or refuse ryotwari patta under Section 3, read with Section 7 and not collateral findings. It was subject to appeal and revision and certiorari under Article 226. The decision of the Revenue Tribunal, are final and conclusive between the parties or persons claiming right, title or interest through them. The trick of pleadings and the camouflage of the reliefs are not decisive but the substance or the effect on the order of the tribunal under the Inams Act are decisive. The civil suit is not maintainable

when the decree directly nullifies the ryotwari patta granted under Section 3 of the Inams Act. (Para 29)

D.V. Raju v. *B.G. Rao*, (1961) 2 Andh WR 368: AIR 1968 AP 220, *approved* and *applied*
P. Peda Govindayya v. *P. Subba Rao*, (1969) 2 ALT 336, *overruled*
State of T.N. v. *Ramalinga Samigal Madam*, (1985) 4 SCC 10; *Syamala Rao* v. *Radhakanthaswami Varu*, (1984) 1 APLJ 113: 1984 Andh LJ 286; *Jyotish Thakur* v. *Tarakant Jha*, AIR 1963 SC 605: 1963 Supp 1 SCR 13; *Athmanathaswami Devasthanam* v. *K. Gopalaswami Aiyangar*, AIR 1965 SC 338: (1964) 3 SCR 763; *Sri Vedagiri Lakshmi Narasimha Swami Temple* v. *Induru Pattabhirami Reddy*, AIR 1967 SC 781: (1967) 1 SCR 280; *Raja Kandregula Srinivasa Jagannadha Rao Panthulu Bahadur Garu* v. *State of A.P.*, (1969) 3 SCC 71: (1970) 2 SCR 714; *Dr Rajendra Prakash Sharma* v. *Gyan Chandra*, (1980) 4 SCC 364: (1980) 3 SCR 207; *Anne Besant National Girls High School* v. *Dy. Director of Public Instruction*, (1983) 1 SCC 200: 1983 SCC (L&S) 140; *Raja Ram Kumar Bhargava* v. *Union of India*, (1981) 1 SCC 681: (1988) 2 SCR 352: 1988 SCC (Tax) 132; *Pabbojan Tea Co. Ltd.* v. *Dy. Commissioner, Lakhimpur*, AIR 1968 SC 271: (1968) 1 SCR 260: (1967) 2 LLJ 872; *K. Chintamani Dora* v. *G. Annamnaidu*, (1974) 1 SCC 567: (1974) 2 SCR 655, *distinguished*
Kamala Mills Ltd. v. *State of Bombay*, AIR 1965 SC 1942: (1966) 1 SCR 64: 57 ITR 643: (1965) 16 STC 613; *Secretary of State* v. *Mask & Co.*, AIR 1940 PC 105: LR (1940) 67 IA 222: (1940) 2 MLJ 140; *Raleigh Investment Co. Ltd.* v. *Governor-General in Council*, AIR 1947 PC 78: LR 74 IA 50: (1947) 15 ITR 332; *Firm and Illuri Subbayya Chetty & Sons* v. *State of A.P.*, AIR 1964 SC 322: (1964) 1 SCR 752: (1963) 50 ITR 93; *A.T.T. Desika Charyulu* v. *State of A.P.*, AIR 1964 SC 807; *Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662: (1968) 22 STC 416; *Hatti* v. *Sunder Singh*, (1970) 2 SCC 841: (1971) 2 SCR 163; *Muddada Chayana* v. *Karnam Narayana*, (1979) 3 SCC 42: (1979) 3 SCR 201; *A. Bodayya* v. *L. Ramaswamy*, 1984 Supp SCC 391; *Doe* v. *Bridges*, (1831) 1 B & Ad 847; *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke*, (1976) 1 SCC 496: (1976) 1 SCR 427: 1976 SCC (L&S) 445, *relied on*
T. Munuswami Naidu v. *R. Venkata Reddy*, AIR 1978 AP 200 (FB); *O. Chenchulakshmamma* v. *D. Subrahmanya Reddy*, (1980) 3 SCC 130: (1980) 1 SCR 1006, *referred to*

The Constitution intends to herald an egalitarian social order by implementing the goals of socio-economic justice set down in the preamble of the Constitution. In that regard the Constitution created positive duties on the State in Part IV towards individuals. The Parliament and the State legislatures made diverse laws to restructure the social order; created rights in favour of the citizens; conferred power and jurisdiction on the hierarchy of tribunals or the authorities constituted thereunder and gave finality to their orders or decisions and divested the jurisdiction of the established civil courts expressly or by necessary implication. The Inam Act is a step in that direction as part of Estate Abolition Act. Therefore, departure in the allocation of the judicial functions would not be viewed with disfavour for creating the new forums and entrusting the duties under the statutes to implement socio-economic and fiscal laws. The legislature made this departure for the reason that the tradition bound civil courts gripped with rules of pleading and strict rules of evidence and tardy trial, four tier appeals, endless revisions and reviews under CPC are not suited to the needed expeditious dispensation. The adjudicatory system provided in the new forums is cheap and rapid. The procedure before the tribunal is simple and not hide-bound by the intricate procedure of pleadings, trial, admissibility of the evidence and proof of facts according to law. Therefore, there is abundant

flexibility in the discharge of the functions with greater expedition and inexpensiveness. (Para 18)

Tribunals — Tribunal of limited jurisdiction — Determination of collateral fact as to whether the tribunal has jurisdiction or not — Tribunal by a wrong decision cannot confer on itself the jurisdiction — But if it has jurisdiction, it is entitled to examine the actual controversy and take a decision rightly or wrongly — Administrative Law — Administrative Tribunals — Constitution of India, Articles 323-A and 323-B — Administrative Tribunals Act, 1985, Sections 14 and 15

The jurisdiction of a tribunal created under statute may depend upon the fulfilment of some condition precedent or upon existence of some particular fact. Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it existed or not is logically temporary prior to the determination of the actual question which the tribunal has to consider. At the inception of an enquiry by a tribunal of limited jurisdiction, when a challenge is made to its jurisdiction, the tribunal has to consider as the collateral fact whether it would act or not and for that purpose to arrive at some decision as to whether it has jurisdiction or not. There may be tribunal which by virtue of the law constituting it has the power to determine finally, even the preliminary facts on which the further exercise of its jurisdiction depends, but subject to that, the tribunal cannot by a wrong decision with regard to collateral fact, give itself a jurisdiction which it would not otherwise have had. Except such tribunals of limited jurisdiction, when the statute not only empowers to enquire into jurisdictional facts but also the rights and controversy finally it is entitled to enter on the enquiry and reach a decision rightly or wrongly. If it has jurisdiction to do right, it has jurisdiction to do wrong. It may be irregular or illegal which could be corrected in appeal or revision subject to that the order would become final. (Para 23)

Civil Procedure Code, 1908 — Section 9 — Jurisdiction of civil court — Exclusion of — Whether alternative remedy provided by a special statute is sufficient or adequate — Question may be relevant and decisive where exclusion of civil court's jurisdiction is not expressly provided for but is pleaded to be implied in such statute — Constitution of India, Articles 323-A and 323-B

Interpretation of Statutes — Social legislation — Purposive approach commended

Section 9 of the Civil Procedure Code, 1908 provides that whenever a question arises before the civil court whether its jurisdiction is excluded expressly or by necessary implication, the court naturally feels inclined to consider whether remedy afforded by an alternative provision prescribed by special statute is sufficient or adequate. In cases where exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or sufficiency of the remedy provided for by it may be relevant, but cannot be decisive. Where exclusion is pleaded as a matter of necessary implication such consideration would be very important and in conceivable circumstances might become even decisive. (Para 22)

In order to find out the purpose in creating the tribunals under the statutes and the meaning of particular provisions in social legislation, the court would adopt the purposive approach to ascertain the social ends envisaged in the Act, to consider scheme of the Act as an integrated whole and practical means by which it was sought to be effectuated to achieve them. Meticulous lexicographic analysis of words and phrases and sentences should be subordinate to this purposive approach. The dynamics of the interpretative functioning of the court is to reflect the contemporary needs and the prevailing values consistent with the constitutional and legislative declaration of the policy envisaged in the statute under consideration. (Para 19)

Deena v. *Union of India*, (1983) 4 SCC 645: (1984) 1 SCR 1: 1983 SCC (Cri) 879, *referred to*

R-M/ATU/10626/S

Advocates who appeared in this case :
B. Kanta Rao, Advocate, for the Appellants;
C. Sitaramiah, Senior Advocate (B. Parthasarthi, Advocate, with him) for the Respondents.

The Judgment of the Court was delivered by

K. RAMASWAMY, J.— Civil Appeal Nos. 931 of 1977 and 200 of 1978 relate to the same dispute though they arose from two suits and separate judgments. The bench that heard Civil Appeal No. 931 of 1977 directed on January 24, 1991 to list Civil Appeal No. 200 of 1978 for common disposal. Civil Appeal No. 200 of 1978 arose out of O.S. No. 118 of 1968 on the file of the Court of Additional Subordinate Judge, Guntur and Appeal No. 259 of 1972 dated June 19, 1975 of the A.P. High Court. The suit for possession and mesne profits was laid by the descendants of Nori Lakshmipathi Somayajulu of Vatticherukuru, Guntur Taluq and District, for short 'NLS'. The dispute relates to the tank known as 'Nori Lakshmipathi Somayajulu's Western Tank' "Vooracheruva" (village tank). It consists of 100 acres of which roughly 30 acres is covered by water spread area marked 'A' Schedule. 'B' Schedule consists of 70 acres (silted up area). The tank was dug in Fasli 1190 (1700 AD). Zamindar, Raja Manikya Rao made a grant of the land for digging the tank and its preservation, maintenance and repairs. It is the descendants' case that it is a private tank enjoyed by the 'grantee', NLS as owner and thereafter the descendants and perfected the title by prescription. It was found as a fact by the High Court and the descendants are unable to persuade us from the evidence to differ from the findings that the tank is a "public tank" dug by the villagers and ever since and as of right they have been drawing the water from the tank for their use and for the cattle of the village. The descendants' plea and evidence adduced in support thereof that it is their private tank, was negated by both the courts. The trial court found that the tank is a

'public trust', the appellants would be hereditary trustees and could be removed only by taking action under Section 77 of the A.P. Hindu Charitable and Religious Institutions and Endowments Act, 1966 for short 'the Endowments Act'. It also held that the descendants acquired title by adverse possession. Accordingly the suit for possession was decreed relegating to file a separate application for mesne profits. On appeal the High Court reversed the decree and held that the tank is a public tank and the tank and the lands stood vested in the Gram Panchayat under A.P. Gram Panchayat Act, 1964 (2 of 1964) for short 'the Act'. Since the Gram Panchayat was in possession from July 7, 1965, though dispossessed the descendants forcibly and as the suit is not under Section 6 of the Specific Relief Act, 1963 but one based on title, it called for no interference. It dismissed the suit. This Court granted leave to appeal under Article 136.

2. Civil Appeal No. 931 of 1977 arose out of the suit for possession in O.S. No. 57 of 1966 on the file of the Court of Subordinate Judge at Guntur filed by the Gram Panchayat against the descendants. The suit was dismissed by the trial court and was confirmed by the High Court in A.S. No. 71 of 1973 and the High Court granted leave under Article 133 on December 10, 1976. The pleadings are the same as in the other suit. In addition the descendants further pleaded in the written statement that the Gram Panchayat unlawfully took possession of the tank on July 7, 1965. They also acquired title by grant of ryotwari patta under Section 3 of the A.P. Inams (Abolition and Conversion into Ryotwari) Act (Act 37 of 1956), for short 'the Inams Act'. The Gram Panchayat had no manner of right to interfere with their possession and enjoyment. They also pleaded and adduced evidence that they were leasing out the fishery rights and grass and trees grown on the land. The income was being utilized for the repairs of tank. The trial court and the High Court found that the lands were endowed to NLS for the maintenance of the tank and the descendants obtained ryotwari patta under Inams Act and are entitled to remain in possession and enjoyment as owners subject to maintaining the tank. Accordingly the suit was dismissed. On appeal in A.S. No. 71 of 1973 by judgment dated April 1, 1966 the High Court confirmed the decree on further finding that by operation of Section 14 of the Inam Act, civil suit was barred. Thus both the appeals are before this Court.

3. In Civil Appeal No. 200 of 1978, Shri Sitaramiah, learned senior counsel for the descendants conceded that the descendants of NLS have no exclusive personal right, title or interest in the tank and the appurtenant total land of 100 acres. In view of the entries of the Inams Fair Register for short 'IFR', it is a public trust and not a public tank.

Unless recourse is had to remove them from trusteeship under Section 77 of the Endowments Act, the appellants cannot be dispossessed. Since admittedly NLS and the descendants were enjoying the property till date of dispossession, presumption of the continuance of the enjoyment anterior thereto as owners could be drawn. The High Court thereby committed error of law in holding that the lands stood vested in the Gram Panchayat under the Act and that it is a public tank. In Civil Appeal No. 931 of 1977, it was further contended that since the grant of ryotwari patta under the Inams Act had become final, Section 14 thereof bars the jurisdiction of the civil court to entertain the suit. Shri B. Kanta Rao, learned counsel for the Gram Panchayat contended that the finding of the High Court that the tank and the appurtenant land, namely, the plaint schedule property, as 'public tank', is based on evidence that the tank was dug by the villagers and that they have been using it for their drinking purposes and for the cattle is a finding of fact. By operation of Sections 85 and 64 of the Act, the land and the tank stood vested in the Gram Panchayat. Entries in the IFR establishes that the grant of the land was for preservation, maintenance and repairs of the tank. Therefore, the grant should be in favour of the institution, namely, the tank. The pattas obtained by the descendants should be for the benefit of the tank, though granted in individual names. By operation of Section 85 of the Act, the descendants acquired no personal title to the property. Ryotwari patta is only for the purpose of land revenue. The Gram Panchayat acquired absolute right, title and interest in the land. The civil suit is not barred on the facts in this case.

4. Before appreciating the diverse contentions, the facts emerged from the findings in both the appeals could be gathered thus. Admittedly the zamindar, Raja Manikya Rao granted 100 acres of land in inam village to dig the tank and the grant was for its preservation and maintenance. The grant was in favour of NLS. In 1700 AD i.e. 1190 Fasli, the tank was dug by the villagers and ever since the villagers have been using the fresh water tank for their drinking purposes and of the cattle and perfected their right by prescription. In course of time the tank was silted up and in and around 30 acres of the water spread area, fresh water is existing. No repairs were effected by the descendants. The rest of the land was silted up. Grass and trees have been grown thereon and was being enjoyed. On July 7, 1965, the Gram Panchayat took unilateral possession of the tank and ever since was exercising possession, supervision and control over it. After expiry of three years from the date of dispossession, the descendants filed O.S. No. 57 of 1966 for possession based on title. Earlier thereto the Gram Panchayat filed the suit for pos-

session. Under the Inams Act, ryotwari patta under Section 3 was granted to the descendants in individual capacity and on appeal the Revenue Divisional Officer, Guntur confirmed the same. It became final as it was not challenged by filing any writ petition. Both the suits now stood dismissed. The counsel on other side have taken us through the evidence and we have carefully scanned the evidence.

5. From these facts the first question emerges is whether the tank and the appurtenant land stood vested in Gram Panchayat.

6. Section 64 of the Act reads thus :

"64. *Vesting of communal property or income in Gram Panchayat.*— Any property or income which by custom belongs to or has been administered for the benefit of the villagers in common, or the holders in common of village land generally of land of a particular description or of lands under a particular source of irrigation, shall vest in the Gram Panchayat and be administered by it for the benefit of the villagers or holders aforesaid."

7. Section 85 reads thus :

"85. *Vesting of water works in Gram Panchayats.*— (1) All public water courses, springs, reservoirs, *tanks*, cisterns, fountains, wells, stand-pipes and other water works (*including those used by the public to such an extent as to give a prescriptive right to their use*) whether existing at the commencement of this Act or afterwards made, laid or erected and whether made, laid or erected at the cost of the Gram Panchayat or otherwise for the use or benefit of the public, and *also any adjacent land, not being private property, appertaining thereto shall vest in the Gram Panchayat and be subject to its control*:

Provided that nothing in this sub-section shall apply to any work which is, or is connected with, a work of irrigation or to any adjacent land appertaining to any such work.

(2) Subject to such restrictions and control as may be prescribed, the Gram Panchayat shall have the fishery rights in any water work vested in it under sub-section (1), the right to supply water from any such work for raising seed beds on payment of the prescribed fee, and the right to use the adjacent land appertaining thereto for planting of trees and enjoying the usufruct thereof or for like purpose.

(3) The government may, by notification in the Andhra Pradesh Gazette, define or limit such control or may assume the administration of any public source of water supply and public land adjacent and appertaining thereto after consulting the Gram Panchayat and giving due regard to its objections, if any." (*emphasis supplied*)

8. A bird's eye view of the provisions brings out vividly that any property or income which belongs to or has been administered for the benefit of the villagers in common or the holders in any of the village land generally or of land of a particular description or of lands under particular source of irrigation shall vest in the Gram Panchayat and be administered by it for the benefit of the villagers or holders aforesaid. The lands or income used for communal purpose shall either belong to the Gram Panchayat or has been administered by the Gram Panchayat. It is not the case of the Gram Panchayat nor any finding recorded by the courts below to that effect. So Section 64 is not attracted, though the villagers acquired prescriptive right to use the water from the tank for their use and of their cattle.

9. All public water courses, springs, reservoirs, tanks, cisterns, etc. and other water works either existing on the date of the Act or made thereafter by the Gram Panchayat, or otherwise including those used by the public ripened into prescriptive right for the use and benefit of the public and also adjacent or any appurtenant land not being private property shall vest in the Gram Panchayat under Section 85(1) and be subject to its control. The proviso is not relevant for the purpose of this case. Under sub-section (2), the Gram Panchayat shall have fishery rights therein subject to any restriction or control prescribed by the government by rules. The Gram Panchayat also shall have the right to use the adjacent land appertaining thereto for planting trees and enjoying the usufruct thereof or for like purposes. Sub-section (3) gives overriding power to the government, by a notification published in the A.P. Gazette to define or limit the control or supervision by the Gram Panchayat or the government may assume administration of any public source of water supply and public land adjacent and appertaining thereto. The only condition precedent thereto is prior consultation of the Gram Panchayat and to have due regard to any objections, if raised, by the Gram Panchayat and issue notification published in the gazette resuming the water sources or the land etc.

10. The word 'vest' clothes varied colours from the context and situation in which the word came to be used in a statute or rule. *Chamber's Mid-Century Dictionary* at p. 1230 defines 'vesting' in the legal sense "to settle, secure, or put in fixed right of possession; to endow, to descend, devolve or to take effect, as a right". In *Black's Law Dictionary*, (5th edn. at p. 1401) the meaning of the word 'vest' is given as : "to give an immediate, fixed right of present or future enjoyment; to accrue to; to be fixed; to take effect; to clothe with possession; to deliver full possession of land or of an estate; to give seisin; to enfeoff". In *Stroud's Judicial*

Dictionary, (4th edn., Vol. 5 at p. 2938), the word 'vested' was defined in several senses. At p. 2940 in item 12 it is stated thus "as to the interest acquired by public bodies, created for a particular purpose, in works such as embankments which are 'vested' in them by statute", see *Port of London Authority* v. *Canvey Island Commissioners*[1] in which it was held that the statutory vesting was to construct the sea wall against inundation or damages etc. and did not acquire fee simple. Item 4 at p. 2939, the word 'vest', in the absence of a context, is usually taken to mean "vest in interest rather than vest in possession". In item 8 to 'vest', "generally means to give the property in". Thus the word 'vest' bears variable colour taking its content from the context in which it came to be used. Take for instance the land acquired under the Land Acquisition Act. By operation of Sections 16 and 17 thereof the property so acquired shall vest absolutely in the government free from all encumbrances. Thereby, absolute right, title and interest is vested in the government without any limitation divesting the pre-existing rights of its owner. Similarly, under Section 56 of the Provincial Insolvency Act, 1920, the estate of the insolvent vests in the receiver only for the purpose of its administration and to pay off the debts to the creditors. The receiver acquired no personal interest of his own in the property. The receiver appointed by the court takes possession of the properties in the suit on behalf of the court and administers the property on behalf of the ultimate successful party as an officer of the court and he has no personal interest in the property vested thereunder. In *Fruit and Vegetable Merchants Union* v. *Delhi Improvement Trust*[2], the question was whether the Delhi Improvement Trust was vested of the Nazul land belonging to the government with absolute right, when the property was entrusted under the scheme for construction of the markets etc. It was held by this Court that placing the property at the disposal of the trust did not signify that the government had divested itself of the title to the property and transferred the same to the trust. The clauses in the agreement show that the government had created the trust as its agent not on permanent basis but as a convenient mode of having the scheme of improvement implemented by the Trust subject to the control of the government.

11. The word 'vesting' in Section 85 would signify that the water courses and tanks, lands etc. used by the public to such an extent as to give a prescriptive right to their use, are vested in the Gram Panchayat, and placed them under the control and supervision of the Gram Panchayat. It confers no absolute or full title. It was open to the government, even after vesting, to place restrictions upon the Gram Panchayat in the

1 (1932) 1 Ch 446
2 1957 SCR 1 : AIR 1957 SC 344

matter of enjoyment and use of such tanks, and appurtenant lands etc. Sub-section (3) of Section 85 expressly makes the matter clear. It empowers the government to assume the administration of any such tank or lands or to define or limit the control which is vested in the Gram Panchayat. Gram Panchayat being a statutory body is bound by the restrictions imposed by sub-section (3) of Section 85. The assumption of management by the government would be subject to the prescriptive right of the villagers, if any. The Division Bench in *Gram Panchayat, Mandapaka* v. *Distt. Collector, Eluru*[3], considered the meaning of the word 'vesting' and correctly laid the law in its interpreting Section 85 of the Act. *Anna Narasimha Rao* v. *Kurra Venkata Narasayya*[4] relied on by Shri Kanta Rao, though supports his contention that the vesting of the tanks etc. in the Gram Panchayat was with absolute rights and the village community rights would override the rights of the government, in our view the laws was not correctly laid down. Under A.P. Land Encroachment Act, 1905; Telengana Area Land Revenue Act, relevant Abolition Acts like A.P. Estates (Abolition and Conversion into Ryotwari) Act, 1948, Inams Abolition Act etc. give absolute rights of vesting in the State over the forest land, tanks, rivers, mines, poramboke, land, etc. free from all encumbrances and the pre-existing rights in the other land stood abolished and will be subject to the grant of ryotwari patta etc. It is also settled law that grant of ryotwari patta is not a title but a right coupled with possession to remain in occupation and enjoyment subject to payment of the land revenue to the State. Therefore, we agree with the High Court that the tank is a public tank and not a public trust and that under Section 85(1) and Section 64, the vesting of the tanks, the appurtenant land and the common land is only for the purpose of possession, supervision, control and use thereof for the villagers for common use subject to the overriding title by the government and its assumption of management should be in terms of sub-section (3) of Section 85 of the Act and subject to the prescriptive right in the water, water spread tank for common use.

12. Admittedly, NSL or the descendants used the plaint schedule property till July 7, 1965. The question then is what rights the descendants acquired therein. Admittedly within six months from the date of dispossession no suit under Section 6 of the Specific Relief Act was laid. Therefore, though the Gram Panchayat was not justified to take law into its own hands to take unilateral possession without due course of law, since the suit filed by the descendants was based on title the descendants

3 AIR 1982 AP 15 : (1981) 2 Andh WR 468 : (1981) 2 Andh LT 377
4 (1981) 1 Andh WR 325: AIR 1981 AP 386

in Civil Appeal No. 200 of 1978 have to establish their better title. Their claim was based on the ryotwari patta granted under Section 7 of the Inams Act. Therefore, entries in IFR bear great evidenciary value to ascertain their rights. In *A.R.R.M.V. Arunachallam Chetty* v. *Venkatachalapathi Guruswamigal*[5], the Judicial Committee of the Privy Council considered the effect of the columns in the IFR and held thus : (AIR p. 65)

> "It is true that the making of this Register was for the ultimate purpose of determining whether or not the lands were tax free. But it must not be forgotten that the preparation of this Register was a great act of State, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be remembered that the Inam Commissioners through their officials made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property, the government was put in possession not only of the conclusion come to as to whether the land was tax free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases, yet the Board when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam Register."

13. Construction of the relevant entries in the IFR is a question of law. Column 2, the general class to which the land belongs, described as 'Dharmadayam' endowment for a charitable "institution", column 7, description of tenure for the "preservation and repairs" of Nori Lakshmipathi Somayajulu Western Tanks at Vatticherukuru, column 9 tax free, column 10, nature of the tenure, permanent, column 11, guarantor of the land Raja Manikya Rao in 1190 Fasli (1700 AD), column 13, name of the original grantee 'Nori Lakshmipathi Somayajulu', column 21 to be confirmed under usual conditions of service and column 22, confirmed. In the survey and settlement record of the year 1906 the same columns have been repeated. The lands in the tank were classified as village 'poramboke' and the tank as 'village tank'. In the village map also the same remarks were reiterated. Therefore, the entries in the IFR are great acts of the State and coupled with the entries in the survey and settlement record furnish unimpeachable evidence. On construction of these documents, it would clearly emerge that the original grant was made for the preservation and maintenance of the tank and tax free inam land was granted for that purpose though it was in the name of the individual grantee. We are of the view that the grant was for the preser-

5 AIR 1919 PC 62, 65 : 46 IA 204 : 43 Mad 253

vation and maintenance of the tank. In *K.V. Krishna Rao* v. *Sub-Collector, Ongole*[6], this Court held under the Inam Act that the tank is a charitable institution. Thereby we conclude that the grant was for the institution. Under Section 3 of the Inams Act, the enquiry should be whether (1) a particular land is inam land; (2) inam land is in a ryotwari, zamindar or inam village; and (3) is held by any institution. In view of the finding that the grant was for the preservation and maintenance of tank, the inam land in an inam village was held by the institution, namely, the tank. Ryotwari patta shall, therefore, be in favour of the institution. Undoubtedly the ryotwari patta was granted in favour of the descendants. In *Nori Venkatarama Dikshitulu* v. *Ravi Venkatappayya*[7], in respect of the tope dedicated to the public benefits in the same village, namely Vatticherukuru, one of the questions that arose was whether the patta granted in the individuals' names, would be their individual property or for the endowment. The Division Bench held that though the pattas were obtained in the individuals' name, the trustees of an institution cannot derive personal advantage from the administration of the trust property. It was held that the grant of patta was for the maintenance of the trust. We approve that the law was correctly laid down.

14. In *Krishan Nair Boppudi Punniah* v. *Lakshmi Narasimhaswamy Varu*[8], relied on by Shri Sitaramiah, on the basis of the entries in IFR, the finding was that the grant was in favour of the individual burdened with service and not to an institution. Therefore, the ratio therein does not assist us to the facts in this case. Moreover, in view of the stand taken by Shri Sitaramiah that the lands are not the private property of NLS or his descendants but held by them as trustees, the grant of ryotwari patta to the individuals by necessary implication, as a corollary, is of no consequence. The question then is whether the enjoyment of the usufruct by the descendants would clothe them with any right as owners of the land. In view of the concurrent finding that descendants did not acquire title by prescription, the passage in *Tagore Law Lecture*, "Hindu Religious Endowments and Institutions" at p. 6 relied on by Shri Sitaramiah to the effect 'dedication of tanks and trees' as private property also renders no assistance to the descendants. Undoubtedly, a presumption of an origin in lawful title could be drawn, as held in *Syed Md. Mazaffaralmusavi* v. *Bibi Jabeda Khatun*[9], that the court has so often readily made presumption in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming. It is not a mere branch of

6 (1969) 1 SCR 624 : AIR 1969 SC 563
7 (1959) 2 Andh WR 357 : AIR 1959 AP 568
8 (1963) 1 Andh WR 214
9 AIR 1930 PC 103 : 57 IA 125 : 1930 ALJ 377

the law of evidence. It was resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law. It was also further held that it is not a presumption to be capriciously made nor is it one which a certain class of possessor is entitled to, de jure. In a case such as the one in question where it was necessary to indicate what particular kind of lawful title was being presumed, the court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. It is the completion of a right to which circumstances clearly point where time had obliterated any record of the original commencement. The longer the period within which and the remoter the time when first a grant might be reasonably supposed to have occurred the less force there is in an objection that the grant could not have been lawful. In *Bhojraj* v. *Sita Ram*[10], it was further held that the presumption, not to supplement but to contradict the evidence would be out of place. A presumption should be allowed to fill in gaps disclosed in the evidence. But the documentary evidence in the IFR and the survey and settlement records furnish the unerring evidence. Though the original grant was not produced, the grant was for the institution and not to the individuals. Therefore, the colour of title though enabled them to enjoy the usufruct for personal use, once the tank and the appurtenant land was found to be public tank, the descendants acquired no personal right over it. The decision in *Bhupathiraju Venkatapathiraju* v. *President, Taluq Board, Narsapur*[11], relied by Shri Sitaramiah the finding was that the grant was to the plaintiffs' family subject to conditions of service. Their right to take the usufruct of the trees therein was held to be for the benefit of the grantee. In that view its ratio cannot be applied to the facts in this case. In *M. Srinivasacharyulu* v. *Dinavahi Pratyanga Rao*[12], one of the contentions raised was that since the produce was being enjoyed by the trustees for over many years for personal use, it must be construed that the trust was for personal benefit of archakas. It was repelled holding that it would be a dangerous proposition to lay down that if the trustees of the religious trusts have for many years been applying the income to their own personal use, the trust deed must be construed in the light of such conduct. The decree of the trial court that the enjoyment was for the institution was upheld. The finding in Civil Appeal No. 931 of 1977, that since the endowment was the dashabandam the descendants are entitled to the ryotwari patta cannot be upheld. Dashabandam grant of land burdened with the service of a public nature was made at a time when maintenance of water sources and water courses to the benefits of the

10 AIR 1936 PC 60 : 38 BLR 344 : 1936 ALJ 755
11 (1913) 19 IC 727 (Mad) (DB) : 13 MLT 419
12 AIR 1921 Mad 467 : 30 MLT 101 : 64 IC 816

villagers was left to the villagers. In *Ravipati Kotayya* v. *Ramasami Subbaraydu*[13], it was held that in the case of dashabandam inams situated in ryotwari villages, the government has the right of resumption on default of service. The lands burdened with dashabandam service which is a service of public nature, are inalienable as being against public policy, we, therefore, hold that the descendants, though enjoyed the income from the properties, did not effect the repairs and neglected the maintenance and upkeep of the tank. They rendered the tank disused and abandoned. By operation of Section 85 of the Act the lands and tank stood vested in the Gram Panchayat for control, management and supervision.

15. Undoubtedly, a hereditary trustee is entitled to be the Chairman of a Board of Trustees, if any, constituted under the Endowment Act or else be in exclusive possession and management of the public trust registered thereunder until he is removed as per the procedure provided therein. Since the tank always remained a public tank and not being a public trust, the Endowment Act does not apply. Therefore, the question of initiating action under Section 77 of the Endowment Act for removal of the descendants as trustees does not arise.

16. In the suit of the descendants the High Court did not consider the effect of grant of ryotwari patta under Inams Act and in the suit of the Gram (Village) Panchayat the effect of vesting under Section 85 of the Act on the grant of ryotwari patta was not considered. Only Section 14 i.e. the bar of civil suit was focused. Consequently both the suits were dismissed by different Division Benches. The question is whether the suit is maintainable.

17. All communal lands, porambokes, tanks, etc., in inam villages shall vest in the government under Section 2-A of Inams Act free from all encumbrances. Section 3 determines the inam lands whether held by the individual or the institution, provides procedure for determination and Section 3(4) gives right of appeal. Section 4 converts those lands into ryotwari lands and accords entitlement to grant of ryotwari patta. Section 5 gives power to restitute the lands to the tenants in occupation though they were ejected between specified dates. Section 7 gives power to grant ryotwari patta to the tenants to the extent of two-thirds share in the land and one-third to the landholder. If it was held by the institution, two-third share would be to the institution and one-third to the tenants. Section 8 grants right of permanent occupancy to the tenants in inam lands held by institutions. Section 9 prescribes procedure for eviction of the tenants having right of permanent occupancy. Section 10-A provides right to ryotwari patta to tenants in a ryotwari or zamindari village with

13 (1956) 2 Andh WR 739 : AIR 1957 AP 182

the right of permanent occupancy, even in the lands, held under customary right etc. Section 12 fastens liability on the ryotwari pattadars to pay land assessment. Section 13 gives exclusive power of jurisdiction to Tehsildar, the Revenue Court and the Collector to try the suit as per the procedure as of a civil court under the Code of Civil Procedure. Section 14 of the Inams Act reads thus :

> "14. *Bar of jurisdiction of civil courts.*— No suit or other proceedings shall be instituted in any civil courts to set aside or modify any decision of the Tahsildar, the Revenue Court, or the Collector under this Act, except where such decision is obtained by misrepresentation, fraud or collusion of parties."

Section 14-A and Section 15 provides that :

> "14-A *Revision.*— (1) Notwithstanding anything contained in this Act, the Board of Revenue may, at any time either suo motu or an application made to it, call for and examine the records relating to, any proceedings taken by the Tahsildar, the Revenue Court or the Collector under this Act for the purpose of satisfying itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision made or order passed therein; and if, in any case, it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for consideration, it may pass orders, accordingly.
>
> (2) No order prejudicial to any person shall be passed under sub-section (1) unless such person has been given an opportunity of making his representation.
>
> 15. *Act to override other laws.*— Unless otherwise expressly provided in this Act the provisions of this Act and of any orders and rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

18. The Constitution intends to herald an egalitarian social order by implementing the goals of socio-economic justice set down in the preamble of the Constitution. In that regard the Constitution created positive duties on the State in Part IV towards individuals. The Parliament and the State legislatures made diverse laws to restructure the social order; created rights in favour of the citizens; conferred power and jurisdiction on the hierarchy of tribunals or the authorities constituted thereunder and gave finality to their orders or decisions and divested the jurisdiction of the established civil courts expressly or by necessary implication. The Inam Act is a step in that direction as part of Estate Abolition Act. Therefore, departure in the allocation of the judicial functions would not be viewed with disfavour for creating the new forums and entrusting the

duties under the statutes to implement socio-economic and fiscal laws. We have to consider, when questioned, why the legislature made this departure. The reason is obvious. The tradition bound civil courts gripped with rules of pleading and strict rules of evidence and tardy trial, four tier appeals, endless revisions and reviews under CPC are not suited to the needed expeditious dispensation. The adjudicatory system provided in the new forums is cheap and rapid. The procedure before the tribunal is simple and not hide-bound by the intricate procedure of pleadings, trial, admissibility of the evidence and proof of facts according to law. Therefore, there is abundant flexibility in the discharge of the functions with greater expedition and inexpensiveness.

19. In order to find out the purpose in creating the tribunals under the statutes and the meaning of particular provisions in social legislation, the court would adopt the purposive approach to ascertain the social ends envisaged in the Act, to consider scheme of the Act as an integrated whole and practical means by which it was sought to be effectuated to achieve them. Meticulous lexicographic analysis of words and phrases and sentences should be subordinate to this purposive approach. The dynamics of the interpretative functioning of the court is to reflect the contemporary needs and the prevailing values consistent with the constitutional and legislative declaration of the policy envisaged in the statute under consideration.

20. In *Deena* v. *Union of India*[14], this Court held that (SCC p. 653, para 4) the "[L]aw is a dynamic science, the social utility of which consists in its ability to keep abreast of the emerging trends in social and scientific advance and its willingness to readjust its postulates in order to accommodate those trends. Law is not static. The purpose of law is to serve the needs of life." The law should, therefore, respond to the clarion call of social imperatives (*sic* and) evolve in that process functional approach as means to subserve "social promises" set out in the Preamble, Directive Principles and the Fundamental Rights of the Constitution.

21. It is seen that the Inam's Act is an integral part of the scheme of the Andhra Pradesh Estates (Abolition and Conversion into Ryotwari) Act, 26 of 1984 for short 'Estate Abolition Act' to cover the left over minor inams. It determined the pre-existing rights of the inamdars and the religious institutions; envisaged grant of ryotwari patta afresh to the concerned and seeks to confer permanent occupancy rights on the tenants. It also regulates the relationship between institutions and its tenants. It created appellate and revisional forums and declared finality

14 (1983) 4 SCC 645 : 1983 SCC (Cri) 879 : (1984) 1 SCR 1

to the orders passed by the tribunals and expressly excluded the jurisdiction of the civil court, notwithstanding anything contained in any other law or inconsistent therewith the Inams Act shall prevail. The exception engrafted was that a suit would lie to challenge the decision obtained by fraud, misrepresentation and collusion by parties.

22. Section 9 of the Civil Procedure Code, 1908 provides that whenever a question arises before the civil court whether its jurisdiction is excluded expressly or by necessary implication, the court naturally feels inclined to consider whether remedy afforded by an alternative provision prescribed by special statute is sufficient or adequate. In cases where exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or sufficiency of the remedy provided for by it may be relevant, but cannot be decisive. Where exclusion is pleaded as a matter of necessary implication such consideration would be very important and in conceivable circumstances might become even decisive.

23. The jurisdiction of a tribunal created under statute may depend upon the fulfilment of some condition precedent or upon existence of some particular fact. Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it existed or not is logically temporary prior to the determination of the actual question which the tribunal has to consider. At the inception of an enquiry by a tribunal of limited jurisdiction, when a challenge is made to its jurisdiction, the tribunal has to consider as the collateral fact whether it would act or not and for that purpose to arrive at some decision as to whether it has jurisdiction or not. There may be tribunal which by virtue of the law constituting it has the power to determine finally, even the preliminary facts on which the further exercise of its jurisdiction depends; but subject to that, the tribunal cannot by a wrong decision with regard to collateral fact, give itself a jurisdiction which it would not otherwise have had. Except such tribunals of limited jurisdiction, when the statute not only empowers to enquire into jurisdictional facts but also the rights and controversy finally it is entitled to enter on the enquiry and reach a decision rightly or wrongly. If it has jurisdiction to do right, it has jurisdiction to do wrong. It may be irregular or illegal which could be corrected in appeal or revision subject to that the order would become final. The questions to be asked, therefore, are whether the tribunal has jurisdiction under Inam Act to decide for itself finally; whether the institution or the inamdar or the tenant is entitled to ryotwari patta under Sections 3, 4 and 7 and whether the tribunal is of a limited jurisdiction and its decision on the issue of patta is a collateral fact.

24. The consideration as to exclusion of the jurisdiction of civil court is no longer res integra. This Court in bead-roll of decisions considered this question in diverse situations. In *Kamala Mills Ltd.* v. *State of Bombay*[15], the questions which arose were whether an assessment made in violation of the Bombay Sales Tax Act could claim the status of an assessment made under that Act, and whether the nature of the transactions was a decision of collateral fact. A bench of seven Judges of this Court held that if it appears that a statute creates a special right or liability and provides for the determination of the right or liability to be dealt with by tribunals specially constituted in that behalf and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are prescribed by the said statute or not. It was held that the Court was satisfied that the Act provided all the remedies associated with actions in civil courts and the remedy for refund of the tax illegally collected was provided and it was not collateral. Section 20 prohibits such a claim being made before an ordinary civil court and held that the civil suit was not maintainable. The leading decisions of the Privy Council in *Secretary of State* v. *Mask & Co.*[16], *Raleigh Investment Co. Ltd.* v. *Governor-General in Council*[17], and the ratio in *Firm and Illuri Subbayya Chetty & Sons* v. *State of A.P.*[18] were approved. In *A.T.T. Desika Charyulu* v. *State of A.P.*[19], a Constitution Bench was to consider whether the jurisdiction of the Settlement Officer and the tribunal created under the Estates Abolition Act to determine whether Shotrium village was an inam estate was exclusive and the civil court's jurisdiction to try the dispute was barred. Despite the fact that no express exclusion of the civil court's jurisdiction was made under the Act it was held that very provision setting up an hierarchy of judicial tribunals for the determination of the questions on which the applicability of the Act depends was sufficient in most cases to infer that the jurisdiction of the civil courts to try the same was barred. Accordingly it was held that the jurisdiction of the Settlement Officer and the Tribunal by necessary implication was exclusive and that the civil courts are barred from trying or retrying the question once over. The decisions of the settlement Officer and of the tribunal were held final and conclusive.

15 (1966) 1 SCR 64 : AIR 1965 SC 1942 : 57 ITR 643 : (1965) 16 STC 613
16 LR (1940) 67 IA 222 : AIR 1940 PC 105 : (1940) 2 MLJ 140
17 LR 74 IA 50 : AIR 1947 PC 78 : (1947) 15 ITR 332
18 (1964) 1 SCR 752 : AIR 1964 SC 322 : (1963) 50 ITR 93
19 AIR 1964 SC 807

25. In *Dhulabhai* v. *State of M.P.*[20] another Constitution Bench reviewed the entire case law on the question of maintainability of civil suit and laid down seven propositions. Propositions 1 and 2 are relevant, which read thus : (SCR p. 682)

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

It was held therein that the civil suit was not maintainable to call in question of assessment made under the Madhya Bharat Sales Tax Act. In *Hatti* v. *Sunder Singh*[21] the tenant had a declaratory relief before the authorities under Delhi Land Reforms Act that he was Bhoomidar. When it was challenged in the civil suit as not being binding, this Court held that the civil suit was not maintainable.

26. In *Muddada Chayana* v. *Karnam Narayana*[22] a case under Section 56(1)(*c*) of the Andhra Pradesh (Andhra Area) (Abolition and Conversion into Ryotwari) Act, 1948, it was held that the dispute as to who the lawful ryot in respect of any holding is, shall be decided by the Settlement Officer. Whether it is liable to be questioned in the civil court, Chinnappa Reddy, J., who had intimate knowledge as an advocate and the judge on the subject, reviewed the law and held that the Act is a self-contained code in which provision was also made for the adjudication of various types of disputes arising, after an estate was notified, by specially

20 (1968) 3 SCR 662 : AIR 1969 SC 78 : (1968) 22 STC 416
21 (1970) 2 SCC 841 : (1971) 2 SCR 163
22 (1979) 3 SCC 42 : (1979) 3 SCR 201

constituted tribunals. On the general principles it was held that the special tribunals constituted by the Act must necessarily be held to have exclusive jurisdiction to decide dispute entrusted by the statute to them for their adjudication. Dealing with the object of the Act it was held at p. 207 C — D that the Act intended to protect ryots and not to leave them in wilderness. When the Act provides machinery in Section 56(1)(*c*) to discover who the lawful ryot of a holding was, it was not for the court to denude the Act of all meaning and by confining the provision to the bounds of Sections 55 and 56(1)(*a*) and (*b*) on the ground of contextual interpretation. Interpretation of a statute, contextual or otherwise must further and not frustrate the object of the statute. It was held that the civil suit was not maintainable and approved the Full Bench judgment of five Judges of the High Court of Andhra Pradesh in *T. Munuswami Naidu* v. *R. Venkata Reddy*[23]. The same view was reiterated in *O. Chenchulakshmamma* v. *D. Subrahmanya Reddy*[24] and held that the order of the Additional Settlement Officer was final insofar as the dispute between the rival claimants to the ryotwari patta was concerned and not liable to be questioned in any court of law. In *A. Bodayya* v. *L. Ramaswamy*[25], while reiterating the ratio in both the judgments, Desai, J. speaking for a bench of three Judges held that under Estate Abolition Act, who the lawful ryot was decided. Self-same question directly and substantially raised in the suit cannot be decided by the civil court as it has no jurisdiction to decide and deal with the same but Settlement Officer had the exclusive jurisdiction to decide and deal with it. In *Deo* v. *Bridges*[26] the oft-quoted dictum of Lord Tenerden, C.J. reads that :

> "where an act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

In *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke*[27], a bench of three Judges after reviewing the case law held that if a dispute was not industrial dispute, nor does it relate to enforcement of any right under the Industrial Disputes Act, the remedy lies only in the civil court. If the dispute arises out of the right or liability under the general common law and not under the Act, the jurisdiction of the civil court is always alternative, leaving it to the election of the suitor to choose his remedy for the relief which is competent to be granted in a particular remedy. If the dis-

23 AIR 1978 AP 200 (FB)
24 (1980) 3 SCC 130 : (1980) 1 SCR 1006
25 (1984 Supp SCC 391
26 (1831) 1 B & Ad 847, 859
27 (1976) 1 SCC 496 : 1976 SCC (L & S) 445 : (1976) 1 SCR 427

pute relates to the enforcement of a right or obligation of the Act, the only remedy available to the suitor is to get an application adjudicated under the Act. In that view, it was held that the civil suit was not maintainable.

27. In *State of T.N.* v. *Ramalinga Samigal Madam*[28], strongly relied on by Shri Kanta Rao, the question therein was whether the jurisdiction of the civil court was ousted to redetermine the nature of the land rendered by the Settlement Officer under Section 11 of the Estate Abolition Act, Tulzapurkar, J. speaking for the Division Bench proceeded on three fundamental postulates namely that the decision of the Settlement Authorities under Section 11 of the Act was for (I) 'revenue purposes', (SCC p. 22, para 12) "that is to say for fastening the liability on him to pay the assessment or other dues and to facilitate the recovery of such revenue from him by the government; and therefore any decision impliedly rendered on the aspect of nature or character of the land on that occasion will have to be regarded as incidental to and merely for the purpose of passing the order of granting or refusing to grant the patta and for no other purpose", (II) only revision against the order and not an appeal; and (III) that by Madras Amendment, Section 64-C was deleted. It was unfortunate that it was not brought to the notice of the court that the purpose of Estate Abolition Act was not solely for the purpose of collecting the revenue to the State. The Act has its birth from a long drawn struggle carried on by the ryots in Madras Presidency for permanent ryotwari settlement of tenures and grant of permanent occupancy rights and the Indian National Congress espoused their rights and passed resolution at Avadi Session to make a legislation in that regard. The recovery of revenue was only secondary. In *Syamala Rao* v. *Radhakanthaswami Varu*[29], a Division Bench of the Andhra Pradesh High Court to which one of us (K. Ramaswamy, J.) was a member considered the historical background, the purpose of the Act and the scheme envisaged therein in extenso and held that the preamble of the Estate Abolition Act was to repeal the permanent settlements, the acquisition of the rights of the landholders in the estates and introduction of the ryotwari settlement therein; under Section 1(4) by issuance of the notification the pre-existing rights shall cease and determine; shall vest in the State free from all encumbrances and declared that all rights and interests created in particular over the State 'shall cease and determine as against the government' protected only dispossession of a person in possession of the ryoti land who was considered prima facie entitled to a ryotwari patta. Section 11 envisaged enquiry into "the

28 (1985) 4 SCC 10
29 (1984) 1 APLJ 113 : 1984 Andh LJ 286

nature of the land" and whether "ryotwari land immediately before the notified dates" be properly included or ought to have been properly included in the holding of the ryot. The enquiry under the Act was entrusted to the revenue authorities who have intimate knowledge of the nature of the lands and the entries in the revenue records of the holders, etc. Act created hierarchy of the tribunals, namely Assistant Settlement Officer; Settlement Officer; Director of Settlements and Board of Revenue; provided revisional powers to those authorities and ultimately the order is subject to the decision of the High Court under Article 226. In that view it was held that by necessary implication the jurisdiction of the civil court was ousted, the decision of Settlement Authorities under Section 11 was made final and no civil suit was maintainable. The legislature having made the Act to render economic justice to the ryots and excluded the dispute between landholders and the ryots covered under Sections 12 to 15 and the ryots inter se under Section 56(1)(*c*), from the jurisdiction of the civil court, it would not be the legislative intention to expose the ryots to costly unequal civil litigation with the State of the dispute under Section 11. It is not necessary in this case to broach further but suffice to state that unfortunately this historical perspective and the real purpose and proper scope and operation of Estate Abolition Act was not focused to the notice of the Court. In *Jyotish Thakur* v. *Tarakant Jha*[30], Section 27 of Regulation III of 1872 provides that in respect of transfer of ryoti interest in contravention of the regulation revenue courts shall not take cognizance of such a transfer. It was contended that by necessary implication the civil suit was not maintainable. In that context this Court held that provisions therein were not intended to be exhaustive to bar the relief in a civil court. In *Athmanathaswami Devasthanam* v. *K. Gopalaswami Aiyangar*[31] the question was whether the civil suit to recover damages and for ejectment of the ryoti lands belonging to the temple was barred. The findings were that the lands were ryoti lands and that the tenant acquired the occupancy rights, but the lease was granted in excess of 5 years. It was contended that it was a transfer without permission of the Endowment Department. While upholding that the lands were ryoti lands and the tenant acquired occupancy rights, this Court disagreeing with the High Court, held that there was no transfer and that the tenant is liable to pay the arrears of rent and the suit was maintainable. In *Sri Vedagiri Lakshmi Narasimha Swami Temple* v. *Induru Pattabhirami Reddy*[32], the contention raised was that Section 93 of the Madras Hindu Religious and Charitable Endow-

30 1963 Supp 1 SCR 13 : AIR 1963 SC 605
31 (1964) 3 SCR 763 : AIR 1965 SC 338
32 (1967) 1 SCR 280 : AIR 1967 SC 781

ments Act, 1951 was a bar to maintain suit for rendition of accounts and recovery thereof against the ex-trustees. This Court repelled the contention and held that the suit for rendition of accounts was not expressly or by necessary implication barred the jurisdiction of the civil court under Section 93. In *Raja Kandregula Srinivasa Jagannadha Rao Panthulu Bahadur Garu* v. *State of A.P.*[33], it was conceded that the question whether Kalipatnam village is an inam estate was to be adjudicated before the tribunals appointed under the Rent Reduction Act. It was contended that the tribunals have no jurisdiction to decide the validity of the notification reducing the rent by operation of Section 8(1) thereof. It was held that there was no statutory prohibition to determine the nature of the land contemplated by the Rent Reduction Act. Accordingly the suit was held to be maintainable. In *Dr Rajendra Prakash Sharma* v. *Gyan Chandra*[34], it was found that under Section 7 of the Administration of Evacuee Property Act, 1950, no proceedings were taken to declare the suit house as on evacuee property. No notification under sub-section (3) of Section 7 was published in the gazette. Under those circumstances it was held that Section 46 did not bar the civil suit. In *Anne Besant National Girls High School* v. *Dy. Director of Public Instruction*[35], this Court held that the civil court has jurisdiction to examine whether action or decision of an administrative authority was ultra vires the relevant rules of Grant-in-Aid Code and Rule 9(vii) was held to be ultra vires. Accordingly the suit was held to be maintainable. In *Raja Ram Kumar Bhargava* v. *Union of India*[36], two questions were raised, firstly the validity of the assessment and secondly recovery of the tax paid under Excess Profit Tax Act, 1940. On the first question it was held that the suit was not maintainable. On the second question without going into the technicalities of the maintainability of the suit, this Court granted the relief. In *Pabbojan Tea Co. Ltd.* v. *Dy. Commissioner, Lakhimpur*[37], the questions were whether the workmen were ordinary unskilled labour or skilled labour; whether the jurisdiction of the authorities under Section 20 of the Minimum Wages Act, 1948 was exclusive and whether the jurisdiction of the civil court was barred. This Court held that the authorities did not hold any inquiry nor received any evidence for determining that issue. No proper hearing was given to the parties to tender evidence. Section 20 is not a complete code as there was no provision for appeal or revision against the orders passed under Section 20(3). There was no further scrutiny by any higher authority against the imposi-

33 (1969) 3 SCC 71 : (1970) 2 SCR 714
34 (1980) 4 SCC 364 : (1980) 3 SCR 207
35 (1983) 1 SCC 200 : 1983 SCC (L & S) 140
36 (1988) 1 SCC 681 : 1988 SCC (Tax) 132 : (1988) 2 SCR 352
37 (1968) 1 SCR 260 : AIR 1968 SC 271 : (1967) 2 LLJ 872

tion of penalty. The Act in terms does not bar the employers from instituting a suit. In those circumstances, it was held that the legislature did not intend to exclude the jurisdiction of the civil court. The ratio in *K. Chintamani Dora* v. *G. Annamnaidu*[38], also does not assist Gram Panchayat for the reason that the decree therein originally granted became final. Subsequently it was sought to be reopened in a later suit. Under those circumstances the civil suit was held to be maintainable notwithstanding the provisions contained under the Estate Abolition Act.

28. Thus we have no hesitation to hold that the ratio in all these cases are clearly distinguishable and render little assistance to the Gram Panchayat. The scope, ambit and operation of the Inams Act was considered by P. Jaganmohan Reddy, J. (as he then was) in *D.V. Raju* v. *B.G. Rao*[39], and held that the paramount object of the legislature was to protect the tenant in occupation and is sought to be achieved by making effective orders of eviction made by the civil court either in execution or otherwise. It further prohibits the institution of any suit or proceeding in a civil court under Section 14 to set aside or modify any decision of the Tehsildar, Collector or Revenue Court except where such decision has been obtained by misrepresentation, fraud or collusion. Section 15 enjoins that the provisions of the Act and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of absolute jurisdiction on the Tehsildar, Revenue Court or the Collector, as the case may be, notwithstanding any provision of law or any suit or decree of a civil court or for that matter even where evictions have taken place in pursuance of such decrees, the evicted tenants can be restored to occupation provided the requirements for the protection of the possession of the tenants are satisfied. In that case the occupant in possession laid proceeding before the Tehsildar for injunction restraining the writ petitioner from ejecting him from the lands. The Tehsildar in exercise of the power under Rule 16 of the Rules granted injunction pending consideration of his right to ryotwari patta. The order of injunction was challenged firstly on the ground of ultra vires of Rule 16 and secondly on the ground of jurisdiction. While upholding the order on both the ground the learned judge held that Tehsildar, Revenue Court and the Collector have exclusive jurisdiction and the civil suit is barred. We respectfully approve it as correct law. The Inams Act did not intend to leave the decisions of the revenue courts under Section 3 read with Section 7 to retry the issue once over in the civil court. Undoubtedly the

38 (1974) 1 SCC 567 : (1974) 2 SCR 655
39 (1961) 2 Andh WR 368 : AIR 1968 AP 220

decision of the Division Bench in *P. Peda Govindayya* v. *P. Subba Rao*[40] is in favour of the contention that the civil suit is maintainable. It is not good law.

29. Thus the glimpse of the object of the Inams Act, scheme, scope and operation thereof clearly manifest that Inams Act is a self-contained code, expressly provided rights and liabilities; prescribed procedure; remedies of appeal and revision, excluded the jurisdiction of the civil court, notwithstanding anything contained in any law, given primacy of Inams Act though inconsistent with any law or instrument having force of law. The jurisdictional findings are an integral scheme to grant or refuse ryotwari patta under Section 3, read with Section 7 and not collateral findings. It was subject to appeal and revision and certiorari under Article 226. The decision of the Revenue Tribunal, are final and conclusive between the parties or persons claiming right, title or interest through them. The trick of pleadings and the camouflage of the reliefs are not decisive but the substance or the effect on the order of the tribunal under the Inams Act are decisive. The civil suit except on grounds of fraud, misrepresentation of collusion of the parties is not maintainable. The necessary conclusion would be that the civil suit is not maintainable when the decree directly nullifies the ryotwari patta granted under Section 3 of the Inams Act. Under the Gram Panchayat Act the statutory interposition of vesting the tank and the appurtenant land in the Gram Panchayat made it to retain possession, control and supervision over it, though the Gram Panchayat unlawfully took possession. The need to grant decree for possession in favour of the Gram Panchayat is thus redundant. The suit of the descendants was normally to be decreed on the finding that ryotwari patta under Section 3 of the Inams Act was granted in their favour and that they were unlawfully dispossessed. Since the grant of ryotwari patta, though in the name of individuals, was to maintain the public tank which stood vested under Section 85 of the Act in the Gram Panchayat, the descendants are divested of the right and interest acquired therein. Thus the suit of the descendants also is liable to be dismissed. Accordingly, the decrees of dismissal of both the suits are upheld and the appeals dismissed. But in the circumstances, parties are directed to bear their own costs.

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40 (1969) 2 ALT 336

LALA HEM CHAND . . . . . APPELLANT ; J. C.*

AND 1942

LALA PEAREY LAL AND OTHERS . . . RESPONDENTS. *June* 24.

ON APPEAL FROM THE HIGH COURT AT LAHORE.

Limitation—Will—Invalid charitable bequest—Property dedicated to charity by executor—Adverse possession for limitation period—Title of heir extinguished—Indian Limitation Act (IX *of* 1908), *art.* 123; *ss.* 10, 28.

Where a testamentary provision purporting to create a charitable trust was void and inoperative for uncertainty, but the executor had retained the property, dedicated it to charity and held it adversely to the heir-at-law for upwards of twelve years on behalf of the charity, the title to it had become vested in the charity, and that of the heir-at-law extinguished under s. 28 of the Limitation Act, 1908.

Gunga Gobind Mundul v. *Collector of the Twenty-Four Pergunnahs* (1867) 11 Moo. I.A. 345, at 361, referred to.

It is an irregular procedure to allow parties to adduce evidence on points not raised in the pleadings or issues without amending the pleadings and raising the necessary issues.

Decree of the High Court affirmed.

APPEAL (No. 87 of 1939) from a decree of the High Court (January 27, 1938) which reversed a decree of the Court of the Subordinate Judge, Delhi (November 30, 1936), in favour of the defendant, the present appellant.

The following facts are taken from the judgment of the Judicial Committee : The appeal arose out of a suit instituted by the respondents, on behalf of the members of the brotherhood of the Digamber Jains, for recovery of possession from the appellant of a house described as "Jain Dharamsala," situate at Khatra Mashru, in ward 4 of the town of Delhi, and entered as No. 48 in the municipal registers. The question for decision in this appeal was whether the respondents had established their title to, and right to recover possession of, the suit property from the appellant. The parties to the suit were Jains, and were governed by the Mitakshara law. In the plaint it was alleged that the house in dispute was purchased by one Lala Janaki Das, presumably with his own funds, that he "converted it" into a Dharamsala, that it was used as

* *Present* : LORD THANKERTON, SIR GEORGE RANKIN, and SIR MADHAVAN NAIR.

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such and managed by him during his lifetime, that after his death in 1909 it remained under the management of his son, Ramchand, the third respondent, till it was handed over to the Jain Orphanage Society of Delhi, that the appellant got possession of it from him in January, 1931, for temporary use during the occasion of the marriage of his daughter, and that he refused to vacate when he was asked to return it. The appellant traversed the allegations of the plaint, repudiated the dedication of the property as "Dharamsala," and pleaded as material facts that the house was owned and possessed by him. He also questioned the right of the respondents to maintain the suit. In the course of evidence the following facts were elicited: one, Sri Ram, "by occupation a pleader, "resident of Delhi," executed a will on March 23, 1892. After appointing two executors, Lala Janaki Das (mentioned in the plaint) and Munshi Ramji Das, and setting out the details of his movable and immovable properties, valued at Rs.40,400, the testator expressed in para. 1 of the will his intention of creating a trust for charity in respect of Rs.11,500 out of his properties as follows: "Out of the aforesaid property "of the value of Rs.40,400, property worth Rs.11,500 . . . . . "viz., one house situate in Khatramashru and valued at "Rs.6500 . . . and Rs.5000 . . . in cash be given away in "charity. That is, the money be given away in charity account "and the house under reference be made wakf. I myself "will manage the wakf house in my lifetime, and after my "death managers shall be appointed and instructions shall be "laid down for their guidance." In paras. ii. and iii. of the will the testator made provisions in favour of his wife, Mst. Durgi Devi, and Mst. Bhugli, widow of his deceased son. In para. iv., after giving a legacy to a cousin of his, he left the residue for charity in the following terms: "As regards the remaining "property of the value of about Rs.12,000 (twelve thousand), "I make the following will: The property which is left "unbequeathed at the time of my death be included in the "charity account." The testator did not carry out his intention of creating a charitable trust.

About a week before his death, by a codicil dated April 30, 1892, he amended the disposition for charity of the residue made in para. iv. of the will as follows: ". . . I now . . . amend "the said wording of para. No. iv. of the will . . . and make "the following will about the use of the unbequeathed sum of "about Rs.12,000: The said amount of money . . . To be

"deposited in the charity account, on account of the land "situate at Pahar Gang. . . . . Rs.7000 (Rupees 7000)." He applied the balance of the residue in legacies to certain specified persons and for the construction of an inner hall in a named temple in the name of his deceased son.

On May 7, 1892, the testator died leaving surviving him his widow Musammat Durgi, and Musummat Bhugli, the widow of his predeceased son Peari Lal, who died on February 21, 1892. On November 19 the executor, Lala Janaki Das, obtained probate of the will and codicil. In 1894, while Musammat Durgi, the widow of Sri Ram, was still living, Musammat Bhugli, the widow of Peari Lal, adopted Hem Chand, the appellant, who was then said to be seven or eight years old. The factum of adoption was at first disputed by the respondents, but it was admitted before the Board. Its validity, however, had been questioned throughout. On April 3, 1907, Janaki Das purchased from one Badri Das, the house in suit. The sale deed stated that ". . . . the "vendee has purchased the property . . . . with the money "left by Babu Sri Ram, Vakil, deceased, for purposes of "building a Dharamsala . . ." It was common ground that the property was purchased by Lala Janaki Das out of the estate left by Babu Sri Ram. The appellant was present when the document was registered. After purchase, the house was completely renovated in 1908. The appellant stated that he "looked to the building of the house." It bore on one of its walls the inscription "Dharamsala Babu "Sri Ram, Vakil, Jaini 1909" written in Urdu and Hindi. That was known to the appellant. Lala Janaki Das died in 1909.

The respondents contended that the suit property was dedicated as a "Dharamsala" by Janaki Das, that the title to it belonged to the Digambar Jain Brotherhood, that the appellant's adoption by Musammat Bhugli at the time when the property vested in Musammat Durgi was invalid, that he came into possession as the house was lent to him in 1931 for temporary use on the occasion of his daughter's marriage, and that he was thus liable to ejectment. They also urged that the appellant, having himself accepted and joined in the trust and allowed construction of the house in dispute out of the sale proceeds of the property at Pahargahj, was estopped from denying its validity.

On behalf of the appellant it was contended that the

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provisions of the will relating to the creation of the charity were vague, and therefore inoperative in law, that the money should be treated as undisposed of and held by the trustee on behalf of the author of the trust or his legal representatives, that as the will was void with regard to the gift to charity, the user of the property in dispute as a "Dharamsala" was immaterial, that his adoption was valid under the Hindu law, and that he was therefore entitled to the property as Babu Ram's legal heir. It was also contended that the appellant was all along in possession of the property, and that he was not estopped from contesting the present suit.

The Subordinate Judge accepted the contentions of the appellant, and dismissed the respondents' suit, holding that the appellant was in "possession" and could not be ousted by any person not holding a superior title. He held, further, that the house in question was used for public and charitable purposes from 1909 to 1931, and that the appellant was not estopped from contesting the validity of the trust.

On appeal by the respondents, the learned judges of the High Court (Addison and Din Mohammad JJ.) held that the adoption of the appellant was invalid under Hindu law, inasmuch as the adoptive mother, Musammat Bhugli, could not by her adoption divest Musammat Durgi of the estate that she held, and that the appellant's claim could not be maintained for the reasons that he was present when the property was purchased with the avowed object of building a Dharamsala, that it was with his knowledge and consent that the building was consecrated as a Dharamsala, and that during the course of more than twenty years he never asserted his title to it. They also came to the conclusion that it was for the first time in 1931 that the appellant obtained possession of the property, with the permission of the then manager. In the result, the decision of the Subordinate Judge was set aside and the respondents' suit was decreed.

1942. April 22, 23, 27. *Rewcastle K.C.* and *S. Hyam* for the appellant. The main point is that in an action for ejectment the plaintiff can only succeed, if at all, on the strength of his title, and not on the weakness or absence of title in the defendant. If that be right, this appeal must succeed and the original action must properly have failed unless one of the respondents could prove that he had title to the property himself. It is conceded that Janaki Das was not a trustee

for a specific trust, and that s. 10 of the Limitation Act cannot apply. At no time did Janaki Das ever claim that he had any personal right of property in any part of the estate of the deceased. He was holding it purely as executor, and continued to hold it in that capacity throughout his lifetime. To dedicate part of a mass of property it must be separated from the other property and clearly dedicated. This type of dedication for a charitable use is, in Hindu law, very much on a par with the dedication of land as public property. When a piece of land is dedicated the title to the land is retained, but a public right of passage over it is created. That would appear to be precisely what happened here. It is submitted, on the evidence, that this property was in some way so far dedicated to charity that there only arose some right on the part of a body of people to make use of it from time to time for certain purposes: Mulla's Principles of Hindu Law, 9th ed., p. 474, para. 407. Had there been a proper endowment the religious or charitable purposes would have been clearly specified, and the property would have been set aside for those purposes by the person making the dedication, as I understand it, the testator. The executor only had authority to act on the instructions and powers given to him by the will. Nothing was ever done by dedication to attempt to transfer the property away from the estate to any outside person. In those circumstances, even if s. 10 of the Limitation Act does not apply, and s. 28 does, and the appellant's title is gone, there is nobody holding during that period in adverse possession to him. There is nothing sufficiently definite to show who were the charity to whom the dedication was made, and if there be nothing definite for that, this action must fail, not because the appellant has any title at all, but because there has not been produced the quantum of evidence necessary in an ejectment action to enable the respondents to prove title. The property in suit has, however, since its purchase by the executor, remained part of the residue of the testator's estate and as such legally devolved on his heir, the appellant.

S. Hyam followed. The gift to charity here being bad, Janaki Das had no right to endow a Dharamsala, and therefore all acts done by him were ultra vires. Adverse possession was not pleaded, and cannot be decided on the record as it now stands. Mere user of the property of itself does not mean that there was a beginning of adverse possession.

J. M. Parikh, for the respondents, was not called on.

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June 24. The judgment of their Lordships was delivered by SIR MADHAVAN NAIR, who stated the facts above set out, and continued: It will be observed that important facts forming the basis of the case as presented to the lower courts for decision, namely, that Lala Janaki Das purchased the suit property from the funds of the estate of Babu Sri Ram of which he was an executor under his will, that the appellant claimed that he was adopted by the widow of Peari Lal—a claim disputed by the respondents, but important to the appellant, as he based his title to the property on it—were disclosed with connected facts only in the course of evidence, and had not been mentioned in the pleadings by either party; nor had any issues been raised regarding them. Their Lordships desire to observe that, though the case has been decided on all the points which arose on the evidence led by the parties, the procedure adopted by the trial court of allowing the parties to adduce evidence on points not raised in the pleadings or issues was irregular, and should not have been allowed without amending the pleadings and raising the necessary issues.

The law is well settled that in an action of ejectment the plaintiff can recover only by the strength of his own title, and not by the weakness of that of the defendant. Mr. Parikh, appearing for the respondents, admitted at the outset that the provision of the will relating to charity is vague, and is therefore inoperative to create a charitable trust; but he did not admit that the result of the failure of the trust is, as was held by the Subordinate Judge, that the executor must be considered as holding the undisposed of residue as trustee for the benefit of the author of the trust or his legal representative, his position being, that the resulting trust which arises when the trust fails or is void on account of vagueness or uncertainty is a trust against the deed and the property, if retained by the executor, is prima facie held by the executor *adversely* to the heir-at-law; and if, as in the present case, he dedicates the property to charity, the trust so created, after the expiry of twelve years' adverse possession, would acquire a statutory title to it.

The law is well established that where a trustee has been in possession for upwards of twelve years of property under a trust which is void under the law, an action against him by the rightful owner would be barred by limitation under the statute, the reason being that the possession of the trustee is as much adverse to the true owner as that of any trespasser.

Sect. 10 of the Indian Limitation Act (IX. of 1908) says, "... no suit against a person in whom property has become "vested in trust for any specific purpose, or against his legal "representatives or assigns (not being assigns for valuable "consideration), for the purpose of following in his or their "hands such property or the proceeds thereof, or for an "account of such property or proceeds, shall be barred by "any length of time." If this section could successfully be invoked in favour of the appellant, then the respondents would be precluded from relying on the plea of adverse possession in their favour; but Mr. Rewcastle has frankly conceded, and in their Lordships' opinion, rightly, that the appellant cannot claim the benefit of this section, as it would be impossible to hold that the property in respect of which the direction in the will is void has become "vested in trust "for a specific purpose" within its meaning. Since the provision in the will creating the charitable trust is invalid, and s. 10 of the Limitation Act is inapplicable to the case, it follows that the property is held by the executor adversely to the true owner, and if he so holds it for the statutory period he would acquire a good title to it.

The learned counsel for the appellant then contended that in this case the executor has shown by his conduct that he did not hold the property for himself, that he held it in no other capacity than purely as executor under the will, that his son after his death continued to act in the same manner, and that, in any event, it has not been shown that the property was dedicated as "Dharamsala," and that Lala Janaki Das and Ramchand have been in adverse possession of it for upwards of twelve years. Neither branch of his argument can be accepted. In support of the first part, reliance was placed on the facts that it was with the proceeds of the sale of the property allotted in the will to charity and other funds of the estate that the property in dispute was bought by Lala Janaki Das, and that the house tax receipts issued by the municipality show that they were issued in favour of the testator Sri Ram, deceased. But this is no proof that the executor was not holding adversely to the heir.

Adverse possession having begun in the manner indicated above, the next question is whether it has been proved that the property was dedicated and that it was held in adverse possession by Lala Janaki Das and Ramchand for the statutory period. It may be mentioned, as argument referred to it,

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that the absence of a deed in this case creating the trust cannot invalidate the endowment, for "no writing is necessary "to create an endowment except where the endowment is "created by will, in which case the will must be in writing and "attested by at least two witnesses if the case is governed "by the Indian Succession Act, s. 57." (See Principles of Hindu Law, by Mulla, 9th ed., s. 407.) As stated already, the Subordinate Judge has found specifically "that there is "sufficient material on the record to show that the house in "question has been used for public and charitable purposes "from 1909-1931." Both courts have found that the property was dedicated as "Dharamsala." There is ample evidence to show that it was treated as dedicated property, and used as such for charitable and religious purposes till the year 1931, when the appellant came into possession. The evidence shows further, that the appellant was aware that the property was purchased with the money allotted by Babu Sri Ram for charitable purposes, that he was present when the sale was registered, that he supervised the construction of the building, and that to his knowledge the building bore the inscription "Dharamsala Babu Ram." The inference from the evidence as a whole is irresistible that it was with his knowledge and implied consent that the building was consecrated as a Dharamsala and used as such for charitable and religious purposes, and that Lala Janaki Das, and after him Ramchand, was in possession of the property till 1931. As forcibly pointed out by the High Court in considering the merits of the case: "During the course of more than twenty years "that this building remained in the charge of Janaki Das, "and on his death in that of his son, Ramchand, the defendant "had never once claimed the property as his own or objected "to its being treated as dedicated property." This Board held in *Gunga Gobind Mundul* v. *Collector of the Twenty-Four Pergunnahs* (1) that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation "the practical effect is the extinction of his title in favour of "the party in possession" (2). Sect. 28 of the Limitation Act says: "At the determination of the period hereby limited "to any person for instituting a suit for possession of any "property, his right to such property shall be extinguished." Lala Janaki Das and Ramchand having held the property adversely for upwards of twelve years on behalf of the charity

(1) (1867) 11 Moo. I.A. 345. (2) Ibid. 361.

for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the appellant, if he had any, has become extinguished by operation of s. 28 of the Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the appellant has become barred by limitation had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably s. 10 of the Limitation Act would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the respondents have established their title to the suit property by adverse possession for upwards of twelve years before the appellant obtained possession of it, and since the suit was brought in January, 1933, within so short a time as two years of dispossession, the respondents are entitled to recover it from the appellant, whose title to hold it, if he had any, has become extinct by limitation, in whichever manner he may have obtained possession, permissively or by trespass.

In the above view, the validity of the appellant's adoption by Musammat Bhugli, the widow of Peari Lal, decided in his favour by the Subordinate Judge and against him by the High Court, does not arise for decision by the Board. Their Lordships will therefore humbly advise His Majesty to dismiss this appeal, with costs.

Solicitors for appellant : *Barrow, Rogers & Nevill.*
Solicitors for respondents : *T. L. Wilson & Co.*

SAHODRA, MUSAMMAT . . . . . APPELLANT ;

AND

RAM BABU . . . . . RESPONDENT.

J. C.* 1942 *Oct.* 13.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu law—Inheritance—Mitakshara—"Sister" and "Sister's son"—Inclusion of half-sister and half-sister's son—Hindu Law of Inheritance (Amendment) Act (II of 1929), s. 1, sub-s. 2; s. 2—Construction.

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* *Present:* LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROMER, SIR GEORGE RANKIN, and SIR MADHAVAN NAIR.

PRIVY COUNCIL.

JAGDISH NARAIN v. NAWAB SAID AHMED KHAN.

Lord Thankerton, Lord Goddard and Sir John Beaumont.

12th December, 1945 [From Allahabad

Limitation Act, Arts. 142 and 144—Suit in ejectment—Plaintiff can succeed only on the strength of his own title—No duty on defendant to plead defects in plaintiff's title—Perpetual grant—Each successor to take is to be the heir of the grantee—Limitation against an heir—Starting point.

In a suit in ejectment the plaintiffs can succeed only on the strength of their own title, and there is no obligation upon the defendants to plead possible defects in the plaintiffs' title which might manifest themselves when the title is disclosed. It is sufficient that in the written statement the defendants deny the plaintiffs' title, and under this plea, they can avail themselves of any defect which such title discloses.

Where a perpetual grant enjoyable generation after generation for the maintenance of the heirs of one *A* provides that each heir is to hold for life only and on his death, the next heir of *A* is to take as such heir and not as heir of his predecessor, *Held*: that in such a case limitation starts to run against an heir from the date when his title accrues on the death of the previous heir.

Sir Thomas Strangman and Mr. *S.P.Khambatta* for Appts.

Messrs. *C. S. Rewcastle* and *Robert Ritson* for Respts.

JUDGMENT.

Sir John Beaumont.—This is an appeal from the judgment and decree of the High Court of Allahabad dated 29th April 1941, which modified a decree of the Subordinate Judge of Bareilly dated 2nd June 1936.

The plaintiffs (who are respondents in this appeal) claimed possession of two-third parts of Muafi property situate in Mauza Bahra Bikram. Their case was that on 8th January 1842, the Government made a grant of the lands in suit in favour of the heirs of Ahmad Khan, who had married Sayara Begum the daughter of Nawab Hafiz Rahmat Khan, who had rendered valuable services to the Government which the Government were minded to reward. The plaint alleged that the grant was made enjoyable in perpetuity generation after generation for the maintenance and help of the heirs of Ahmad Khan, and that each heir was to hold for life only and on the death of an heir the next heir of Ahmad Khan was to take as such heir and not as heir of his predecessor. The plaint further alleged that Ahmad Khan had no male or female issue, and that after his death Mt. Mohammadi Begum was his heir according to Muhammadan law and entered into possession of his estate.

In the written statement of the several defendants the title of the plaintiffs was denied and it was alleged that Sayara Begum, the widow of Ahmad Khan, was the absolute owner of the property in suit, and that in 1841 she made a gift of the property to Mohammadi Begum; that in 1854 Mohammadi Begum mortgaged the property, and in 1856 it was sold by the Court in a suit instituted by the mortgagee and was purchased by the predecessors in title of the defendants, and that the defendants and their predecessors have been in possession of the property ever since.

Both Courts in India held that the tenure of the land in suit was as claimed by the plaintiffs, and that each heir of Ahmad Khan held the property for life and on his death the next heir took. These findings have not been challenged before their Lordships, and it follows from such findings that limitation would start to run against an heir from the date when his title accrued on the death of the previous heir.

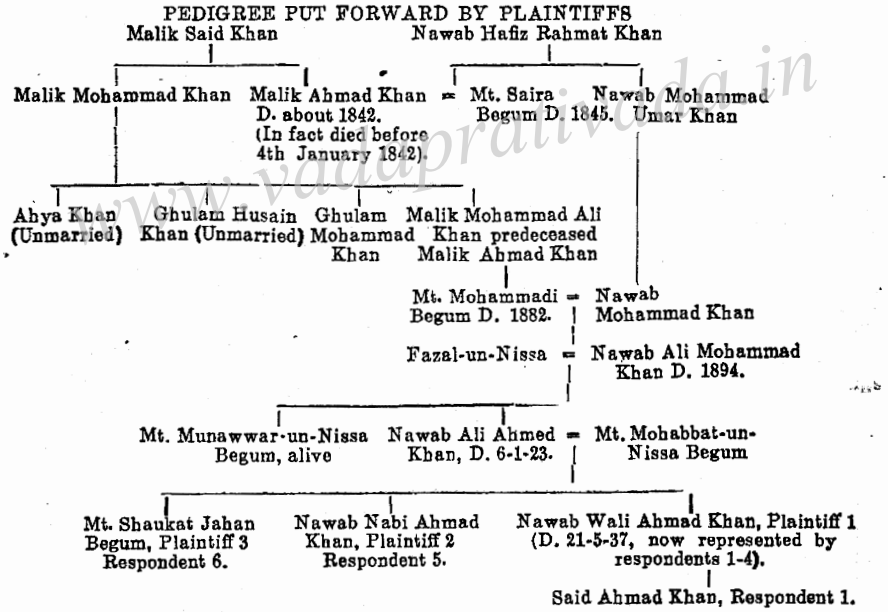
The Subordinate Judge held that the plaintiffs had proved that they were the heirs of Mohammadi Begum, but that they had not proved that Mohammadi Begum was the heir of Ahmad Khan, and accordingly dismissed the suit.

In appeal the High Court agreed with all the findings of the lower Court except with regard to the heirship of Mohammadi Begum. The Court held that Sayara Begum, as widow of Ahmad Khan, was one of his heirs according to Muhammadan law and inherited one-fourth of his property, and that it was not proved that Mohammadi Begum was the heir of Sayara Begum; but the Court held it proved that Mohammadi Begum was the heir of Ahmad Khan as to the remaining three-fourths of his property and accordingly they decreed the plaintiffs' suit as to three-fourths of the two-thirds of the property claimed.

The Subordinate Judge had held that the case of the plaintiffs failed because they had not proved that there were no male collaterals in the male line of descent or ascent of Ahmad Khan, or of his father, alive at the death of Ahmad Khan and that, as such male collaterals would succeed as heirs according to Muhammadan law in preference to Mohammadi Begum, the plaintiffs had failed to discharge the burden which rested upon them of proving their title. The High Court held that this defect in the title of the plaintiffs had not been pleaded by the defendants, and expressed the view that the Subordinate Judge had made out a case for the defendants which was not foreshadowed in the written statements and was not set up at the trial. Their Lordships are quite unable to agree with the High Court in this view. The plaintiffs were suing in ejectment, and they could only succeed on the strength of their own title. There was no obligation upon the defendants to plead possible defects in the plaintiffs' title which might manifest themselves when the title was disclosed. It was sufficient that in the written statements the defendants denied the plaintiffs' title, and under this plea they could avail themselves of any defect which such title disclosed.

The following pedigree which was handed in by Counsel for the defendants and admitted by Counsel for the plaintiffs, and which is substantially the pedigree proved at the trial, shows the position of the family of Ahmad Khan :

PEDIGREE PUT FORWARD BY PLAINTIFFS



It will be observed that Ahmad Khan died about 1842, and his widow died in 1845. Mohammadi Begum was the daughter of one of the four sons of the only brother of Ahmad Khan, so that she was a great-niece of Ahmad Khan. It is in evidence that she was also the informally adopted daughter of Ahmad Khan and his wife. It will further be observed that Mohammadi Begum died in 1882 and that her only son died in 1894 leaving a son and daughter. The daughter, who inherited one-third of her father's property, is not a party to these proceedings. The son, who inherited two-thirds of the property, died in 1923 and the original plaintiffs were his children ; they filed their suit in 1934, 11 years and 11 months after the death of their father and so just within the period of limitation. The findings of the lower Courts that the plaintiffs

were the heirs of Mohammadi Begum as to two-thirds of her property has not been challenged before their Lordships, and the only question which arises for decision is that upon which the Courts in India differed, namely, whether Mohammadi Begum was the heir of Ahmad Khan.

The plaintiffs called two witnesses who gave verbal evidence upon the question. Witness 1 was Said Ahmad Khan (respondent 1 who was the son of the original plaintiff 1). He stated that his information about the earlier history of the family was derived from his paternal grandfather who, as stated, had died in 1923. The grandfather can have had no personal knowledge of matters which occurred in 1842 and, as the source of his information as to matters which occurred before his birth or in early youth were not disclosed, his statement, which is admissible under S. 32, Evidence Act, has little evidential value. Said Ahmed Khan alleged that the father of Mohammadi Begum died during the lifetime of Ahmad Khan and the learned Subordinate Judge found that in that event Mohammadi Begum could inherit as heir of Ahmad Khan only if there were no male collaterals in the male line of descent or ascent of Ahmad Khan, or his father Said Khan, alive at the time of Ahmad Khan's death. This finding has not been challenged. The witness further stated that he did not know whether the father of Ahmad Khan had any, and if so how many brothers. Witness 2 called by the plaintiffs was Basityar Khan who also stated that he did not know if Said Khan had any brother. This witness stated that he had seen a written pedigree of the family which was not produced, and this omission detracts from any value which might otherwise attach to his evidence. Their Lordships agree with the view of the learned Subordinate Judge that the verbal evidence produced by the plaintiff does not prove that Mohammadi Begum was an heiress of Ahmad Khan under Muhammadan law.

In addition to verbal evidence the plaintiffs also relied on certain documentary evidence, and the High Court attached great importance to one document which will be referred to later. Most of the documents produced were relevant on the question of tenure which is not now in question, and these documents need not be noticed. It may, however, be observed that Ex. "A," which is an extract from the Register retransfer of Muafi lands, contains an entry of a deed of gift made on 4th January 1842, by Mt. Sayara Begum, wife of Ahmad Khan, in favour of Mohammadi Begum described as a daughter of the donor of Muafi land in Mauza Bahra. This suggests that the original possession of Mohammadi Begum was under the deed of gift, though from the terms of the tenure as defined by Government on 8th January 1842 (Ex. 14), it follows that Mohammadi Begum's title as donee would terminate on the death of Sayara in 1845. The document on which the High Court strongly relied in proof of the heirship of Mohammadi Begum is Ex. 22. This purports to be a copy of an extract from a report regarding Muafi lands under an order dated 9th January 1882, taken from the record of Case No. 53/II, relating to enquiry and management of the muafi of Hafiz Rahmat Khan, disposed of on 29th September, 1882. It relates to the jagir of Pilibhit and states :

"This Jagir belongs to Ahmad Khan Mohammadi Begum, heir, came in possession. She sold it to the Nawab Saheb Bahadur of Rampur. The vendee is in possession by virtue of the purchase and Mohammadi Begum is a resident of mohalla Qela in Bareilly."

The author of the report is not shown and the order of 9th January, 1882, under which it purports to have been made, is not on the record. There is, however, a copy order, Ex. 21, in Case No. 53 directing the record-keeper with reference to the muafi register to make a note against every tract of land, showing whether the tract was then held as muafi or not, and directing that if it was held as muafi it should be ascertained whether the lawful heirs of the persons in whose name it was released were alive or not. On the assumption that the order of 9th January 1882, was in similar terms the important point to which the enquiry was to be directed was whether the heir was alive. No doubt, in case of disputed heirship this would involve an

enquiry as to who was the heir, but any such enquiry would involve giving notice to possible claimants so that their case might be adjudicated upon. There is nothing to show that any such notice was given or that any enquiry as to who was the heir of Ahmad Khan was conducted by the officer who made the report. It may well be that, finding that Mohammadi Begum was a member of the family of Ahmad Khan and had been in possession for 40 years the officer assumed her title as heir. The omission from the report of any reference to Sayara Begum who was certainly one of the heirs of Ahmad Khan, or to the deed of gift in favour of Mohammadi Begum, supports the view that no real enquiry was made as to Mohammadi Begum's title as heir. The report does not deal with the property in suit, though the property with which it does deal was probably held on a similar tenure. Their Lordships are unable to attach to the reference in this report to Mohammadi Begum as heir the importance which the High Court attached to it.

It was argued for the respondents that at this distance of time reasonable inferences should be drawn in favour of the plaintiffs and that to require them to eliminate from their pedigree possible heirs whose very existence is not proved is to impose an impossible burden upon them. But it must be remembered that though lapse of time may have prejudiced the chances of the plaintiffs in proving their case, it may well also have prejudiced the defendants in resisting the claim, and the lapse of time is certainly not due to any default on the part of the defendants or their predecessors. ' The respondents' are not so free from criticism. The son of Mohammadi Begum made no effort to support his claim during the 12 years in which he survived her, and his son did nothing during the 29 years in which he survived his father, and the plaintiffs themselves did nothing until the expiration of nearly 12 years from the date when their alleged title accrued. Their Lordships see nothing in the circumstances of the case which would justify drawing any inference which might relieve the respondents of any part of the burden of proving their title. It was argued further that since Mohammadi Begum was left in possession after the death of Sayara Begum when her title as donee terminated, she must be assumed to have remained in possession as heir, and that the fact that no claim was made by any collateral male heir should lead to an inference that no such collateral male heir existed. Their Lordships are unable to accept this argument. It is quite possible that a collateral male heir, not being a member of the immediate family of Ahmad Khan, may have known of the deed of gift in favour of Mohammadi Begum, and may not have known of the terms upon which the muafi lands of Ahmad Khan were held under Government grant.

In their Lordships' view the finding of the learned Subordinate Judge that the plaintiffs had failed to prove that Mohammadi Begum was an heir of Ahmad Khan was right. Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed, that the judgment and decree of the High Court be set aside and the judgment of the Subordinate Court dismissing the plaintiffs' suit with costs be restored. The plaintiffs must pay the costs of the appeal to the High Court and to His Majesty in Council.

Messrs. *T. L. Wilson & Co.* : Solicitors for Appts.

Messrs. *Douglas Grant & Dold* : Solicitors for Respts.

N. R. R.

Sri Gangavamsam SATYANARAYANA
v. Routu RAMASWAMI NAIDU
and others.

Patanjali Sastri, J.

C. R. P. No. 357 of 1944.

Petition (disposed of on 28—11—1945) under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Parvatipur dated 30—10—1943, and passed in O. P. No. 52 of 1942.

Madras Agriculturists Relief Act, S. 10 (2) (i)—Mortgage with possession—Enjoyment for interest—Stipulation for addition of another sum to be advanced by the mortgagee and that sum bearing interest—Inapplicability of S. 10 (2) (i).

Where a mortgage had been renewed under another mortgage including a further sum due under a compromise decree and the new mortgage provided that the mortgagee should take

AIR 1959 SC 31

In the Supreme Court of India

(BEFORE SUDHI RANJAN DAS, C.J. AND N.H. BHAGWATI, BHUVANESHWAR PRASAD SINHA, K. SUBBA RAO AND K.N. WANCHOO, JJ.)

Civil Appeal No. 267 of 1958

MORAN MAR BASSELIOS CATHOLICOS ... Appellant;

Versus

THUKALAN PAULO AVIRA & ORS. ... Respondents.

With

Petition No. 59 of 1957

(Under Article 22 of the Constitution of India for enforcement of Fundamental Rights).

REV. FATHER K.C. THOMAS & ORS. ... Petitioners;

Versus

T.P. AVIRA & ORS ... Respondents.

Civil Appeal No. 267 of 1958*, decided on September 12, 1958

Advocates who appeared in this case :

M.K. Nambyar, Senior Advocate, M. Abraham, Advocate, & S.N. Andley, Rameshwar Nath & J.B. Dadachanji, Advocates of Rajinder Narain & Co., with him, for the Appellant;

K.P. Abraham, Senior Advocate, (S. Subramania Iyer, P. Sivarama Iyer, P.P. John & M.R. Krishna Pillai, Advocates, with him), for Respondent No. 1 (In Appeal);

T.N. Subramania Iyer. Senior Advocate (G.B. Pai and Sardar Bahadur, Advocates, with him), for Respondent No. 3 (In Appeal);

G.B. Pai & Sardar Bahadur, Advocates, for Respondent No. 4 (In Appeal);

P. Ram Reddy, Advocate, for the Petitioners;

M.R. Krishna Pillai, Advocate, for Respondent No. 1 (In Petition);

S.N. Andley & Rameshwar Nath, J.B. Dadachanji, Advocates of Rajinder Narain & Co, for Respondent No. 2 (In Petition);

Sardar Bahadur, Advocate, for Respondent No. 4 (In Petition).

The Judgment of the Court was delivered by

SUDHI RANJAN DAS, C.J.— In order to appreciate the points urged before us in this appeal it is necessary to briefly narrate some facts which will bring out the genesis of the controversy that has been going on between the two rival sections of the Malankara Jacobite Syrian Christian community for a considerable length of time and which has brought in its train protracted litigation involving ruinous costs.

2. In Malabar there is a Christian community commonly known as Malankara Jacobite Syrian Christians. That community traces its origin to 52 A.D. when St. Thomas, one of the disciples of Jesus Christ, came to Malabar and established the Christian Church there. In 1599 A.D., under the influence of the Portugese political power on the West Coast of India, the community accepted the Roman Catholic faith. This affiliation, however, did not last long. At a meeting known as Mattancherry Meeting held in 1654 the Roman Catholic Supremacy was thrown off and the Church in Malabar came under the authority of the Patriarch of Antioch who began to depute Metropolitans for ordaining Metropolitans in Malabar. Later on the Patriarch himself also ordained Metropolitans for Malankara. Thus in 1840 the then reigning Patriarch of

Antioch personally ordained one Mar Mathew Athanasius who had gone to Syria for the purpose.

3. In 1808 a trust for charitable purposes was created by one Moran Mar Thoma VI, popularly called Dionysius the great, by investing 3000 Star Pagodas with the British Treasury at Trivandrum on interest at 8% per annum in prepetuity. The trust property in dispute consists of this amount and the accretions thereto. It appears that a Society called the Church Mission Society and the Malankara Jacobite Syrian Church had come to jointly hold certain properties including this trust property. Disputes arose between the Church Mission Society and the Malankara Jacobite Syrian Church with regard to such porperties. Those disputes were settled by what is known as the Cochin Award made in 1840. This award divided the properties between the two bodies and so far as the properties allotted to the Malankara Jacobite Syrian Church were concerned, it provided that they should be administered by three trustees, namely, (*i*) the Malankara Metropolitan, (*ii*) a Kathanar (that is priestly) trustee, and (*iii*) a lay trustee.

4. In 1876 Patriarch Peter III came to Malabar. He called a meeting of the accredited representatives of all the churches in Malabar which accepted the ecclesiastical supremacy of the Patriarch of Antioch. The said representatives met together in a Synod called the Mulunthuruthu Synod under the presidentship of Patriarch Peter III. The proceedings of that meeting were recorded in writing, a copy of which is marked Ex. F.O. At that Synod the Malankara Syrian Christian Association, popularly called the Malankara Association, was formed to manage all the affairs of the churches and the community. It consisted of the Malankara Metropolitan as the ex-officio President and three representatives from each church. A managing committee of 24 was to be the standing working committee of the said Malankara Association.

5. On March 4, 1879 one Mar Joseph Dionysius claiming to be the properly consecrated Metropolitan of the Malankara Jacobite Syrian Church and the President of the Malankara Association filed a suit (OS No. 439 of 1054) in the Zilla Court of Alleppey against one Mar Thomas Athauasius who claimed to have been ordained by his brother Mar Mathew Athanasius as his successor and two other persons who claimed to be the Kathanar and lay trustees for the recovery of the church properties. Mar Jospeh Dionysius asserted that the supremacy of the Patriarch consisted in consecrating and appointing Metropolitans from time to time to govern and rule over the Malankara Edavagai, sending Morone (the sanctified oil) for baptismal purposes, receiving the Ressissa from the community to maintain his dignity and generally in controlling the ecclesiastical and temporal affairs of the Edavagai. Mar Thomas Athanasius totally denied such alleged supremacy of the Patriarch. According to him the Patriarch could not claim, as a matter of right, to have any control over the Jacobite Syrian Church in Malabar either in temporal or spiritual matters, although, as a high dignitary in the churches of the country where their Saviour was born and crucified, the Malabar Syrian Christian community did venerate the Patriarch. That suit was, after various proceedings, finally disposed of by the Travancore Royal Court of Final Appeal by its judgment (Ex. DY) pronounced in 1889, which, by a majority of 2 to 1, dismissed the appeal of the defendant Mar Thomas Athanasius and confirmed the decree of the lower courts in favour of the plaintiff respondent Mar Joseph Dionysius. The conclusions arrived at by the majority of Judges, as set forth in paragraph 347 of that judgment, were, amongst others, that the ecclesiastical supremacy of the See of Antioch over Jacobite Syrian Church in Travancore had been all along recognised and acknowledged by the Jacobite Syrian Christian Community and their Metropolitans; that the exercise of the supreme power consisted in ordaining either directly or by duly authorised delegates, Metropolitans from time to time to manage the spiritual matters of the local Church, in sending Morone to be used in the churches for baptismal and other purposes and in general supervision over the spiritual government of the Church: that the authority of the Patriarch had never extended to the government of

temporalities of the Church which, in this respect, had been an independent Church; that the Metropolitan of the Jacobite Syrian Church in Travancore should be a native of Malabar consecrated by the Patriarch or by his duly authorised Delegate and accepted by the people as their Metropolitan. The finding was that the plaintiff-respondent has been so consecrated and accepted by the majority of the people and had succeeded to the Metropolitionship on the death of Mar Mathew Athanasius. As a result of the aforesaid judgment Mar Joseph Dionysius came into possession of the office of the Malankara Metropolitan and of the church properties. The Patriarch Peter III did not, naturally enough, approve of that judgment, for it denied to him any authority over the temporalities of the Church.

6. Up to 1905 one Abdul Messiah was the reigning Patriarch of Antioch. It was a matter of dispute whether there was a valid Synodical removal of Abdul Messiah from the office of Patriarch. There is no dispute, however, that the Sultan of Turkey had withdrawn the Firman he had issued recognising Abdul Messiah as the Patriarch and had issued a fresh Firman in favour of one Abdulla II who began to perform the duties of the Patriarch.

7. In 1909 Mar Joseph Dionysius died and the Malankara Association elected and installed one Mar Geevarghese Dionysius (who, in 1907, had gone to Syria and got himself ordained as a Metropolitan by Patriarch Abdulla II) as the Malankara Metropolitan and as such he became the ex-officio President of the Malankara Association and one of the trustees of the Church properties. The other two co-trustees of Mar Joseph Dionysius, namely, Kora Mathan Malpan and C.J. Kurien continued as co-trustees of Mar Geevarghese Dionysius.

8. In 1909 Abdulla II came to Malabar with the object of regaining his temporal authority over the Malankara Jacobite Syrian Christian Church. After his arrival he convened a meeting of the Malankara Association at the Old Seminary of Kottayam and demanded that the said Association should accept and acknowledge the temporal authority of the Patriarch. This the congregation declined to do and the meeting ended in confusion. Abdulla II thereafter started approaching the parish churches separately and attempted to get from them Udampadis (Submission Deeds) acknowledging the spiritual and temporal supremacy of the Patriarch. He actually succeeded in getting such Udampadis from some of the churches but not from many. He started rewarding persons who gave Udampadis by ordaining them as Metropolitans and ex-communicating those who declined to do so. In 1910 Mar Poulose Athanasius (the first plaintiff in the present suit and now the respondent in the present appeal arising out of that suit) gave an Udampadi and was ordained as a Metropolitan, Mar Geevarghese Dionysius declined to submit and give any Udampadi and consequently in 1911 Abdulla II ex-communicated Mar Geeverghese Dionysius whom he himself had ordained in 1907 and ordained one Mar Kurilos as the Malankara Metropolitan so as to make him automatically the ex-officio President of the Malankara Association and one of the trustees of the trust properties. The other two trustees Kora Mathan Malpan and C.J. Kurien went over to the vide of Abdulla II and acknowledged his new nominee Mar Kurilos as the Malankara Metropolitan and as such the ex-officio trustee Mar Geevarghese Dionysius retaliated by convening a meeting of the Malankara Association which declared his ex-communication invalid and removed from trusteeship the two trustees who had gone over to the side of the Patriarch and appointed two new trustees, namely, Mani Poulose Kathanar who was the second appellant but has since died and one Kora Kochu Korula also since deceased. The said meeting also resolved to enquire into the real position of Abdulla II and Abdul Messiah and suspend the payment of Ressissa to the Patriarch. Abdulla II left Malabar in October 1911 and in 1912 issued a Kalpana (message or order) branding Abdul Messiah and Mar Geevarghese Dionysius as "wolves" from whom the faithful should entirely keep aloof.

9. In 1912 Abdul Messiah, whose Firman had been withdrawn by the Sultan of Turkey, came to Malabar. He declared the ex-communication of Mar Geevarghese as invalid. In 1913 he issued a Kalpana (Ex. 80) establishing a Catholicate in Malabar as it appeared to him that "unless we do instal a Catholicos, Our Church, owing to various causes, is not likely to stand firm in purity and holiness". By this Kalpana Abdul Messiah ordained one Mar Poulose Basselios as the first Catholicos and also ordained three Metropolitans. This Kalpana further provided that the Catholicos aided by the Metropolitans would ordain Melpattakars "in accordance with the Canons of Our Holy Fathers" and consecrate Holy Morone and that the Metropolitan had the sanction and authority to instal anew Catholicos when a Catholicos died. Shortly after this Abdul Messiah left Malabar in March 1913. The position at that time, therefore, was that there were two rival groups in the Malankara Jacobite Syrian Church who were represented by two rival sets of trustees, namely. Mar Geevarghese Dionysius (since deceased) and his co-trustees Mani Poulose Kathanar (the second appellant) now deceased and Kora Kochu Korula also since deceased on the one side and Mar Kurilos and Kora Mathan Malpan and C.J. Kurien who had deserted Mar Geevarghese Dionysius and had sided with Mar Kurilos. In 1915 Abdulla II and Abdul Messiah died.

10. In the meantime in 1913 the Secretary of State for India filed an interpleader suit (OS No. 94 of 1088) in the District Court of Trivandrum. In that suit he impleaded both the sets of rival claimants as defendants, namely, (*i*) Mar Geevarghese Dionysius, (*ii*) Mani Poulose Kathanar (*iii*) Kora Kochu Korula being one set claiming to be trustees, and (*iv*) Mar Kurilos, (*v*) Kora Mathan Malpan and (*vi*) C.J. Kurien being the other set also making the same claim. The prayer was for the determination of the question as to which of the two rival sets of trustees was entitled to draw the interest on the amounts standing to the credit of the Malankara Jacobite Syrian Christian community in the British treasury. The two rival sets of trustees filed written statements interpleading against each other, the defendants Mar Geevarghese Dionysius, Mani Poulose Kathanar and Kora Kochu Korula being treated as plaintiffs and the defendants Mar Kurilos, Kora Mathan Malpan and C.J. Kurien being treated as defendants. As will appear from para 3 of the trial court's judgment (Ex. 255) pronounced on September 15, 1919, the suit was converted into a representative action on behalf of the Jacobite Syrian Christian population of Malabar with the permission of the court and notice was given of the institution of the suit under Section 26 of the Travancore CPC by publishing advertisements in the several jurisdictions peopled by the Syrian Christian community. Defendants 7 to 41 got themselves impleaded in the suit as defendants and supported Defendants 1 to 3. During the pendency of the suit, Defendant 4, Mar Kurilos died and Mar Poulose Athanasius, who claimed to be the successor of Mar Kurilos as Malankara Metropolitan, was added as Defendant 42. By the aforesaid judgment (Ex. 255) the trial court upheld the claim of defendants Mar Geevarghese Dionysius, Mani Poulose Kathanar and Kora Kochu Korula (Defendants 1 to 3) as the lawful trustees of the Church properties.

11. The defendants Kora Mathan Malpan, C.J. Kurien and Mar Poulose Athanasius (Defendants 5, 6 and 42) appealed to the Travancore High Court, In 1923 the Full Bench of the Travancore High Court pronounced its judgment (Ex. DZ) which will be found reported in 41 Tr.L.R. 1. By that judgment the Full Bench reversed the judgment and decree of the District Court and directed that the money lying deposited in court be withdrawn by the Defendants 5 and 6 and by the person to be thereafter duly elected, appointed and consecrated as the Malankara Metropolitan.

12. Mar Geevarghese Dionysius and his two co-trustees (Defendants 1, 2 and 3) applied under Section 12 of the Travancore High Court Regulation, 1099 for review of the aforesaid judgment of the Full Bench. That application was admitted subject to the condition that on the re-hearing the findings recorded (*i*) as to the authenticity of Ex.

18 the version of the Canon Law produced by the Defendants 5, 6 and 42, (*ii*) as to the power of the Patriarch to ex-communicate without the intervention of the Synod, and (*iii*) as to the absence of an indirect motive on the part of the Patriarch which induced him to exercise his powers of ex-communication must be taken as binding. The appeal was then re-heard by a Full Bench which, by its judgment pronounced on July 4, 1928 (Ex. 256), upheld the decision of the learned District Judge and confirmed his decree. That judgment will be found reported in 45 Tr.L.R. 116. The net result of that litigation, therefore, was that Mar Geevarghese Dionysius and his two co-trustees (Defendants 1, 2 and 3) became finally entitled to withdraw the moneys deposited in the Court as the lawful trustees of the church properties.

13. On August 16, 1928 the Managing Committee of the Malankara Association was authorised to draw up a constitution for the Church and the Association. On the very next day Mar Julius Elias, the Patriarch's Delegate who was in Malabar at that time and who has figured as PW 17 in the present proceedings, issued an order on Mar Geevarghese Dionysius calling upon him to execute an Udampadi within two days and at the same time suspending him for having "committed several grave offences against the Holy Throne of Antioch and the faith and practices of the Holy Church and repudiated the authority of the ruling Patriarch". He also sent letters to the Governments of Travancore and Madras to withhold the payment of interest to defendant Mar Geevarghise Dionysius on the ground of his suspension.

14. On August 21, 1928 OS No. 2 of 1104 was filed in the District Court of Kottayam by 18 persons belonging to what, for the sake of brevity, may be called the Patriarchal party against the Defendants 1, 2 and 3 of OS No. 94 of 1088 and 12 other persons including the second Catholicos, Mar Geevarghese Philixinos, who may be compendiously called as belonging to the Catholicos' party, and the Secretary of State for India. It may be mentioned here that in 1929 on the death of Mar Geevarghese Philixinos, Moran Mar Basselios, who was Defendant 1 in the suit out of which this appeal arises and is the appellant before us, was installed by the local Metropolitans as the third Catholicos in terms of the procedure prescribed by the Kalpana (Ex. 80) issued by Abdul Messiah and he was substituted as a defendant in OS No. 2 of 1104 in place and stead of the second Catholicos Mar Geevarghese Philixinos. On January 23, 1931 OS No. 2 of 1104 was dismissed for non-compliance with the court's order for payment of certain moneys to the Commissioner appointed in that suit. The plaintiffs applied for restoration of the suit by setting aside of that order of dismissal. That application for restoration was dismissed on September 29, 1931 (Ex. 46). There was a Civil Misc. Appeal No. 74 of 1107 against the order refusing to restore the suit.

15. In view of the disputes raging between the two sections of the community which resulted in acute dissensions in the Church, an attempt was made to restore goodwill and amity amongst the members of the community and at the instance of Lord Irwin, the then Viceroy of India, Patriarch Elias I visited Malabar in 1931. He, however, died in Malabar before he could effect any settlement. In 1933 Ebhraim was elected as Patriarch of Antioch without, it is said, notice to the Malabar community. Mar Geevarghese Dionysius and his supporters did not recognise Ephraim as the duly installed Patriarch.

16. Kora Kochu Korula who was one of the co-trustees of Mar Geevarghese Dionysius died in 1931 and one E.J. Joseph was appointed a trustee in his place and stead. During the pendency of the Civil Miscellaneous Appeal, hereinbefore mentioned. Mar Geevarghese Dionysius died in February 1934 and the trust properties passed into the possession of Mani Polouse Kathanar and E.J. Joseph. Shortly thereafter the draft constitution was published in the shape of a pamphlet. On December 3, 1934 three notices (Ex. 59, 60 and 61) were issued convening a meeting of the Churches to be held on December 26, 1934 at M.D. Seminary at Kottayam for, inter alia, electing the

Malankara Metropolitan and adopting the draft constitution. Notices were also published in two leading Malayalam newspapers (Ex. 62 and 63). The meeting was held on the appointed day and the proceedings of that meeting will be found recorded in Ex. 64. Shortly put, the third Catholicos, who was Defendant 1 in the present suit and is now the appellant before us and who was also Defendant 3 in OS No. 2 of 1104 was unanimously elected as Malankara Metropolitan and as such he automatically became a trustee of the church properties. The meeting also unanimously adopted the constitution (Ex. A.M.). The factum and validity of this meeting are strenuously challenged on diverse grounds to which reference will be made hereafter.

17. On July 5, 1935 the Metropolitans of the Patriarchal party issued a notice (Ex. D) summoning a meeting of the Church representatives for August 22, 1935 at Karingasserai to elect the Malankara Metropolitan. In that notice it was mentioned that none of the Catholicos party should be elected, although Ex. A.M. was not referred to therein as a ground for such exclusion. The meeting was held on August 22, 1935. At that meeting Mar Poulose Athanasius, the original first plaintiff in the present suit now deceased, was elected Malankara Metropolitan, Mar Poulose Kathanar and E.J. Joseph, the Defendants 2 and 3 in the present suit were removed from trusteeship and Avira Joseph Kathanar and Thukalan Paulo Avira, Plaintiffs 2 and 3 in the present suit, Plaintiff 2 having died since, were elected trustees and the three new trustees (Plaintiffs 1 to 3 in the present suit) were authorised to file a suit for the recovery of the trust properties.

18. After these resolutions were passed at the meeting the Civil Miscellaneous Appeal No. 74 of 1107, which was pending in the High Court, was on July 23, 1936 allowed to be dismissed for non-prosecution. On March 10, 1938 was filed in the District Court of Kottayam the suit (OS No. 111 of 1113) out of which the present appeal has arisen for various reliefs to which reference will hereafter be made in some detail. That suit was dismissed on January 18, 1943. The plaintiffs preferred an appeal to the Travancore High Court, which was numbered as AS No. 1 of 1119. On August 8, 1946 that appeal was allowed and the suit was decreed by a majority of Judges in the proportion of 2 to 1. The defendants applied for review which came up before the Travancore High Court. That review application having been dismissed on December 21, 1951, the defendants applied for and obtained special leave to appeal from this Court under Article 136 of the Constitution. That appeal before this Court was numbered CA 193 of 1952. By its *judgment delivered on May 21, 1954*[1] this Court allowed the appeal, set aside the judgment of the High Court and admitted the review application and directed the entire appeal No. AS 1 of 1119 to be re-heard on all points. The Travancore High Court thereupon took up the re-hearing of the appeal. The arguments commenced on September 15, 1956 and concluded in the first week of October 1956 when judgment was reserved. On November 1, 1956 came the States Reorganisation Act which brought into being the present State of Kerala and the Kerala High Court. In December 1956 the same Judges heard the appeal formally de novo by putting a few questions and on December 13, 1956 delivered a unanimous judgment allowing the appeal and decreeing the suit. The High Court on March 21, 1957 granted a certificate under Article 133 of the Constitution. Accordingly Moran Mar Basselios Catholicos, the original first defendant, has preferred this appeal impleading Thukalan Paulo Avira, the original third plaintiff, and Kurian George Semmassen the original seventh defendant, as the respondents, the other parties having died in the course of the long drawn proceedings. Two individuals have been elected by the Patriarchal party under orders of this Court made on April 22, 1957 to carry on this litigation in the event of the first respondent's death during its pendency and they have since been added as party-respondents.

19. In the meantime on April 17, 1957 was filed a petition under Article 32 of the Constitution by 8 persons belonging to the Catholicos party praying for a writ of

certiorari or other appropriate order or direction or writ for quashing the judgment and decree passed by the High Court of Kerala dated December 31, 1956 inin A.S. I of 1119. That application has also come up for hearing along with the appeal. Shri T.N. Subramania Aiyer took a preliminary objection as to the maintainability of the appeal on the ground that although the final judgment of the Kerala High Court was passed on December 13, 1956, it only restored the decree of the majority of the Travancore High Court pronounced on August 8, 1946 and accordingly, that being a decree passed before the commencement of the Constitution, no appeal would lie under Article 133 of the Constitution. This objection, however, was not seriously pressed by learned counsel and would, at any rate, not affect the maintainability of Article 32 petition. In the circumstances nothing further need be said on this preliminary objection, except that it is rejected as untenable.

20. The plaintiffs have brought the suit out of which the present appeal has arisen claiming to be trustees and praying for a declaration of their own title as trustees and for a declaration that the defendants were not trustees and for possession of the trust properties and other incidental reliefs. It is perfectly clear that in a suit of this description if the plaintiffs are to succeed they must do so on the strength of their own title. The plaintiffs in this suit base their title to trusteeship on their election at a meeting of the churches alleged to have been held on August 22, 1935 at Karingasserai when the original plaintiff is said to have been elected the Malankara Metropolitan and the plaintiffs 2 and 3 as Kathanar and lay trustees. That meeting was admittedly held without any notice to the members of the Catholicos party, for they were, quite erroneously as we shall presently indicate, regarded as having gone out of the Church. In justification of this stand reference is made, rather half-heartedly, to the Kalpana (Ex. Z) which commanded the faithful not to have anything to do with the heretics. On our finding on that question to be hereafter recorded, namely, that the defendants and their partisans had not become *ipso facto* heretics in the eye of the civil court or aliens or had not gone out of the Church, it must necesssarily follow, apart from the question of the competency of the convener of the meeting, that the meeting had not been held on due notice to all churches interested and was consequently not a valid meeting and that, therefore, the election of the plaintiffs was not valid and their suit, in so far as it is in the nature of a suit for ejectment, must fail for want of their title as trustees.

21. Learned counsel for the respondents, however, seek to get over this difficulty by contending that the present suit has been filed by the plaintiffs not only in their capacity as trustees, but also in their individual capacity as members of the Malankara Jacobite Syrian Christian community who claim that as such members they are entitled to come before the court for the preservation of the properties held in trust for all the members of the community including themselves. Learned counsel for the defendant-appellant contends that the present suit is not a representative suit nor a suit under Section 72 of the Travancore CPC corresponding to Section 92 of our CPC and that, therefore, the plaintiff cannot question the validity of the defendants' title as trustees of the church properties. Learned counsel for the defendant-appellant also points out that even if the plaintiffs may in their individual capacity as members of the community maintain this suit with a view to dislodge the defendants from their office as trustees the onus is on the plaintiffs and not on the defendants who have not come to court for a declaration of title to prove that the defendants have no title as trustees. The question of burden of proof at the end of the case, when both parties have adduced their evidence is not of very great importance and the court has to come to a decision on a consideration of all materials. Further although in the cause title or in the body of the plaint the plaintiffs do not claim to have instituted the suit for themselves and on behalf of all other members of community proceedings were taken under the provisions of the Travancore Code of Civil Procedure corresponding to '6'.1, Rule 8 of

our CPC. We, therefore, proceed to determine the questions arising in this appeal on the basis that the plaintiffs were entitled to maintain this suit as members of the Malankara Jacobite Syrian Christian community not only on behalf of themselves but on behalf of all the members of the said community.

22. The plaintiffs first seek to displace the title of the defendants on the plea that the defendants are heretics or aliens to the Church or have voluntarily gone out of the Church by establishing a new Church and consequently have lost their status as members of the Malankara Jacobite Syrian Church and have forfeited their office as trustees of the properties of that Church. The major part of the argument advanced before us on both sides has centred round the question as to how far the contentions now sought to be put forward by the plaintiffs in the present suit in derogation of the title of the defendants are concluded by the final decision (Ex. 256) in the interpleader suit (O.S. No. 94 of 1088) and by the provisions of the Kerala Code of Civil Procedure corresponding to Order 9, Rule 9 of our CPC in view of the dismissal for default of the other suit (Order 2 of 1104).

23. At the forefront, of course, has come the question as to the identity of the parties in the different suits. As will appear from paragraph 3 of the judgment (Ex. 255) pronounced by the trial court on September 15, 1919 in the interpleader suit (O.S. No. 94 of 1088) that suit was, with the permission of the court, converted into a representative action on behalf of the Jacobite Syrian Christian population of Malabar. Therefore the decision in that interpleader suit (O.S. No. 94 of 1088) must be binding on all members of the Malankara Jacobite Syrian Christian community. In paragraphs 6, 9 and 32 of the plaint in the present suit the plaintiffs who represent the interests of Defendants 4 to 6 in the interpleader suit (O.S. No. 94 of 1088) themselves rely on the decision in that interpleader suit as operating as *res judicata* as between the parties to the present suit on questions referred to in those paragraphs. Indeed in paragraph 55 of the grounds of appeal filed by the plaintiffs in the present suit the contention is put forward that the trial court should have held, inter alia, that Ex. 256 operated as *res judicata* in respect of the points decided in that case. It is also to be remembered that the first plaintiff in the present suit was Defendant 42 in that interpleader suit and: the second defendant in the present suit was the second defendant in that interpleader suit. In these circumstances there does not appear to us any difficulty as to parties in applying the principle of *res judicata* to the matters in issue in this suit, if the other conditions for its application are satisfied.

24. In order to ascertain exactly what are the matters in issue in the present suit between the parties thereto it is necessary to analyse the plaint in some detail. The properties claimed to belong to the Malankara Jacobite Syrian Church which have to be administered by three trustees, namely, the Malankara Metropolitan, one Kathanar (clergy) and a lay man to be elected by the Church, are referred to in paragraphs 1 and 2 of the plaint. The salient facts summarised above as constituting the background of the present disputes are then set forth in paragraphs 3 to 12. Reference is thereafter made in paragraphs 13 and 14 to the meeting said to be a meeting of the Malankara Association held in Karin-gasserai in August, 1935. It is alleged that at that meeting the first plantiff was elected as the Malankara Metropolitan and the second and third plaintiffs were elected respectively as the Kathanar (priestly) trustee and the lay trustee and the second and the third defendants were removed from trusteeship. In paragraph 15 is formulated the plaintiff's claim to be in possession of the church properties. Paragraphs 16 to 21 repudiate the claims of the first defendant allegedly founded on his election as the Malankara Metropolitan and trustee at a meeting of the Malankara Association said to have been held in December 1934. It is alleged that the last mentioned meeting was not convened by any competent person nor was due notice of it given to all the Churches. In paragraph 22 it is stated that, for reasons stated there and more particularly specified in paragraphs 26, the first defendant was

disqualified and declared unfit to be Malankara Metropolitian. The reasons set forth are five in number and each of them is characterised as amounting to a denial or repudiation of the authority of His Holiness the Patriarch of Antioch. The contentions formulated in paragraphs 23 and 25 are that the acts and pretentious referred to therein constitute heresy and that the first defendant as well as the second and third defendants, who are supporting and co-operating with the first defendant, had become *ipso facto* heretics and aliens to the Malankara Jacobite Syrian Church. Paragraph 26 of the plaint, which is very important for the purposes of our decision of this appeal runs as follows:

> "The defendants and their partisans have voluntarily separated themselves from the ancient Jacobite Syrian Church and have constituted for themselves a new church called "Malankara Orthodox Syrian Church". According to the beliefs and doctrines of that Church, such functions as, consecration of Morone, ordination of Metropolitans, granting of staticons and allotting Edavagas to Metropolitans—privileges which are exclusively within the powers of His Holiness the Patriarch—could be done by the first defendant and others, without any recourse to His Holiness the Patriarch. Further it is provided, that Ressissa which is due to His Holiness the Patriarch may be paid to the person holding the dignity of Catholicos of the said; Church. In short, this act which provides for the permanent constitution of the said Church without any connection with His Holiness the Patriarch, and in repudiation and negation of him as well constitutes heresy. The defendants have no right to claim membership of the ancient Jacobite Syrian Church. For these reasons also, the defendants have become disqualified and unfit to be the trustees of, or to hold any other position in, or enjoy any benefit from the Jacobite Syrian Church.

25. The constitution referred to above presumably is Ex. AM, which is said to have been adopted at the M.D. Seminary meeting held in December, 1934. The rest of the allegations in the plaint need not be scrutinised in detail, except that it may be noted that in paragraph 35 the plaintiffs claim to be entitled to maintain the suit not only as trustees but also in their individual capacity as members of the community. The plaintiffs claim that they be declared as lawful trustees, that the defendants be declared to have no right to retain possession of the church properties, that the defendants be compelled to surrender and the plaintiffs be put in possession of the suit properties, that the defendants be directed to pay mesne profits and render accounts of their administration and of the rents etc. realised by them and that the defendants be restrained from functioning as trustees.

26. The defendants have filed their written statement denying the contentions of the plaintiffs. In particular they deny that they have been guilty of any act of heresy or that even if they were they *ipso facto* ceased to be members of the Church. Paragraphs 22 to 26 of the plaint are denied in paragraphs 26 to 39 of the written statement. It is averred that there were not two different churches or two kinds of faiths and that the defendants had not established a separate church and had not separated from the Jacobite Syrian Church. They deny that the meeting said to have been held at Karingasserai in August 1935 was convened by any competent person or was held on notice to all churches. They contend that the meeting was invalid and the first plaintiff was not validly elected Malankara Metropolitan and the second and third plaintiffs had not been validly elected as trustees. It is also pleaded in paragraph 45 of the written statement that it is the plaintiffs and their partisans who had been from 1085 (1910 A.D.) contending that the Patriarch had temporal power over the properties of the church, that the patriarch had power, acting by himself, to ex-communicate and ordain Melpattakars (bishop), that only the Patriarch could consecrate Morone (holy oil), that the Canon of the Church is the book, which was marked as Ex. 18 in the suit of 1913 and that the Catholicate had not been validly established and that by non-co-operating with and opposing the Malankara Syrian

Church the plaintiffs had voluntarily separated themselves and had ceased to be the members of the Church. In paragraphs 46 and 47 of the written statement alternative pleas are taken that the plaintiffs and their partisans had lost their rights, if any, to the Church properties by adverse possession and limitation. The defendants contend that, in the premises, the plaintiffs, have no title and were not entitled to maintain the suit.

27. The allegations in the written statements are denied and the averments in the plaint are reiterated in the replication filed by the plaintiffs. Certain clarifications called Issue Papers, according to the Rules and Forms of the Code of Civil Procedure of Travancore were filed in the case. They are in the nature of interrogatories and answers thereto, obviously designed to form the basis on which the issues have to be struck.

28. Not less than 37 issues were raised on the pleadings. Of them issues 1 and 3 raise the question of the validity of the respective titles of the three plaintiffs, that is to say, title of the first plaintiff as Malankara Metropolitan and of the second and third plaintiffs as the trustees of the church properties and the validity of the Karingasserai meeting in August 1935. Issues 6 to 9 concern the validity of the M.D. Seminary meeting in December 1934 at which the first defendant is alleged to have been elected as Malankara Metropolitan, the second and third defendants having been previously elected trustees as the Kathanar and the lay trustees. Issues Nos. 10, 11, 13, 14, 15,16, 17, 19 and 20 are as follows:—

"10. Has the 1st defendant been duly and validly installed as Catholicos in 1104? If so by whom? And was it done with the cooperation and consent of Mar Geevarghese Dionysius and the other Metropolitans of Malankara?

(*a*) Were his two immediate predecessors in that office also duly and validly installed in the same manner and did they function as such?

(*b*) Has the institution of the Catholicate for the East exercising jurisdiction over Malankara ever existed at any time before 1088?

(*c*) Was the institution of the Catholicate for the East with jurisdiction in Malankara, purported to be brought into existence in 1088 for the first time? Or had it only been in abeyance for some time? And was it only revived and re-established in 1088?

(*d*) Was such a re-establishment effected by Abdul Messiah with the co-operation of the late Malankara Metropolitan Mar Geevarghese Dionysius and the other Metropolitans of Malankara and the Malankara Church? If so, is it valid and lawful? Was Abdul Messiah competent to do so?

(*e*) Did Mar Geevarghese Dionysius submit himself to the authority of the Catholicate from 1088 till his death?

(*f*) Have the Malankara Jacobite Syrian Association the Association Committee, and the Churches and people of Malankara also accepted the Catholicate and have submitted themselves to its authority from 1088?

(*g*) Are the plaintiffs estopped from contending that the Catholicate was not validly re-established in 1088 or that its authority was not accepted or recognised by the Malankara Jacobite Syrian Church?

(*h*) Whether after the revival of the Catholicate the powers of the Patriarch, if any, as regards ordination or appointment of the Malankara Metropolitan and the Metropolitans of Malankara have become vested in the Catholicos?

(*j*) Cannot the offices of Catholicos and Malankara Metropolitan be combined in one and the same person?

11. Is the Patriarch of Antioch the ecclesiastical head of the Malankara Jacobite Syrian Church or is he only the supreme spiritual head?

(*a*) What is the nature, extent and scope of the Patriarch's ecclesiastical or spiritual authority, jurisdiction, or supremacy over the Malankara Jacobite Syrian Church?

(*b*) Is the Patriarch acting by himself or through the Delegate duly authorised by him in that behalf, the only authority competent to consecrate Metropolitans for Malankara? Or is the consecration a Synodical Act in which the Patriarch acts and can act only in conjunction with a Synod of two or more Metrans?

(*c*) Whether "Kaivappu" or "the laying on of hands" which is a necessary and indispensable item in the consecration of a Metropolitan should be by the Patriarch or his duly appointed Delegate alone or can it be done by the Catholicos also?

(*d*) Is the Patriarch alone entitled to and competent to consecrate "Morone" for use in the Malankara Church? Or is the Catholicos also entitled to do it?

(*e*) Whether by virtue of long-standing custom accepted by the Malankara Church and rulings of Courts, the Holy Morone for use in the Malankara Churches has to be consecrated by the Patriarch?

(*f*) Is the allocation of Dioceses or Edavagais in Malankara a right vesting solely in the Patriarch and whether before exercising jurisdiction in any Diocese the Metropolitan ordained and appointed by the Patriarch (by issuing a Station) has only to be accepted by the People of the Diocese? Or is the allocation of Edavagais, so far as Malankara is concerned, not a right which the Patriarch or Catholicos or Malankara Metropolitan has or has ever had, but a right which vests and has always vested in the Malankara Jacobite Syrian Association? Whether a Metropolitan, before he can exercise jurisdiction in any Diocese in Malankara, must have been either elected for the office before ordination by the Malankara Jacobite Syrian Association duly convened for the purpose or accepted by the same after ordination?

(*g*) Is the Patriarch the sole and only authority competent to ordain and appoint the Malankara Metropolitan? Is the issue of a Staticon or order of appointment by the Patriarch either before selection or election by the meeting of the church representatives or after such election or selection essential? Or is such order unnecessary and the election, or acceptance by the Jacobite Syrian Association sufficient?

(*h*) What is Ressissa? Is it a contribution which the Patriarch and Patriarch alone is entitled to levy as a matter of right? Or is it only in the nature of a voluntary gift which may be made to or received by the Patriarch and Catholicos?

(*i*) Has the Patriarch no temporal authority or jurisdiction or control whatever over the Malankara Jacobite Syrian Church? or whether, as the ecclesiastical head, he court exercise and has all along exercised temporal authority by awarding such spiritual punishment as he thinks fit in cases of mismanagement or misappropriation of church assets?

13. Which is the correct and genuine version of the Hoodaya Canons compiled by Mar Hebraeus? Whether it is the book marked as Ex. A or the book Marked as Ex. XVIII in O.S. 94 of 1088?

14. Do all or any of the following acts of the 1st defendant and his partisans amount to open defiance of the authority of the Patriarch? Are they against the tenets of the Jacobite Syrian Church and do they amount to heresy and render them *ipso facto* heretics and aliens to the faith?

(*i*) Claim that the 1st defendant is a Catholicos?

(*ii*) claim that he is the Malankara Metropolitan?

(*iii*) claim that the 1st defendant has authority to consecrate Morone and the fact

that he is so consecrating?

(*iv*) Collection of Ressisa by the 1st defendant?

15.(*a*) Have the 1st defendant and his partisans voluntarily given up their allegiance to and seceded from the Ancient Jacobite Syrian Church?

(*b*) Have they established a new Church styled the Malankara Orthodox Syrian Church?

(*c*) Have they framed a constitution for the new church conferring authority in the Catholicos to consecrate Morone to ordain the higher orders of the ecclesiastical hierarchy, to issue Staticons allocating Dioceses to the Metropolitans and, to collect Bessissa?

(*d*) Do these functions and rights appertain solely to the Patriarch and does the assertion and claim of the 1st defendant to exercise these rights amount to a rejection of the Patriarch?

(*e*) Have they instituted the Catholicate for the first time in Malankara? Do the above acts, if proved, amount to heresy?

16.(*a*) Have the defendants ceased to be members of the Ancient Jacobite Syrian Church?

(*b*) Have they forfeited their right to be trustees or to hold any other office in the Church?

(*c*) Have they forfeited their right to be beneficiaries in respect of the trust properties belonging to the Malankara Jacobite Syrian community?

17. Have Defendants 2 and 3 by helping and actively co-operating with the 1st defendant in the above acts and pretensions become heretics or aliens to the faith or gone out of the fold?

19. (*a*) Have the plaintiffs and their partisans formed themselves into a separate Church in opposition to Mar Geevarghese Dionysius and the Malankara Jacobite Syrian Church?

(*b*) Have they separated themselves from the main body of the beneficiaries of the trust from 1085?

20. Do the following acts and claims of the plaintiffs constitute such separation?

(*a*)(*i*) The claim that Patriarch alone can consecrate Morone?

(*ii*) That the Canon of the Church is Ex. XXIII in O.S. 94?

(*iii*) That the Catholicate is not established?

(*iv*) That the Patriarch by himself can ordain and excommunicate Metropolitans?

(*b*) Have the plaintiffs been claiming that the Patriarch has temporal powers over the Church?

(*c*) Have they been urging that Mar Geevarghese Dionysius was not the Malankara Metropolitan?

(*d*) Have they made alterations in the liturgy of the church?

(*e*) Has the 1st plaintiff executed an Udampady to the Patriarch conceding him temporal powers over the Jacobite Syrian Church and its properties?

(*f*) Have the plaintiffs and their partisans by virtue of the above acts and claims become aliens to the church and disentitled to be trustees or beneficiaries of the Church and its properties?

29. The pleadings, in which may be included the replication and the issue papers and the actual issues raised in this case, quite clearly indicate that the principal contention of the plaintiffs in the present suit is that the defendants had become heretics or aliens to the Church or had voluntarily gone out of the Church only by reason of certain conduct definitely particularised in paragraphs 19 to 26 of the plaint,

namely, (*i*) the acceptance of Abdul Messiah as a validly continuing Patriarch; (*ii*) the acceptance of the establishment of the Catholicate with power to the Catholicos for the time being (*a*) to ordain Metropolitans, (*b*) to consecrate Morone (*c*) to issue staticons, (*d*) to allot Edavagais and (*e*) to receive Ressissa. These are the specific acts on which is founded the charge of heresy or going out of the Church by setting up a new Church. It has not been disputed that the power to issue Staticons and to allot Edavagais are not independent powers but are incidental to and flow from the power to ordain Metropolitans. The question is whether these contentions are concluded by the final decision, (Ex. 256) pronounced on July 4, 1928 in the interpleader suit (O.S. No. 94 of 1088) which is reported in 45 Tr. L.R. 116. This leads us to scrutinise the matters which were in issue in that suit.

30. It is unfortunate that the pleadings in that interpleader suit have not been exhibited in the present cases. The judgment (Ex. 255) pronounced by the trial Judge in 1919 and reported in 41 Tr. L.R. 1, however, summarises the pleadings and the rival contentions of the two opposing sets of trustees who interpleaded against each other. The findings of the trial Judge relevant for our present purpose may be thus summarised:

"(*i*) that Mar Geevarghese Dionysius was the lawful Malankara Metropolitan and was recognised and accepted as such by the Malankara Syrian Church and as such had become a trustee of the Church properties (Issue 1).

(*ii*) that the Patriarch had only a power of general supervision over the spiritual government of the Church but had no right to interfere with the internal administration of the Church in spiritual matters which rested only in the Metropolitan and that the Patriarch has no authority, jurisdiction, control, supervision or concern over or with the temporalities of the Arch-Diocese of Malankara (Issue III).

(*iii*) that Patriarch Abdulla II did make an attempt to secure authority over the temporalities of the Syrian Church when he visited Travancore in 1085 but that his attempts and pretensions in regard to the government of the temporalities of the Church were illegal and against the interest and well being of the Malankara Church and the community (Issues V & VI);

(*iv*) that Mar Geevarghese Dionysius was excommunicated by Patriarch Abdulla II but such excommunication was opposed to the constitution of the Malankara Church as laid down by the Synod of Mulunthuruthu and was Canonically invalid and he was still recognised and accepted as the Malankara Metropolitan by a large majority of Malankara Christian community (Issues VII to XVII);

(*v*) that Defendants 2 and 3, Mani Paulose Kathanar and Kora Kochu Korula had been elected by the community as trustees to cooperate with Mar Geevarghese Dionysius (Issue XVIII);

(*vi*) that 4th defendant (Mar Kurilos) had not been elected and was not accepted and recognised as the Malankara Metropolitan by the community and was not competent to be a trustee (Issues XIX & XX);

(*vii*) that Defendants 5 and 6 (Kora Mathan Malpan and C.J. Kurien) had been validly removed from the office of trustee and Defendants 2 and 3 (Mani Poulose Kathanar and Kora Kochu Korula) had been validly appointed in their places (Issues XXI and XXII);

(*viii*) that Defendants 1, 2 and 3 (Mar Geevarghese Dionysius, Mani Poulose Kathanar and Kora Kochu Korula) did not accept Abdul Messiah or deny the authority of Abdulla II over the spiritual supervision of the Church and they had not by such act become aliens to the faith or incompetent to be trustees (Issue XXVII);

(*ix*) that the 42nd defendant (Mar Athanasius, the original first plaintiff) had not been Canonically ordained or validly appointed as Malankara Metropolitan or as President of the Malankara Association (Issues XXX to XXXIII);

(*x*) that Defendants 1, 2 and 3 were entitled to receive payment of the interest in deposit."

31. It was on the above findings that the learned District Judge passed a decree in favour of Defendants 1, 2 and 3 in that interpleader suit declaring them as the lawful trustees of the Church properties.

32. The Defendants 5, and 6 and 42 appealed to the High Court. The principal questions urged in the appeal were:

"(1) What was the Canon law binding on the Church and what were the powers of the Patriarch under that law in regard to the excommunication of a Metropolitan;

(2) Was the excommunication of Mar Geevarghese Dionysius by the Patriarch opposed to the Canon law and the constitution of the Malankara Syrian Church as laid down by the Synod of Mulunthuruthu;

(3) If the Patriarch was by himself competent to excommunicate a Metropolitan, whether any procedure had been prescribed to be followed by the Patriarch before the power of excommunication could be exercised by him;

(4) If no such procedure had been so prescribed, whether that power had been exercised in a manner consonant with the principles of natural justice and with no corrupt motive; and

(5) Whether the excommunication of Mar Geevarghese Dionysius was valid?

33. A Full Bench of the Travancore High Court pronounced judgment, Ex. DZ, in 1923. The Full Bench in paragraph 80 of the judgment held that Ex. 18, which was produced by the then appellants, was the correct version of the Canon law which was accepted as such by the Malankara Jacobite Syrian Church. The conclusions arrived at by the Full Bench on questions 1, 2 and 3 noted above were summarised in paragraph 124 of the judgment as follows:—

"Our conclusions on the questions 1, 2 and 3 formulated for decisions are:

(*a*) That Exhibit 18, and not Exhibit A, is the version of the Canon Law that has been recognised and accepted by the Malankara Jacobite Syrian Christian Church as binding on it;

(*b*) That under Ex. 18, the Patriarch of Antioch possesses the power of ordaining and excommunicating Episcopas and Metropolitans by himself, i.e., in his own right and that it is not necessary for him to convene a Synod of Bishops and proceed by way of Synodical action, in order to enable him to exercise these powers; the person ordained being of course, a native of Malabar and accepted by the people;

(*c*) That there is nothing in the Mulanthuruthu Resolutions, Exhibit EL, which limits the powers possessed by the Patriarch under the Canon Law in matters of spiritual character, or which imposes restrictions on him in regard to the exercise of such powers; and

(*d*) That no special forms of procedure are prescribed by Exhibit 18 for observance by Patriarch before he exercises his powers of excommunication."

34. Then after an elaborate discussion of the relevant materials the learned Judges in paragraph 254 recorded their findings on questions 4 and 5 in the affirmative and held that Mar Geevarghese Dionysius had lost the status of Malankara Metropolitan and Metropolitan trustee. In that view of the matter they considered it unnecessary to express any opinion on the question whether Mar Geevarghese Dionysius had become schismatic or alien to the Jacobite faith by the repudiation of Patriarch Abdulla II and

the recognition of Abdul Messiah. They further held that although the Malankara Association had the power to remove them, the Defendants 5 and 6 had not been validly removed inasmuch as the meeting which removed them had been convened and was presided over by Mar Geevarghese Dionysius, an excommunicated Metropolitan and that the proceedings of that meeting having been *ab initio* void, the Defendants 5 and 6 continued to be trustees. It has already been stated that there was an application for review of this judgment made by Mar Geevarghese Dionysius and his co-trustees which was admitted on three conditions hereinbefore mentioned. On a re-hearing of the appeal the Full Bench pronounced its judgment, Ex. 256, on July 4, 1928 which is the final judgment in that case. The net result of that judgment may be thus summarised:

(*i*) The excommunication of Mar Geevarghese Dionysius was invalid because of the breach of the rules of natural justice in that he was not apprised of the charges against him and had not been given a reasonable opportunity to defend himself;

(*ii*) That the Defendants 1 to 3 had not become heretics or aliens or had not set up a new Church by accepting the establishment of the Catholicate by Abdul Messiah with power to the Catholicos for the time being to ordain Metropolitans and to consecrate Morone and thereby reducing the power of the Patriarch over the Malankara Church to a vanishing point;

(*iii*) That the Defendants 4 to 6 had not been validly elected.

35. It is said that there was no issue as to whether the acts imputed to Mar Geevarghese Dionysius had been done by him or not or whether the ordination of three Metropolitans by Abdul Messiah was valid or not and that the charge against Mar Geevarghese Dionysius and his two co-trustees (Defendants 1 to 3) was only that of heresy founded on certain acts. It is true that the same acts are referred to in paragraphs 19 to 20 of the present plaint, but, it is contended, there was no charge of their having gone out of the Church by their having set up a new church as evidenced by those very acts. We do not think there is any force in this contention. In paragraph 32 of his judgment Chatfield C.J. held that no enquiry was held into the conduct of Mar Geevarghese Dionysius who had never been placed on his defence or apprised of the charges against him or given any opportunity of defending himself and that as such his excommunication was invalid and he continued to be a Malankara Metropolitan and as such one of the trustees of the church properties. To the same effect were the findings of Joseph Thaliath J. and of Parameswaran Pillai J. Learned Advocate for the then appellants, (Defendants 4 to 6) then fell back on the case that quite irrespective of the validity of the excommunication of Mar Geevarghese Dionysius he and his co-trustees could not be permitted to act as trustees as they had rendered themselves aliens to the faith by reason, amongst others, of their repudiating the lawful Patriarch Abdulla II and accepting the deposed Patriarch Abdul Messiah and by upholding the Catholicate with powers to the Catholicos as hereinbefore mentioned. Reliance was placed on the decision of the House of Lords in *Free Church of Scotland* v. *Overtoun*[2] in support of the contention that Mar Geevarghese Dionysius and his adherents had set up a new Church effectively free from the control of the Patriarch. It is clear, therefore, that as a consequence of the finding on the breach of the rules of natural justice, it became incumbent on the Full Bench to deal with the alternative case founded on the decision in the *Free Church of Scotland case* (supra).

36. In paragraph 34 of the judgment Chatfield C.J. sums up the contentions set out by the Defendants 4 to 6 in their written statement. He points out that it was said, amongst others, that Mar Geevarghese Dionysius and his co-trustees (Defendants 1 to 3) had "rendered themselves aliens to the faith". The word "alien" is significant, for it connotes the idea of a person going outside the faith. The matter does not, however, hang on this slender thread alone. After referring to the various facts, which had taken

place soon after his excommunication and the acts and conduct of Mar Geevarghese Dionysius, e.g., the repudiation of the lawful Patriarch and the acceptance of a Pariarch who had been deposed and by getting the deposed Patriarch to come to Malabar to do various acts as Patriarch of Antioch, e.g., to ordain certain persons as Metropolitans, to set up a Catholicate by ordaining one Mar Ivanios as Catholicos with power to ordain Metropolitans and consecrate Morone, the learned Chief Justice stated that the contentions advanced for Defendants 4 to 6 were that the defendant Mar Geevarghese Dionysius and his partisans had all along desired a separation from the See of Antioch and had succeeded in their attempt and that "a new Church had been created". Towards the end of that paragraph the learned Chief Justice again refers to the contention advanced on behalf of Defendants 4 to 6 that "by reason of the actions of the first defendant mentioned in the first part of those paragraphs the first defendant and his followers seceded from the Jacobite Syrian Church in the year 1087 and set up a different Church....." The word "seceded", in the context in which it is used, leaves no room for doubt that the charge of having gone out of the Church by setting up a new Church which accepted the Catholicate with the powers to the Catholicos as herein-before mentioned was canvassed and actually decided in the final judgment on review. Chatfield C.J. and the other judges negatived the contentions put forward on behalf of Defendants 4 to 6 with the following observations:—

Per Chatfield, C.J.:—

> "The objection to the trusteeship of Defendants 1 to 3 does not seem to have been stated in this form in the written statements of Defendants 4 to 6 and 42. In any case it is not contended that the appointment of a Catholicos is a thing which is in itself forbidden and to work for which is a sign of disloyalty to the Church. In the Canon "of Nicea" as given on both Exhibits A and XVIII there is express provision for a great "Metropolitan of the East" who was to have power like the Patriarch, to consecrate Metropolitans in the East. All that can be urged against the first defendant therefore is that he co-operated with one who was not a valid Patriarch when the latter was doing acts which could only be done by a Patriarch or at the worst that he caused this unlawful Patriarch to do such acts. It is conceded by the Defendants that if Abdulla had done these acts there would have been no objection. Therefore, the whole matter resolves itself into a personal dispute between two claimants to the Patriarchate in which it said, the first defendant deserted the Patriarch who had created him Metropolitan and supported his rival. Such conduct might amount to an ecclesiastical offence for which the offender could be deprived by his ecclesiastical superior but it could not be an offence for which the civil courts could try him or express any opinion as to his guilt."

Further down

> "In the circumstances it cannot be said that the Church to which the Defendants 1 to 3 belong is a differents Church from that for which the endowment now in dispute was made. Therefore, no question of any loss' or forfeiture of trusteeship by the first defendant irrespective of Ex. L or of any threatened diversion of trust funds can arise."

Per Joseph Thaliath, J.:

> "Ordinarily, it is for the ecclesiastical tribunals to pronounce whether a person is guilty of an ecclesiastical offence, and what the consequences are if one is found so guilty. The decisions of secular courts with respect to ecclesiastical matters, by the very nature of things, cannot be very satisfactory. We have also to consider the probable inconvenience that will result from the temporal courts determining whether a person is guilty of any declaration made by proper ecclesiastical tribunals. If we are now to enquire into the alleged offence of schism of the first defendant, it will come to this. Every time the Metropolitan trustee applies for the

interest on the trust fund, there will be some people who are members of the Jacobite Church to object to the payment of interest, on the ground that the Metropolitan cannot act as the trustee of the Church, since, according to them, he is guilty of some heinous ecclesiastical offence or other. And every time a fresh suit will have to be instituted to decide the question. For these reasons, it seems to me, that the better policy for the temporal courts to adopt will be not to enter into such questions as long as there has been no pronouncement on the subject made by the ecclesiastical authorities. There has been no such pronouncement in the present case. Hence I have to find this point also against the defendant."

Per Parameswaran Pillai J.:

"I have considered this aspect of the case very carefully and have come to the conclusion that there is no substance in this contention. The first defendant has not denied the authority of the Patriarch of Antioch and, therefore, he remains the Metropolitan Trustee of the Malankara Church and he claims to draw the money on behalf of that Church. At best, what he did was, when Abdulla and Abdul Messiah both claimed to be the Patriarchs of Antioch, he acknowledged the latter as the true Patriarch in preference to the former. If he was wrong in this he has committed a spiritual offence for which his spiritual superior might punish him in a proper proceeding. This court has nothing to do with his spiritual offence. *Free Church of Scotland* v. *Overtoun*[1] referred to in this connection by Sir C.P. Ramaswami Iyer has no bearing upon the facts of this case."

37. It must, therefore, be held that the contentions put forward in paragraph's 19 to 26 of the plaint in the present suit on which issues Nos. 14,15, 16 and 19 have been raised were directly and substantially in issue in the interpleader suit (O.S. 94 of 1088) and had been decided by the Travancore High Court on review in favour of Mar Geevarghese Dionysius and his two co-trustees (Defendants 1 to 3) and against Defendants 4 to 6. In short the question whether Mar Geevarghese Dionysius and his two co-trustees (Defendants 1 to 3);had become heretics or aliens or had gone out of the Church and, therefore, were not qualified for acting as trustees was in issue in the interpleader suit (O.S. No. 94 of 1088) and it was absolutely necessary to decide such issue. That judgment decided that neither (*a*) the repudiation of Abdulla II, nor (*b*) acceptance of Abdul Messiah who had ceased to be a Patriarch, nor (*c*) acceptance of the Catholicate with powers as hereinbefore mentioned, nor (*d*) the reduction of the power of the Patriarch to a vanishing point, *ipso facto* constituted a heresy or amounted to voluntary separation by setting up a new Church and that being the position those contentions cannot be re-agitated in the present suit.

38. Learned counsel appearing for the respondents seek to get out of this position by contending that, apart from the grounds set up in the interpleader suit (Order 94 of 1088) the plaintiffs in the present suit also rely on a cause of action founded on new charges which disqualify the defendants in the present suit from acting as trustees of the Church properties. Shri T.N. Subramania Aiyer appearing for the third respondent who has been elected Malankara Metropolitan by the Patriarchal party and made a party to the proceedings under the order of the court aforementioned formulates the new charges as follows:

(*i*) By adopting the new constitution (Ex. A.M.), which takes away the supremacy of the Patriarch, the defendants have set up a new church;

(*ii*) By inserting Clause (5) in the constitution (Ex. A.M.) the defendants have repudiated the Canons which have been found to be the true Canons binding on the Church (Ex. BP—Ex. 18 in O.S. No. 94 of 1088) and have thereby gone out of the Church;

(*ii*)(*a*) The privilege of the Patriarch alone to ordain Metropolitans and to consecrate Morone has been taken away as a consequence of the adoption

of a wrong Canon (Ex. 26—Ex. A in O.S. No. 94 of 1088) indicating that the defendants have set up a new church;

(*ii*)(*b*) The privilege of the perquisites of the Ressissa has been denied to the Patriarch by the new constitution in breach of the true Canons;

(*iii*) That there has been a complete transfer of the trust properties from the beneficiaries, namely, Malankara Jacobite Syrian Church to an entirely different institution, the Malankara Orthodox Syrian Church;

(*iv*) The re-establishment of the institution of the Catholicate of the East in Malabar having jurisdiction over India, Burma, Ceylon and other countries in the East is different from the institution of Catholicate that was the subject matter of the interpleader suit (O.S. No. 94 of 1088). It is necessary now to discuss these contentions separately.

39. Re (1): In support of the first charge learned counsel has drawn our attention to paragraphs 18, 22 and 26 of the plaint, paragraphs 29 and 38 of the written statement, paragraphs 18 and 27 of the replication and to issues Nos. 6, 14, 15 and 16. We do not think the pleadings and the issues are capable of being construed in the way learned counsel would have us do. The supremacy of the Patriarch has indeed been alleged to have been taken away, but that is not a general averment founded on Ex. A.M.—indeed there is no specific mention of Ex. A.M. in paragraph 26 of the plaint—but it is based on certain specific matters which appear to be incorporated as rules of the new constitution (Ex. A.M.). Therefore, what are pleaded as disqualifying the defendants from being trustees are those specific matters and not the general fact of adoption of the constitution. There is no charge in the plaint that for the incorporation in the constitution (Ex. A.M.) of any matter other than those specifically pleaded in the plaint the defendants have incurred a disqualification. The plaintiffs came to court charging the defendants as heretics or as having gone out of the church for having adopted a constitution (Ex. A.M.) which contains the several specific matters pleaded in the plaint and repeated in the replication and made the subject matter of specific issues. Those self-same matters were relied on as entailing disqualification in the earlier suit. The plaintiffs themselves contend that some of these matters are *res judicata* against the defendants in this suit by reason of the conditions subject to which their application for review was admitted. On the pleadings as they stand and on the issues as they have been framed, it is now impossible to permit the plaintiff-respondent to go outside the pleadings and set up a new case that the supremacy of the Patriarch has been taken away by the mere fact of the adoption of the new constitution (Ex. A.M.) or by any particular clause thereof other than those relating to matters specifically referred to in the pleadings. The issues cannot be permitted to be stretched to cover matters which are not, on a reasonable construction, within the pleadings on which they were founded.

40. Re (*ii*) and (ii a): Same remarks apply to these two grounds formulated above. There is no averment anywhere in the pleadings that by accepting the Hudaya Canon compiled by Bar Hebreus (Ex. 26—Ex. A in O.S. No. 94 of 1088) as the correct Canon governing the church, the defendants have gone out of the Church. Learned counsel draws our attention first to issue No. 13 and then to issue No. 16 and contends that the loss of status as members of the Church by acceptance of the wrong Canon is within the scope of those two issues and that the parties to this suit went to trial with that understanding. We do not consider this argument to be well founded at all. A reference to the pleadings will indicate how and why the Hoodaya Canon came to be pleaded and discussed in this case.' The plaintiffs impute certain acts and conduct to the defendants and contend that by reason thereof the defendants have become heretics or aliens or have gone out of the Church. These imputations form the subject matter of issues 14 and 15 and the conclusions to be drawn from the findings on those

issues are the subject-matter of issues Nos. 16 and 17. The defendants, on the other hand, impute certain acts and conduct to the plaintiffs as a result of which, they contend, the plaintiffs have separated from the Church and constituted a new Church. Issues 19 and 20 are directed to this counter charge. In order to decide these charges and counter charges it is absolutely necessary to determine which is the correct book of Canons, for the plaintiffs founded their charges on Ex. B.P.—Ex. 18 in Order I.S No. 94 of 1088 and the defendants took their stand on Ex. 26—Ex. A in O.S. No. 94 of 1088. Issue No. 13 was directed to determine that question. Issue No. 16 is concerned with the conclusions to be drawn from the findings on issues Nos. 14 and 15. The plaintiffs cannot be permitted to use issue No. 16 as a general issue not limited to the subject matter of issues 14 and 15, for that will be stretching it far beyond its legitimate purpose.

41. Re.(ii b): This ground raises the question of the Patriarch's right to Ressissa. Ressissa is a voluntary and not a compulsory contribution made by the parishioners. Ex. F.O., which records the proceedings of the Mulunthuruthu Synod held on June 27, 1876, refers to a resolution providing, *inter alia*, that the committee, that is to say, the Committee of the Malankara Association, will be responsible to collect and send the Ressissa due to His Holiness the Patriarch. This may suggest that some Ressissa was due to the Patriarch. But in paragraph 218 of Ex. DY which is the judgment pronounced by the Travancore Royal Court of Final Appeal on July 12, 1889, it is stated that no satisfactory evidence had been adduced before the court as to the payment of Bessissa to the Patriarch by the committee in Malankara, that the evidence on record was very meagre and inconclusive and that it was open to doubt whether it was payable to the Metropolitans in this country or to the Patriarch in a foreign country. Ex. 86, which records the proceedings of the meeting of the Malankara Association held on September 7, 1911, refers to a resolution forbidding maintaining any connection with Patriarch Abdulla II and presumably in consequence of this resolution the payment of the Ressissa to the Patriarch was stopped. The interpleader suit (Order 94 of 1088) was filed in 1913. If non-payment of Ressiasa could be made a ground of attack, it should have been taken in that suit and that not having been done, it cannot now be put forward according to the principles of constructive *res judicata*. Besides, the provisions of paragraph 115 of the impugned constitution (Ex. A.M.) require every Vicar in every parish church to collect only two chukrums from every male member who has completed 21 years of age and to send it to the Catholicos. This does not forbid the payment of Ressissa to the Patriarch, if any be due to him and if any parishioner is inclined to pay anything to the Patriarch who is declared in Clause (1) of this very constitution to be the supreme head of the Orthodox Syrian Church. In any case, according to the Canons relied upon by each of the parties, namely, Ex. B.P.—Ex. 18 of Order 94 of 1088 produced by the plaintiffs or Ex. 26—Ex. A in Order 94 of 1088 insisted upon by the defendants, the non-payment of Ressissa does not entail heresy. Even if the question involved in ground (ii b) is not covered by the previous decision in the interpleader suit (Order 94 of 1088) the question has, on the foregoing grounds, to be decided against the plaintiff-respondent.

42. Re. (*iii*): This is really not a charge but a statement of the conclusion which the plaintiff-respondent desires to be drawn from the other charges formulated above. Accordingly the point has not been pressed before us and nothing further need be said about it.

43. Re. (*iv*): An attempt is made by learned counsel for the respondents to make out that what was referred to in the interpleader suit (Order 94 of 1088) was the ordination of a Catholics whereas in the present suit reference is made to the establishment of a Catholicate and further that in any case the Catholicate of the East referred to in the plaint in the present suit is an institution quite different from the Catholicate which was the subject matter of discussion in the interpleader suit (O.S.

No. 94 of 1088). We do not think there is any substance whatever in this contention. A reference to paragraphs 30 and 31 of the written statement clearly indicates that the institution of Catholicate, which is relied upon by the defendants, is no other than the Catholicate established in Malabar in 1088 by Patriarch Abdul Messiah. This position in accepted by the plaintiffs themselves in their grounds of appeal Nos. 13, 15, 17, 18 and 27 to the High Court of Travancore from the decision of the District Judge of Kottayam in this case. Issues Nos. 14 and 15 as well as the judgment of the District Judge in this case also indicate that the subject matter of this part of the controversy centred round the Catholicate which had been established by Abdul Messiah in the year 1088. Before the argument advanced before us there never was a case that the impugned constitution (Ex. A.M.) had established a Catholicate of the East. The purported distinction sought to be drawn between the ordination of Catholicos and the establishment of a Catholicate and a Catholicate established by Abdul Messiah in 1088 and the Catholicate of the East created by the impugned constitution (Ex. A.M.) and which is sought to be founded upon as a new cause of action in the present suit, appears to us to be a purely fanciful afterthought and is totally untenable.

44. For reasons stated above we have come to the conclusion and we hold that the case with which the plaintiffs have come to court in the present suit is that the defendants had become heretics or aliens or had gone out of the Church by establishing a new church because of the specific acts and conduct imputed to the defendants in the present suit and that the charges founded on those specific acts and conduct are concluded by the final judgment (Ex, 256) of the High Court of Travancore in the interpleader suit (Order 94 of 1088) which operates as *res judicata*. The charge founded on the fact of non-payment of Ressissa, if it is not concluded as constructive *res judicata* by the previous judgment must, on merits, and for reasons already stated, be found against the plaintiff-respondent. We are definitely of the opinion that the charges now sought to be relied upon as afresh cause of action are not covered by the pleadings or the issues on which the parties went to trial, that some of them are pure afterthoughts and should not now be permitted to be raised and that at any rate most of them could and should have been put forward in the earlier suit (Order 94 of 1088) and that not having been done the same are barred by *res judicata* or principles analogous thereto. We accordingly hold, in agreement with the trial court, that it is no longer open to the plaintiff-respondent to re-agitate the question that the defendant-appellant had *ipso facto* become heretic or alien or had gone out of the church and has in consequence lost his status as a member of the Church or his office as a trustee.

45. In the view we have taken on the question of *res judicata* it is not necessary for us to discuss the further question whether this suit is founded on the same cause of action as that on which Order 8. No. 2 of 1104 was founded or whether by allowing that suit to be eventually dismissed for default the plaintiffs can under the relevant provisions of the Travancore Code of Civil Procedure corresponding to Order 9, Rule 9 of our CPC maintain the present suit.

46. The next line of attack adopted by learned counsel for the respondents is that the appellant had not been validly elected as trustee by the Malankara Association. This objection affects only the appellant who was the first defendant in the suit, but does not affect the other two defendants (since deceased) who had been elected in 1931 at a meeting whose validity is not questioned. The first plaintiff claims to have been elected as the Malankara Metropolitan at a meeting of the Malankara Association held on December 26, 1934 at the M.D. Seminary. The M.D. Seminary meeting was convened by notices issued individually to all the Jacobite Syrian Christian Churches in Malabar. Three notices (Exs. 59, 60 and 61) are alleged to have been sent under the same cover and at the same time. Exhibit 59 purports to be a notice issued by the defendant Basselios Catholicos. It is addressed to Vicars, Kykers and Parishioners. The meeting was fixed for Wednesday the 11th Dhanu, 1101 (December 26, 1934). The

first item of the agenda was to elect one as Malankara Metropolitan. Exhibit 60 is a notice emanating from three Vice-Presidents of the Malankara Jacobite Syrian Association named therein and addressed to the Vicars, Kykers and Parishioners. It referred to the Kalpana (meaning the notice) sent by the Catholicos (Ex. 59) and intimated that a meeting of the Malankara Jacobite Syrian Association would be held in the M.D. Seminary on the appointed day and asking them to elect a priest and a lay man from the Church as their representatives. Exhibit 61 is a notice by the Managing Committee of the Association addressed to each Church. This also refers to the notice (Ex. 59) issued by the Catholicos and fixes the meeting at the same time and place. Besides these individual notices, advertisements were issued in two leading daily newspapers, copies of which have been marked Exs. 62 and 63. All that has been said in paragraph 18 of the plaint is that no meeting was held and that even if there was a meeting the same had not been held legally or according to the usages or convened by a competent person or after notice to all the churches according to custom. On a plain reading of that paragraph there can be no getting away from the fact that the only objection taken is that the meeting had not been convened by a competent person and that notice had not been given to all the churches. No other specific objection is taken to the validity of the notice. Learned counsel for the respondent now seeks to rely on the sentence in that paragraph which avers that the proceedings had in that meeting were illegal and void. That averment clearly is a conclusion founded on the specific objections taken previously and cannot possibly be taken as a separate and independent ground of objection expressed in so vague a language as to embrace all objections that the ingenuity of human mind may now conceive and put forward. Indeed issue 6 (*a*) which is the only issue relating to the election of the first defendant at this meeting quite clearly negatives such an omnibus meaning now sought to be read into paragraph 18 of the plaint.

47. The District Judge found, for reasons most of which appear to us to be cogent and well founded, that all the churches had been duly served and that the meeting was properly convened and held. Paragraph 146 of his judgment deals with the question whether the Association meeting was convened by a competent authority. In paragraph 147 he discusses the question whether invitations were sent to all churches. He held that all the churches had been duly served. The reasons adopted by the District Judge may be summarised thus:

(*i*) A large majority of churches being in favour of the defendants, there could be no incentive on the part of the defendants to suppress the notices;

(*ii*) The evidence of the plaintiff's witnesses clearly indicates that the partisans of the Patriarch would not have attended the meeting even if notices had been received by them and indeed, according to them, notices from heretics would not be read in their churches at all;

(*iii*) In point of fact two of the churches siding with the-plaintiffs had returned the notices which were marked as Exs. 150 and 151, and lastly

(*iv*) that, apart from the individual notices to the churches, there were advertisements issued in two leading Malankara daily newspapers which have been marked Exs. 62 and 63. Although the fact that the churches siding with the plaintiffs would not have attended the meeting does not appear to us to b& sufficient reason for not giving notice to them, it nevertheless has a bearing on the question of the probability or otherwise of the suppression of notices from the churches siding with the plaintiffs. The public advertisements in newspapers also negative the alleged attempt at suppression of the notice. Further, as the Mulunthuruthu resolutions embodied in Ex. P.O., which records the proceedings of the meeting at which the Malankara Association was constituted did not provide for any particular mode of service for meetings, it was enough that the

ordinary rules adopted by voluntary associations and clubs had been followed, namely, that in the absence of any specific rules, the mode of service determined by the Managing Committee should prevail. The Kerala High Court has, however, in the judgment under appeal, taken a different view. Their reasonings are set out in paragraph 48 of their judgment which is reported in 1957 K.L.J. page 83 at page 147. The learned Judges of the High Court held that the Catholicos, even if validly appointed, had been assigned no place in the Malankara Association or in the Managing Committee as its member or President and consequently could not be said to be competent to issue such a notice as "Ex. 59. After pointing out that Ex. 60 had been issued by three Metropolitans as Vice Presidents and Ex. 61 had been issued by the members of the Managing Committee, the High Court points out that in the absence of specific rules as to who can issue the notices, Exs. 60 and 61 have to be accepted as proper and valid notices issued by competent persons. Learned counsel for the respondents urges that the High Court overlooked the fact that Ex. 60 was not issued by all the Vice Presidents, because the Metropolitans on the plaintiffs' side who were also Vice Presidents did not join in issuing the notice Ex. 60. There is no substance in this contention. The judgment of the Travancore Royal Court of Final Appeal (Ex. DY) pronounced on July 12, 1889 quite clearly held that a Metropolitan of the Jacobite Syrian Church should be a native of Malabar consecrated by the Patriarch or his delegate and accepted by the people as their Metropolitan to entitle him to the spiritual and temporals-government of the local church. Indeed in paragraphs 54 and 78 of his judgment in the present suit the District Judge has also definitely found that persons ordained by the Patriarch will have to be accepted by the whole Malankara Church as represented by the Malankara Association and that the Metropolitans on the plantiffs side had not been so accepted and that, therefore, they could not possibly become Vice Presidents and their non-joinder in the notice (Ex. 60) could not vitiate it. The High Court was, therefore, quite correct in its finding that Exs. 60 and 61 were issued by proper persons. But on the question as to whether the notices had been issued and served on all the churches, the High Court has observed that there was no reliable and convincing evidence in proof of that fact. The High Court has referred to the evidence of DWs 23 and 22 and has concluded that although the notices Exs. 60 and 61 were issued by competent persona the evidence on record fell short of the standard of proof necessary for establishing the fact of service of the notices on all the churches and particularly on those on the plaintiffs' side. Ordinarily we do not go behind the findings of fact by the final court of facts but in the present case it appears to us, with respect, that the learned Judges of the High Court have overlooked important materials on the record which, if taken into account, will certainly go to show that all the churches had ample notice of the meeting. It is clear from the judgment that in arriving at their conclusion the learned High Court Judges completely overlooked the evidence of DW 29 who was the Secretary of Mar Geevarghese Dionysius and who was personally concerned with 'the issue of the notices. We have been taken through the evidence of the defendants' witness who said that they did not think notices had been sent to the Metropolitans on the plantiffs' side. The High Court, however, completely overlooked the evidence of the plaintiffs witness Kuran Mathew (PW 2) who said that for meetings of the church representatives no notices are sent to the Metropolitans but are sent only to the churches. Further, as already observed, the Metropolitans on the plaintiffs' side were never accepted by the Malankara Association and, therefore, no notices need have been sent to them. It is true that notices convening the Ex. 98B meeting in 1106 were served on the Metropolitans on the plaintiffs' side, but that was a special occasion for bringing

about a settlement. It is somewhat significant that we do not find in the record placed before us any statement of any witness examined by the plaintiffs that he (if he was a Metropolitan) or his church had not in fact been served. Besides, the notices by advertisement in newspapers (Exs. 62 and 63) will also be sufficient notice to the Metropolitans and churches on both sides. Learned counsel for the appellant has placed before us portions of evidence of some of the witnesses examined by the plaintiffs. Those witnesses say that even if they had been served they would not have taken any note of them and indeed would not have got them read in their church. As already observed this attitude of the partisans of the plaintiffs does not absolve the defendants from the duty of serving notices on the churches on the plaintiffs' side but it undoubtedly shows that the defendants knowing of this attitude would have no incentive to suppress the notices from them. Further the learned Judges do not also appear to have adverted to the evidence of DW 25 who was a partisan of the plaintiffs as admitted by PW 5 and who did not complain of any want of notice to his church. Further, the learned Judges have not given any reason why the notices by advertisements in the newspapers could not be 'accepted as sufficient notice in the absence, as they found, of any specific rules as to the mode of service. Apart from Exs. 59, 60 and 61 the advertisements in the newspapers evidenced by Exs. 62 and 63 appear to us to be sufficient notice to all churches. There is no evidence at all that any particular church did not in fact know that a meeting was going to be held at the time and placed hereinbefore mentioned. On the materials placed before us we feel satisfied that the notices were served on all the churches including those which sided with the plaintiffs and that there was no adequate ground for rejecting the finding of fact arrived at by the trial court on this question after a fair and full consideration of the evidence on record. The conclusion of the High Court appears to us, with respect, to be based partly on a mis-reading of evidence and partly on the non-advertance to important material evidence bearing on the question and to the probabilities of the case.

48. Learned counsel for the respondent has tried to find fault with the notices in minor details. For instance, it has been argued that in the notices other than Ex. 59 no agenda was mentioned. Apart from the fact that no such objection was taken in the plaint, it is clear that those notices by a clear reference to Ex. 59, specially because they had all been sent together, did incorporate the agenda set out in full in Ex. 59. In our opinion the M.D. Seminary meeting was properly held and the first defendant, who is now the sole appellant before is, was validly appointed as the Malankara Metropolitan and as such became the ex-officio trustee of the church properties. There is no question that the Defendants 2 and 3 who are now dead had been previously elected by a meeting of the Malankara Association duly convened and held and were properly constituted trustees. In this view of the matter it must follow that the plaintiffs cannot, even in their individual or representative capacity, question the title of the defendants as validly appointed trustees.

49. The result, therefore, is that this appeal must be accepted, the judgment of the Kerala High Court set aside, the decree of the trial court dismissing the suit must be restored and we order accordingly. The plaintiff-respondent as also the newly added respondents must pay to the defendant-appellant the costs of this appeal and the plaintiff-respondent must also pay the costs of all proceedings in all courts including the costs of the proceedings already awarded to him by this court, which will stand. The suit will, therefore, stand dismissed with costs throughout and all interim orders as to security for mesne profits etc., will be vacated.

50. The Article 32 petition is not pressed and is dismissed. No order as to the costs of that petition.

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* Appeal from the Judgment and Decree dated 31st December, 1956, of the Kerala High Court in AS No. 1 of 1119 (Travancore) arising out of the Judgment and Decree dated 18th January, 1943, of the District Court of Kottayam in OS No. 111 of 1113.

[1] (1954) KLT 385 : (1955) SCR 520

[2] LR (1904) AC 515