IN THE SUPREME COURT OF INDIA
(CIVIL APPELLATE JURISDICTION)
CIVIL APPEAL No. 4768-4771 OF 2011

IN THE MATTER OF:

Bhagwan Sri Rama Virajman & Ors. ...Appellants

Versus

Sri Rajendra Singh & Ors, ...Respondent

COMPILATION OF JUDGMENTS
BY SHRI C.S VAIDYANATHAN SR. ADV

VOLUME III

PAPER BOOK
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1938 SCC OnLine Lah 40 : AIR 1938 Lah 369 (FB)

Lahore High Court
Full Bench
(BEFORE YOUNG, C.J. AND BHIDE AND DIN MOHAMMAD, JJ.)

Mosque known as Masjid Shahid Ganj and others ... Plaintiffs Appellants;

Versus

Shromani Gurdwara Parhandhak Committee, Amritsar ... Defendants Respondents.

First Appeal No. 244 of 1936, from decree of Dist. Judge, Lahore
Decided on May 25, 1936 and January 26, 1938

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The Judgment of the Court was delivered by

YOUNG, C.J.:— This is an appeal from the Court of the learned District Judge of Lahore. The plaintiffs brought a suit in the lower Court praying for a declaration that a certain parcel of land known in this case as Shahid Ganj was and is the site of a wakf mosque, dedicated to God; that the mosque could not be used for any purpose which, according to Mahomedan law, was opposed to the purposes of a mosque, and that plaintiffs Nos. 2 to 18, and also all other followers of Islam, had a right to use the mosque for the purposes of worship without let or hindrance by any one. Consequential relief was claimed in the form of a mandatory injunction to the following effect, that the defendants: (a) Should not use plaintiff No. 1 (i.e. the mosque itself) for any purpose which may be contrary to its sanctity and use according to Mahomedan law; (b) Should not in any way interfere in the plaintiffs Nos. 2 to 18's rights of worship relating to the said mosque; and (c) Should reconstruct the portion of the

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mosque which was demolished by them on the night between 7th and 8th July, 1935, in the same shape and form as it was before demolition. In the alternative, the plaintiffs claimed damages for the demolition so that they might rebuild it in its former shape. It is to be noted that the plaintiffs did not sue for possession.

2. By their defence the defendants, that is the Shromani Gurdwara Parbandhak Committee and another, who are in possession of the site, denied that the building was a mosque, claimed that the suit was barred by (a) the principle of res judicata, (b) by the provisions of the Sikh Gurdwaras Act, (c) by decision of the Sikh Gurdwaras Tribunal, dated 20th January, 1930, and that the suit was not within the time prescribed by the Limitation Act. The learned District Judge found that the building was in its origin wakf, that is originally dedicated for prayers in 1722, but that it had not been used as a mosque for prayers since 1762. He decided that the claim was not

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within limitation, and was barred by the decision of the Sikh Gurdwaras Tribunal and the provisions of the Sikh Gurdwaras Act, but not by the decisions of the Courts between 1850 and 1883. He held that the defendants had acquired a title by adverse possession and that plaintiff No. 1, that is the mosque itself, was a juristic person capable of suing through its nest friend. The facts which are proved, and accepted by the parties, are that in the year 1722 the mosque was erected, dedicated to God, and used as a mosque until the establishment of Sikh Rule in the year 1762; that from the year 1762 till the institution of the suit the building had not been used as a mosque or place of worship; that two actions had been brought by a descendant of the original Mutwalli of the mosque in 1854 and 1855, but both these actions had failed on the ground of limitation; that in 1925 the Sikh Gurdwaras Act was passed and the question was litigated under that Act as to whom this property belonged; the Anjuman Islamia of Lahore filed a petition on behalf of the Muslims under S. 5 of the Act praying that the mosque should be excluded from the consolidated list, and an issue was framed as to what right, title or interest the Anjuman had in the property claimed; the tribunal decided that the Anjuman had no right, title or interest in the property; that on the night of 7th July, 1935 the Sikhs demolished the mosque.

3. From the date of their possession in 1762 the Sikhs have used this building as their own. In one of the domes they kept the Guru Granth Sahib until about the year 1883 when the dilapidation of the building made it dangerous for the Granth Sahib still to be kept there. The Sikhs have also for many years let the building on rent to tenants, and for the use of the tenants they placed a latrine upon the roof. These facts have not been challenged here in appeal. Mr. Badri Das on behalf of the respondents accepts the findings that the mosque as an institution is a juristic person, and also that the building was originally dedicated to sacred uses as a mosque. It is not contested by the appellants that the building has not been used as a mosque, that is for the purpose of prayers, since 1762. In fact the findings of fact by the lower Court throughout are not contested here. There has been continuous adverse possession by the Sikhs for no less than 173 years, and during that time there has been a complete denial to the Muslims of all their rights. The facts being as they are, it is obvious that no appellants ever were faced with a more difficult task than the appellants in this appeal. The fact that the plaintiffs did not sue for possession shows that they recognized the difficulties of their position. The main point argued in this Court concerns the Limitation Act, and the finding of the Court below that the suit was not brought within time. It has been somewhat difficult to follow the arguments of learned counsel appearing for the appellants, but the points appear to be these; (1) that Mahomedan law governs wakfs, and that Mahomedan law does not recognize any rule of limitation; (2) that a mosque as a juristic person, and because of its sanctity, has a perpetual existence and cannot be subject to adverse possession; (3) that property in a mosque vests in God and nothing divests God of His property except, perhaps, an Act of the Legislature; (4) that a mosque is not immovable property and, therefore, Article 144, Lim. Act, does not apply; (5) that if the Limitation Act is held to apply, a new period of limitation commenced to run from the date of the demolition of the mosque on the ground that when property is dedicated to sacred uses, there is a duty cast on an owner of such property, whether his title is acquired by adverse possession or in

any other manner, to maintain the sacred character of the land or building so dedicated, and to maintain the sacred building.

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4. We have been referred to a mass of authority, little of which is of assistance in dealing with the points in issue. All these points can be dealt with together. In my opinion it is clear that if the Limitation Act applies to the suit, there is no force in any of them. The first point to be considered is the effect of the Punjab Laws Act (Act 4 of 1872) upon the personal law of the Muslims. S. 5 of the Act is very much in point. It is as follows:

> *5.* In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be:
>
> (a) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;
>
> (b) The Mahomedan law in cases where the parties are Mahomedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

5. It is clear therefore from this Act that Mahomedan law does not necessarily govern cases in which even Mahomedans only are interested. This Act allows for modification of Mahomedan law by legislative enactment and makes it clear that Mahomedan law only applies in cases where the parties are Mahomedans and there has been no legislative interference with the personal law. The next point to consider is the Section 3 of the Limitation Act, 1908 (Act 9 of 1908) is as follows:

> 3. Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed, although limitation has not been set up as a defence.

6. This section applies to every suit instituted. It provides no exception for suits concerning wakfs, religious institutions, or land and buildings dedicated to sacred uses. Article 144, Limitation Act provides a period of 12 years within which an action for possession of immovable property must be brought, the time to run from the date when the possession of the defendant became adverse. Articles 134-A, 134-B and 134 -C, which prescribe the period of limitation in actions concerning Hindu, Mahomedan or Buddhist religious or charitable endowments show conclusively that the contention of the appellants that wakfs—or property dedicated to God—are outside the law of limitation is not maintainable. That the Act is concerned with the personal law of Mahomedans is shown by reference to Articles 103, 104 and 125. The Limitation Act therefore beyond any argument, applies to this suit, and the original Mahomedan law has been accordingly modified by legislative enactment. It is not possible therefore for it to be argued now that Mahomedan law simpliciter can be applied by the Courts of British India. While dealing with the Limitation Act it is important to note S. 28 which reads as follows:

> 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.

7. It has been frequently held, and now cannot be disputed, that the operation of S. 28 perfects a title to the property in favour of the person in adverse possession after the period prescribed for recovery of possession has run. 12 years' continuous possession by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner of land, but confers a good title upon the wrong-doer: *see*, 3 Cal 224[1] and 3 All 435.[2].

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8. It was conceded by counsel for the appellants that there is no direct authority in favour of his proposition that a suit concerning wakf property was not subject to the Limitation Act. Having regard to the quotations herein from the Act itself it is quite clear that there could be no such authority. The cases to which we have been referred, which were alleged by counsel indirectly to apply to this point, were cases in which only Muslims were involved, or the Limitation Act did not apply, or adverse possession had not been established. 35 Mad 681[3] was strongly relied upon by the appellants. All that case decided however was that, according to Mahomedan law, when a wakf was created all proprietary rights of men were extinguished in the property so dedicated. No question of adverse possession or limitation arose. This proposition of law however clearly applies

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only as between Muslims themselves, and then only when no statutory modification of Mahomedan law exists. We have not been referred to any authority for the proposition that as between Muslims and non-Muslims dedicated property was inalienable or not subject to adverse possession. We have also been referred by counsel for the appellants to cases both civil and criminal concerning grave yards. In none of these however was the question of limitation or adverse possession raised or decided. The Mahomedan law relating to wakfs was laid down, namely, that once land was dedicated to the purpose of a grave yard it was inalienable. I deal later with the offence under S. 297, I.P.C.; it can have no bearing upon the civil aspect of this question. The principal authority on civil law relied upon by the appellants is that in 38 P.L.R. 182.[4] This was a decision of their Lordships of the Privy Council. This case however by no means covers the proposition argued by the appellants. In this case in the year 1928, Ballabh Das, according to the findings in the lower Courts, obtained by deed a transfer of the land in suit from one Mt. Musaheb Khanam, who was the descendant of the original manager of the qabristan or grave-yard. Their Lordships held that the land was a grave-yard and that the ancestor of the vendor was not the owner of the land but only the manager; that the land was a cemetery in the ordinary Mahomedan sense and was no longer the subject of private ownership. It followed that the vendor had no title to the land and that therefore Ballabh Das could not get a better title than his vendor had. It is to be noted in this case that the question of adverse possession did not arise, the land was alienated in 1928 and the suit brought well within time. This case is therefore no authority for the proposition that land dedicated to sacred uses is not alienable to strangers, or that adverse possession would not confer a good title upon a vendee who was in possession of the land for 12 years even after wrongful alienation to him by the manager. It would appear to be obvious that any thing which admits of possession also admits of adverse possession. A mosque can clearly be "possessed". On the other hand the cases reported in A.I.R. 1935 Oudh 425[5] and A.I.R. 1936 Oudh 207[6] are authorities showing that suits concerning Muslim grave yards are subject to limitation and adverse possession.

9. It is conceded by the respondents that a mosque as an institution (but not as a building consisting of stones, bricks and mortar) is a juristic person. According to Mahomedan law its sacred character is perpetual. Counsel for plaintiff 1, that is the mosque, could not refer us to any authority of the Indian Courts or of the Privy Council for his proposition that property dedicated to sacred uses retains its sacred character under all circumstances and for all time. He relied upon two decisions of the Courts in England reported in (1885) 16 Q.B.D. 379[7] and (1869) 4 Q.B. 407.[8] Those cases decided that if land was dedicated to sacred uses, only an Act of Parliament could

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divest such land of its sacred character. In fact the position in England—as indicated by these authorities—would appear to be much the same as the position under Mahomedan law where that law has not been modified by statute. In these cases no question of limitation or adverse possession arose, and they do not decide that the sacred character of such property in England would prevent the title passing by adverse possession to a third party. In any event they recognize that an Act of Parliament may alter the character of such land. The Limitation Act in India is equivalent to an Act of Parliament, and it clearly deals with property dedicated to God.

10. It was impossible to follow or understand the argument that a mosque as a "juristic person" had a perpetual existence and was not "property", and therefore could not be subject to adverse possession. It appeared to be based on the false analogy of the position in law of a Hindu deity. It is true that "God" as a deity has a perpetual existence and cannot be subject to possession of any kind and there are many authorities to this effect; indeed no authorities

are needed for such an obvious proposition. On the other hand there are authorities to the effect that the wood or stone idol of a Hindu deity is property and therefore subject to adverse possession: *see* Gour's Hindu Code, S. 199, Para. 2072, 4 Mad 315[9] and 51 All 621.[10] In any event there is no analogy between a Hindu or—any Mother—deity and a mosque. A mosque is the house of God but is not the deity. A mosque as a building is also clearly "property" in every sense of the word even if it be the "property of God". There is a clear distinction between a mosque as an institution, or as a juristic person which can own property, and a mosque as a building; the mosque as a building may be Owned by the institution (juristic person) or by anyone else who may acquire adverse possession over it. A mosque as a building has every attribute of "property", it is, for example, subject to trespass, and it has been held that a mosque is "immovable (property" and that the juristic person—that is the institution — as owner of such immovable property has a right of preemption under Section 13 of the Punjab Pre-emption Act, 1905. An eminent Muslim Judge (Shah Din J.) was a party to this view in 59 P.R. 1914;[11] argued that the mosque as a juristic person was divorced from the mosque building, and as a juristic person could not be subject to the Limitation Act whatever might happen to the mosque or to the Muslim worshippers. I cannot understand this argument. A "juristic person" cannot exist apart from property or right. All property in the mosque and all rights having been lost to the Muslims and to the juristic person by 12 years' adverse possession, the juristic person—a legal fiction — ceases also to exist. It owns nothing and represents nothing.

11. Another argument of a similar character which has been addressed to us is as follows: That if the Limitation Act does apply, and by virtue of S. 28 of that Act a title to the land in suit is acquired by the respondents, the mosque being sacred in character, it is the duty of the present proprietors not only to maintain that sacred character but the building itself; in fact that there is some form of onerous covenant running with such land which cannot be got rid of, and apparently that no matter if the owner of the land be atheist or infidel of any kind, this duty is paramount and must be carried out. This argument is based upon the case in 38 P.L.R. 182[4] already referred to, and in particular upon the use of the words "extra commercium" by their Lordships in that judgment, and perhaps also upon S. 297, I.P.C. It is said that such land is not governed by any human law and that the sacred character must therefore be maintained. As I have pointed out above, the decision of their Lordships in 38 P.L.R. 182[4] cannot possibly be used as an authority for this purpose. Dedicated

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property is "extra commercium" as regards Muslims themselves but not as regards Muslims and third parties, or if there is statutory modification of Mahomedan law. Indeed if, there was anything in this point at all, the appellants would not have had to go, to the length of contending that the Limitation Act did not apply to this suit.

12. The criminal liability cast upon persons under S. 297, I.P.C. for deliberately destroying sacred edifices with the intention of offending religious sentiment cannot have any bearing upon the point under consideration. There may be complete ownership of property by adverse possession or otherwise, but for good cause the Legislature may enact that the owner, in the interest of the public, cannot do what he likes with his own. A cow may be owned and similarly it is an offence to slaughter a cow publicly; but it cannot therefore be said that there is, by reason of this salutary provision, a duty cast upon a Muslim owner of a cow to maintain its sacred character and therefore to keep it alive and not have it slaughtered at all. We have nothing to do in this appeal with the demolition of the mosque in relation to any possible liability under the Indian Penal Code. We have not been referred to any authority for this proposition, and I would be very slow, without authority, to lay down that a building once dedicated to God retains its sacred character for all time and under all circumstances, or that it was the duty of any owner of such property to maintain the original sacred character of the building. This proposition, if accepted, must apply to all forms of

property dedicated to God. It would apply equally to a Hindu temple. We would then get the curious and dangerous position that where Muslims have taken possession of Hindu temples dedicated to God, demolished them, and erected mosques on the sacred sites, it would be the duty of the Muslims to maintain the sacred character of the land as understood by the Hindus. If this contention were correct, the position, if such a mosque eventually came into the possession of a third religious community, apparently might be that three forms of rites might have to be performed in the same building at the same time. One thing is clear that if the general proposition was established—greatly to the detriment of the maintenance of law and order—that there could be no adverse possession of land dedicated to God and the Limitation Act did not apply, there is no mosque in this country built on the site of a Hindu temple which could not now be recovered by the Hindus. There have been many decisions of their Lordships of the Privy Council which make it clear that the doctrine of adverse possession does apply to property dedicated to God: *see*, 36 Bom 135,[13] 27 Bom 363,[14] 27 Bom 500,[15] 23 Cal 536,[16] 37 Cal 885,[17] 51 All 621,[10] 41 Mad 124[18] and 23 Mad 271.[19] The law as laid down by these authorities cannot now be disputed. There can be no distinction in law, in my opinion, between different forms of land dedicated to God; for instance there is no distinction between a mosque and its site dedicated to God and land dedicated to God for the use of that mosque. The same would apply to Hindu temples and the land dedicated thereto.

13. On the last point that, assuming the Limitation Act applied, a new period of limitation commenced to run from the date of the demolition of the mosque, it was argued that although all rights may have been lost to the Muslims and to the mosque—as a building—by virtue of the Limitation Act, there was a right remaining in the mosque — as a juristic person — to be maintained in its original form and that therefore on its demolition a right of action arose. This argument was difficult to understand but it appears to have been based upon the argument already considered that it was the duty of any owner to maintain the sacred character of a building, in his

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possession and, in addition, that there was a duty to maintain the building itself. We have not been referred to any authority on this point and indeed it appears tome that it is without any force whatever. When the Sikhs took possession of the mosque in 1762, limitation clearly began to run, and all rights being lost to the mosque and its worshippers at the expiry of the prescribed period of 12 years, no new act by those in possession could give a fresh cause of action. It was argued that the demolition of the mosque amounted to desecration and that this was a new act of desecration giving rise to a cause of action. From the history however of this building, it is clear that from the Muslim point of view, there was complete desecration of the mosque many years ago and the demolition of the building was no more desecration than the original acts. In addition the injury to the Muslims was complete when they were dispossessed, and there cannot be after the expiry of the limitation period—all rights being lost — any further right accruing to the mosque itself, as a building or as a juristic person, or to the Muslims.

14. The final argument which shows that there is nothing in the contentions of the-appellants is that if they thought they were right that the Limitation Act did not apply, and that adverse possession could not be obtained by the respondents, there was nothing to prevent them from suing, for possession. They have not done so and the reason is obvious; they knew the Limitation Act did apply and that therefore they could not get possession. They have tried therefore by the exercise of considerable ingenuity to attain their end by this suit for a declaration and injunction.

15. To sum up therefore: The personal law of the Mahomedans has been modified by the Punjab Laws Act and the Limitation Act. Mahomedan law regarding wakfs, and the lack of any rule of limitation within that law, cannot apply to this suit

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The Limitation Act and Article 144 of the Act apply. A mosque is immovable property. Every suit is subject to the Limitation Act, and the Act applies without distinction to suits concerning both sacred and secular property; nor does it make any difference if the plaintiffs in such suits are divine or human. It therefore follows that the Muslims and the mosque at the end of 12 years' adverse possession by the Sikhs lost all rights in the land and building, including the right of worship. The Sikhs on the other hand by virtue of Section 28 of the Lim. Act, obtained a good title to the land and building thereon and have full rights therein as owners. The building under the circumstances cannot be held to have maintained its sacred character as a mosque, nor is there any duty cast upon the present proprietors to maintain its original sacred character or to maintain it as a building. Property dedicated to God can be alienated if adverse possession of the property is obtained and kept for 12 years. Finally there was no subsisting right in the plaintiffs at the date of suit and therefore no action lay. On these grounds therefore this appeal must be dismissed with costs and it is unnecessary for me to discuss the other points raised. I have had the advantage of reading the judgment of my learned brother Bhide upon the other points. I agree with him on all his conclusions and have nothing to add.

16. BHIDE, J.:— In the vicinity of a well known Sikh Shrine called the 'Gurdwara Shahid Gunj Bhai Taru Singh' situated in Lahore City, there used to be a mosque which according to the deed of dedication relied upon by the plaintiffs in this case (vide Ex. P. 141) was built by one Qurban Ali and was made over by his son Falak Beg to one Sheikh Bin Mohammad as a mutwalli or custodian in the year 1134 of the Hijri era, corresponding to 1722 A.D. According to the defendants the mosque or the adjacent site was subsequently the scene of massacre of thousands of Sikhs who fell

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victims to the religious persecution of the then Muslim Governors of Lahore. About the year 1760, when the Sikhs came into power, they took possession of the mosque and the adjacent site, and on a portion thereof erected the shrine known as Gurdwara Shahid Gunj Bhai Taru Singh referred to above, in memory of Bhai Taru Singh, one of the principal martyrs. Since then the mosque admittedly remained in possession of the Sikhs. There is evidence on the record showing that the Sikh Holy Granth was kept in it and it was used as a place of worship for some years, but subsequently it seems to have been turned to secular uses and let out for residential purposes from time to time Shortly after the advent of British Rule, Nur Ahmad, a descendant of Sheikh Bin Mohammad the first Mutwalli of the mosque, made strenuous efforts to recover possession of the mosque and some land which was attached to it. He filed several petitions for the purpose, and also a civil suit which was fought out up to the Court of the Judicial Commissioner; but his claim was dismissed as it was found that the Sikh mahants in charge of the neighbouring Gurdwara had held adverse possession of the property for over 20 years. In 1883, one Pirshah sent a petition to the Lieutenant Governor of the Punjab on behalf of the Mahomedans for restitution of the mosque. An enquiry was again made through Sayyad Alam Shah, Extra Assistant Commissioner, but after considering his report the Lieutenant Governor refused to interfere.

17. No further attempt to recover the mosque was apparently made till the year 1925, when on the Gurdwara Shahid Gunj Bhai Taru Singh having been notified as a 'Sikh Gurdwara' under the Sikh Gurdwaras Act, and the adjacent property including the building of the mosque having been claimed to belong to the Gurdwara, a muslim association of Lahore, known as the Anjuman-i-Islamia, Punjab, claimed the mosque on behalf of the Mahomedan community under S. 5 of that Act. This petition was however dismissed by the Sikh Gurdwaras Tribunal on 20th January, 1930 and no appeal was preferred from that decision.

18. There was litigation between the then mahants of the 'Gurdwara Shahid Gunj Bhai Taru Singh' and the present defendants, under the Sikh Gurdwaras Act, in which the latter were successful and as a result, the Gurdwara and the appertaining properties including the mosque passed under the control of the defendants. On the night of the 7th and 8th July, 1935 the Sikhs, whose title had been upheld by the Courts more than once, proceeded to demolish the building of the mosque which had become old. This however offended the feelings of the Mahomedan community and led to serious

communal disturbances followed by a public agitation for the recovery of the site of the mosque, which eventually resulted in the institution of the present suit on 30th October, 1935. Plaintiff 1 in this case is the mosque itself, suing in its juristic capacity, while the other plaintiffs (2 to 18) are Mahomedans, including some minors and pardanashin ladies, claiming to have a right to pray in the mosque. The latter set of plaintiffs sued in a representative capacity on behalf of the Mahomedan community and the procedure laid down in O. 1, R. 8 of the CPC, was complied with for the purpose. The plaintiffs did not sue for possession but dating their cause of action from the demolition of the mosque on the night of 7th and 8th July, 1935 prayed for the following reliefs:

(a) a declaration to the effect that plaintiff 1 (i.e. the site of the mosque) is the site of a wakf mosque dedicated to God and that it cannot be used for any purpose, which according to Mahomedan law be against the purposes of a mosque and that the plaintiffs 2 to 18 and all other followers of Islam have a right to use the

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said mosque for purposes of worship without let or hindrance by any one, and

(b) consequential relief in the shape of the following injunctions: (i) that defendants should not use plaintiff 1 for any purpose which may be contrary to its sanctity and use according to Mahomedan law; (ii) that defendants should not in any way interfere with the rights of plaintiffs 2 to 18 to worship in the said mosque, and (iii) that the defendants should be required to reconstruct that portion of plaintiff 1, i.e. the mosque, which they demolished or caused to be demolished on the night of 7th and 8th July, 1935, in the same shape and form, as before or in the alternative that they should be ordered to pay such amount to the plaintiffs as may be held to be sufficient for such reconstruction.

19. The defendants resisted the suit on various grounds, including limitation and res judicata. The issues framed in the case were as follows:

1. Is plaintiff 1 a juristic person, capable of suing through Maulana Mohammad Ahmad as next friend? O.P.
2. Does a suit for declaration lie, when plaintiffs 2 to 18 are not in possession of the subject matter of the suit? O.P.
3. Is the suit barred: (a) by decision of the Sikh Gurdwaras Tribunal, dated 20th January, 1930, (b) by provisions of the Gurdwaras Act, (c) by previous decisions between 1850 and 1883? O.D.
4. Was the notification under the Gurdwaras Act secured by fraud and deceit? If so, what is the effect? O.P.
5. Is the subject-matter of the suit waqf, that is a mosque, dedicated for prayer? O.P.
6. (a) Was the subject-matter of the suit used as a mosque by Muslims for prayers prior to July 1935? O.P. (b) If the dedication is proved, but the subject-matter of the suit was not actually used for prayers up to 1935, what is the effect on the suit? O.P.
7. Is the suit within time? O.P.
8. Have the defendants acquired a title to the property in dispute by adverse possession or otherwise? O.D.
9. Are the plaintiffs entitled to: (1) right of worship at the subject matter of the suit; and (2) mandatory injunction for reconstruction of the buildings on the site in suit? O.P.

20. The learned District Judge in dismissing the suit summarised his findings on the above issues as follows:

1. The "Masjid Shahid Ganj" is a juristic person capable of suing through Maulana Mohammad Ahmad as next friend.
2. A suit for a declaration does lie; but
3. The suit is barred: (a) by decision of the Sikh Gurdwaras Tribunal, dated 20th January, 1930; (b) by the provisions of the Gurdwara Act, though not by (c) the decisions between 1850 to 1883.
4. The notification under the Gurdwaras Act was not secured by fraud and deceit.
5. The subject-matter of the suit was in its origin waqf, that is, a mosque originally dedicated for prayers in 1722; but
6. It has not been used as a Muslim place of worship, since possession and control passed to the Sikhs, about 1762.
7. The plaintiff's suit is not within limitation.
8. The defendants have acquired from the mahants in possession from about 1762 to 1934 a title by adverse possession.
9. The plaintiffs are not entitled to the reliefs claimed.

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21. From the above decision the present appeal has been preferred. The defendants had disputed in the Court below that the demolished building was ever used as a mosque (vide Issue 5), but their learned counsel did not challenge before us the findings of the learned District Judge on the point, viz. that the building was constructed by one Qarban Ali and was dedicated as a mosque in 1722 A.D. and that one Sheikh Din Mohammad was appointed as its first custodian or mutwalli, as shown, by the deed of dedication Ex. P. 14/1. The learned counsel for the defendants also did not dispute the finding on Issue 1 that plaintiff 1—the mosque—could sue as a

'juristic person'. The plaintiffs had attempted to prove in the Court below that in spite of the long possession of the Sikhs, Mahomedans had occasionally exercised their right to pray in the mosque (*vide* Issue 6) but the evidence on the point was meagre and wholly unconvincing and the point was not pressed by their learned counsel before us. The decision of the appeal must therefore proceed upon these findings viz., that the building in question was originally constructed and dedicated for being used as a mosque about the year 1722 A.D., that the Sikhs had been in possession of it for over 150 years and that the Mahomedans had not exercised their right of saying prayers in the mosque during this long period.

22. On the above findings, the first and foremost difficulty in the way of the appellants is that of limitation, and consequently, the main arguments addressed to us centred round Issues 7 and 8 which relate to this question. The position taken up by the learned counsel for the appellants at the outset was that according to Mahomedan law, property dedicated as waqf vests in the Almighty, is 'extra commercium' and retains its character as 'waqf' for all time. It was contended that in view of these characteristics, 'waqf' property is not subject to the law of limitation. On behalf of the defendants, the fact that according to Mahomedan law, pure and simple, 'waqf' property has the above characteristics was not disputed; but it was contended that the law governing the decision of the point is not pure Mahomedan law but that law as modified by statute and that suits relating to waqf property are subject to the operation of the law of limitation like any other suit.

23. An examination of the above question raises the following points for consideration: (1) To what extent is Mahomedan law applicable to the decision of the point? (2) If the law of limitation is applicable, what is the section or article of the Limitation Act which applies to this case? (3) Is the suit within time according to the law applicable?

24. As regards the first point, the law is to be found in Section 5 of the Punjab Laws Act, which lays down that in questions regarding succession and certain matters including any religious usage or institution, the rule of decision shall be any custom applicable to the parties, if one is proved, and other, wise the Mahomedan law in cases where the parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment or is opposed to the provisions of the Act or has been modified by any custom. It will thus appear that even when both the parties to the suit are Mahomedans (in the present case the defendants are not governed by Mahomedan law), the Mahomedan law applies only in so far as it has not been altered or abolished by legislative enactment. Now the Mahomedan law does not admittedly place any time limit on the enforcement of claims. But the Limitation Act applies to all suits without any reservation in favour of claims based on Mahomedan law. In fact the Limitation Act specifically provides for limitation in respect of certain claims which are purely

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governed by Mahomedan law (see e.g. Articles 103, 104, 125 etc., of Sch. 2, Lim. Act). There are also special provisions which prescribe periods of limitation in connexion with Mahomedan religious endowments along with Hindu and Buddhistic endowments, (*see* Article 134-A, 134-B of Sch. 2, Lim. Act). It cannot therefore be disputed that the Mahomedan law has been altered by the law of limitation and even waqf property is not outside its scope. The Limitation Act is a comprehensive enactment laying down specific periods of limitation for different kinds of suits and when no specific section or article is applicable, the residuary Article 120 will ordinarily apply. Section 10 of the Lim. Act lays down that limitation shall not apply in the case of certain suits against trustees etc. relating to religious endowments; but it is not disputed that the present suit does not fall within the scope of that section. In support of the contention that the present case should be decided according to the principles of Mahomedan law, pure and simple, reliance was placed on behalf of the appellants on 20 Cal 116[20] at p. 137. That was a case decided by a Full Bench of the Calcutta High Court in 1892 and all that was laid down therein was that questions relating to the validity of dispositions made by Mahomedans should be determined according to the Mahomedan law and that this had been the uniform practice of that Court from the year 1798 onwards. No

question of limitation was involved and that ruling is certainly no authority for the proposition that suits relating to waqf property are not subject to the law of limitation. Besides in the Punjab we have a positive enactment of the Legislature laying down the extent to which the Hindu or Mahomedan law is applicable in this province and S. 5 of that Act lays down, as stated above, that even when the parties are Mahomedans, that law will apply only so far as it is not altered by statute, Section 3 of the Limitation Act, lays down that:

> Subject to the provisions contained in Ss. 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed, although limitation has not been set up as a defence.

25. There being no provision in the Limitation Act, exempting suits relating to 'wakf' properties from its operation, the present suit must be held to be subject to the rules of limitation prescribed in the Limitation Act. The learned counsel for the appellants admitted his inability to cite any direct authority laying down that a suit of the present description relating to what was once 'wakf' property is not governed by the Limitation Act. He referred to a number of authorities in support of his contention that, according to Mahomedan law 'wakf' property is 'extra commercium' and retains its character as such permanently: viz. 38 P.L.R. 182,[4] 27 P.R. 1913,[21] 2 M.I.A. 390,[22] 1906 A.W.N. 159,[23] 26 Bom 198,[24] A.I.R. 1930 Oudh 245,[25] 35 Mad 681[3] and 100 I.C. 241.[26] But none of these rulings really appears to have any bearing on the question of limitation before us. In 38 P.L.R. 182,[4] a decision by their Lordships of the Privy Council on which great reliance was placed, a piece of land, which was a portion of a grave-yard was sold by one Mt. Musahib Khanam to the defendant Ballabhadass, professing to have derived her title to it from her grandfather Kale Khan. The Mahomedans of Lucknow sued to establish that the land was a part of a grave yard and as such inalienable. The main point for decision in the case was whether the land in dispute was a portion of a grave yard or the private property of Kale Khan and the chief evidence on the point was that of the Khasra or the 'revenue record' of 1868. In this Khasra the land was described as a 'grave-yard' (qabarastan) and this entry

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raised a presumption in favour of the plaintiffs. Kale Khan was shown in the Khasra as the owner of the land, but he had been also described as a 'Sunni Faqir' and his occupation given as 'service,' and their Lordships, after taking into consideration all the entries in the Khasra and the other relevant facts, came to the conclusion that Kale Khan was merely a manager or custodian and not the real owner. On the basis of this finding it was held that the land was inalienable and the plaintiff's suit was decreed. The land had been sold only in 1928, shortly before the suit and no question of title by adverse possession of the alienee arose in the case. Kale Khan, having been found to be only a manager, could not, of course, claim any adverse-possession.

26. It will thus appear that the decision of their Lordships in the above case lends no support whatever to the view that wakf property being 'extra commercium' could not be adversely possessed. When it is said that 'wakf property' is extra commercium' according to Mahomedan law all that is meant is that, such property cannot be dealt with or alienated like ordinary property according to that law—the reason apparently being that according to that law human ownership in such property ceases and it vests in the Almighty. This feature of 'wakf' or dedicated property is not peculiar to Mahomedan law and the position as regards dedicated property is practically the same under Hindu law, as will be shown hereafter. But this does not mean that no one can acquire a valid title to dedicated property by adverse possession over twelve years. The title of a person claiming such adverse possession over dedicated property rests not on Mahomedan or Hindu law but on the law of limitation and prescription as it prevails in British India and if personal law has been modified by the statute of limitation (as shown above), the Courts in

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British India have no option but to give effect to that statute. The other rulings cited on behalf of the appellants on this question are also of no assistance to the appellants but may be noticed briefly.

27. 27 P.R. 1913[21] was a Privy Council ruling similar in some respects to 38 P.L.R. 182.[4] In that case also the entry in the revenue records to the effect that the land in suit was a 'qabarastan' (grave-yard) was held to be sufficient to show that it was so and one Makhdum Husain Shah whose, name was entered in the column of 'owners' was found to be a mere trustee or a custodian. No question of adverse possession was raised, but it is significant that the portions of the 'qabarastan' which had been already sold or encroached upon were excluded from the scope of the suit. 2 M.I.A. 390[22] was an old case decided by their Lordships of the Privy Council in 1840. In that case the wakf property was held to be exempt from the law of limitation, but this decision was based on a special regulation (viz. Regn. 2 of 1805) which was then in force. In 1906 A.W.N. 159.[23] on which some stress was laid by the learned counsel, the property in dispute which had been confiscated by Government was found to be a grave-yard and it was therefore held that the Government could acquire no better rights than those of the original owners. For, Government could only confiscate such rights as the original owners had, and nothing more. In 26 Bom 198.[24] the land in dispute was found to be a grave-yard, which though disused for some years, retained its character as such and the Mahomedans had been in the habit of performing religious services at the tombs thereon. It was remarked:

> The ownership of the soil may he vested in others; but the permission to bury in the land, granted as it must be subject to the custom of the community, carries with it the right to perform all customary rites.

28. It will thus appear that the decision was based on the permission for burials

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granted by the owners and local custom. In A.I.R. 1930 Oudh 245,[26] a Single Bench ruling of the Oudh Chief Court, the question of adverse possession was raised, but no such possession was apparently proved and the point was not discussed. In 35 Mad 681,[3] it was said that all proprietary rights of men are annihilated when property is dedicated and vests in God and the same was also held in 100 I.C. 241,[26] but in neither of these rulings was any question of adverse possession by a third party involved.

29. It will thus appear that there is no warrant either in the Limitation Act or the rulings cited for the proposition of law contended for by the learned counsel for the appellants, viz that 'wakf' property is not subject to the law of limitation. On behalf of the respondents, on the other hand, A.I.R. 1935 Oudh 425[5] and A.I.R. 1936 Oudh 207[6] were cited. The former was a suit for possession of a portion of a wakf property (a grave-yard) governed by Mahomedan law, but it was held to be barred under Article 142, Limitation Act. In the latter case, which was of a similar type, it was remarked that the plaintiff could recover only such portions of the grave-yard over which defendants title had not been perfected by adverse possession. Both these suits were apparently between. Mahomedans and related to wakf property and yet they were held to be governed by the ordinary law of limitation, In 50 Cal 329,[27] a mutwalli had mortgaged a portion of a wakf property for a purpose unconnected with the wakf and in 1906 a final decree for foreclosure and possession had been obtained. In 1913, the successor of the mutwalli brought a suit to recover the property. Their Lordships of the Privy Council held that the suit was governed by Article 142 or 144, Limitation; Act, but was within time, as the late mutwalli had been in possession within 12 years. 56 All 111[28] is another ruling of their Lordships of the Privy Council in which wakf property was held to be governed by the law of limitation.

30. I have confined myself above to cases relating to wakf property under the Mahomedan law, because it was argued that the inalienability and permanent character of wakf property were peculiar features of Mahomedan law and could not be affected by the law of limitation. As a matter of fact these features are not really so peculiar to Mahomedan law. It was pointed out in 27 Mad 435[29] (at p. 450) that the "inalienable character of land consecrated to religious purposes has been generally

recognized under the Roman, Christian and Mahomedan systems as well as under Hindu law". In 12 Bom 247[30] (at p. 264) it was said that property dedicated to a pious purpose is by Hindu law as well as by Roman law placed 'extra commercium': In 6 Bom 546[31] (at p. 552) it was remarked that grants made to a Hindu temple are permanent, irresumable and substantially inalienable. It will thus appear that there is no material difference in this respect in the character of property dedicated for religious purposes whether under Mahomedan law or other laws. There are many reported cases including several decisions of their Lordships of the Privy Council, wherein properties dedicated to Hindu temples or idols have been held to be subject to the law of limitation and prescription: *see* e.g., 23 Madras 271,[19] 32 Cal 129,[32] 37 Cal 885,[17] 44 Mad 831,[33] 57 All 159,[34] A.I.R. 1936 P.C. 183[35] etc. It is thus perfectly clear that the law of limitation applies to property whether sacred or secular.

31. The learned counsel for the appellants next contended that a mosque, being a place of worship had a peculiar sanctity attached to it and such property could not lose its character by any human act such as adverse possession by a stranger. No authority was cited in support of this contention and the only argument advanced was that the cases cited for the respondents were distinguishable as they did not relate to

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'mosque'. But the Mahomedan law itself does not appear to make any distinction so far as the incidents of 'wakf' property are concerned as between a 'mosque' and other wakf properties. Any property which is "wakf"—whether it is a mosque or something else—is according to that law "extra commercium" and its ownership vests in God. There is therefore no reason why a "mosque" should not be subject to limitation and prescription when other "wakf" properties have been held to be so as shown above. The Limitation Act certainly does not exempt wakf properties from its operation. Not only this, but as pointed out already, there are distinct provisions in it relating to "Muhammadan religious endowments"— which expression presumably includes "mosques" (*vide* Articles 134-A and 134-B of Sch. 2 and S. 10 of the Act), In support of the contention that a mosque" retains its character for all time, reliance was next placed on certain rulings relating to 'grave, yards' wherein accused persons were convicted under S. 297, Penal Code, although the graves were on properties owned by the accused persons or where the accused persons had committed alleged criminal acts with the permission of the owners e.g. 18 All 395,[36] 40 Cal 548[37] and A.I.R. 1932 Cal 459.[38] These rulings are based upon the language of S. 297, Penal Code, and appear to have really no bearing on the question of limitation before us. The mere fact that a person may be guilty of committing an offence under S. 297, Penal Code with respect to graves on land owned by himself, cannot show that adverse possession can never be obtained over land covered by graves and that a "grave-yard" most retain its character as such for all time. So long as the graves stand, even the owner of the land underneath will be guilty, under S. 297, Penal Code, if he commits any act falling within the purview of that section with the requisite knowledge or intention. For the purposes of the criminal offence udder S. 297, Penal Code, the question of ownership may not be material but these rulings cannot support the proposition that a "grave-yard" must remain a grave-yard for all time and that private ownership over it cannot be acquired by adverse possession. For example, if a person builds on land covered by graves, and no action is taken for over 12 years, there seems to be no reason why that land should not become his private property. This was, in fact, the view taken in A.I.R. 1935 Oudh 425[5] and A.I.R. 1936 Oudh 207[6] already referred to.

32. The learned counsel for the appellants tried next to find some support for his argument from the analogy of English law and drew our attention to the law relating to consecrated property as summarized in Vol. 11 of *Halsbury's Laws of England*, pp. 860 -864. It was urged that when a church is consecrated it retains its character "whoever may be the actual owner and whatever may be the nature of his tenure". Attention was also drawn to (1869) 4 Q.B. 407[8] in which Lord Cock-burn remarked;

> .... Where ground is once consecrated and dedicated to sacred purposes, no Judge has power to grant a faculty to sanction the use of it for secular purposes and nothing short of an act of Parliament can divest consecrated ground of its sacred character.

33. But neither in the summary of English law as given in the paragraph in *Halsbury's Laws of England* referred to above nor in (1869) 4 Q.B. 407[8] was there any reference to the question of adverse possession of third parties or limitation, and consequently the above remarks which are of a general character and based on English Ecclesiastical law can be of no more assistance to the appellants on the question of limitation than the general character and incidents of wakf property as laid down in

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Mahomedan law. Lastly, it was contended that as the 'mosque' was suing as a 'juristic' person and as the building of the mosque is the corpus of such a juristic person, it must be looked upon as incorporeal and eternal and not as ordinary 'immoveable property,' and that it was, therefore, not subject to the law of limitation and prescription laid down in Article 144 and Section 28 of the Limitation Act. This argument again was not supported by any authority and is difficult to follow/So far as I can see, it appears to be founded on some confusion of ideas. It is difficult to see why the building of a mosque or its site cannot be looked upon as 'property' merely because the 'mosque' has been held to be capable of suing or being sued as a 'juristic' person. The expression 'juristic' person (or its equivalent 'legal person') simply means any subject-matter to which the law attributes a legal or fictitious personality (*cf. Salmond's Jurisprudence*, 9th Edn p. 425). The necessity for the attribution of such a personality in the case of a mosque arises from the fact that Mahomedan law recognizes the validity of gifts of property in favour of mosques and consequently a mosque can become a holder of property (*cf. Tyabaji's Mahomedan Law*, Edn. 2 Para. 363; *Ameer Ali's Mahomedan Law*, Edn. 4 Vol. 1 p. 397 and *Abdul Rahim's Mahomedan Jurisprudence* p. 218). Hindu religious institutions have also been held to be 'juristic persons' in similar circumstances and for similar reasons: *see*, 44 Mad 831[13] at p. 839, a decision of their Lordships of the Privy Council. As a holder of property, a mosque must have a status to take legal action to protect such property and consequently it is found convenient for the purposes of law to look upon a mosque as a 'juristic' or 'legal' person capable of suing and being sued. But when the law attributes such a personality to a mosque, it attributes it not to the building of the mosque, but to the mosque as an institution i.e. as a religious foundation. For, the building used as a mosque at a particular time may fall down and may be replaced by a new one; but the properties gifted in favour of the mosque will continue to be attached to the mosque as an institution. The learned counsel for the appellants were not able to cite a single authority in support of their contention that the mosque, as a 'juristic person' is identical with the building of the mosque. On the other hand, 59 P.R. 1914[11] and 153 P.R. 1884,[12] which were cited on behalf of the appellants go to show that the mosque conceived as a 'juristic' person is the religious foundation or the institution and not the building or the 'brick and mortar' of which it consists.

34. In 153 P.R. 1884[12] it was remarked:

> As to the second point, we are of opinion that though theoretically 'wakf' property belongs to no human owner, nevertheless a mosque—as a concrete example of 'wakf'—is an institution, and, its possession is legally maintained by its lawful, guardian for the time being; in virtue of his position, the guardian can resist trespass, recover-debts, make purchases and mortgages all in virtue of the right which resides in the institution. In the same way we think the mosque, as an institution, might acquire an easement by prescription; and that being so, we cannot think of any rule or principle by which we could deny to the mosque (as an institution) the same right of preventing, strangers approaching its walls by the exercise of a right of pre-emption, as other house holders have. The object of the right of pre-emption is to secure the cohesion of families, and obviate the inconvenience of a mixed or alien neighbourhood among private house-holders. Now it can hardly be denied that exactly the same convenience which, results to a private house from the exercise of the right, may result also to a mosque.
>
> We have no hesitation in deciding, on this principle, that the mosque as an institution has practically proprietary rights exercised through the guardian, and that one of the rights is to claim,

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on the ground of vicinage, a right of pre-emption in the case of sales of adjoining properties. In the present case, the mosque adjoins the house sold, as much and, indeed, more than the plaintiff's house does, therefore the plaintiff has no preferential claim.

35. The above remarks were approved in the later ruling (59 P.R. 1914,[11] to which Shah Din J., an eminent Mahomedan jurist of this Province, was a party) and it was held that while the 'mosque' was a 'juristic' person, the building of a mosque was 'immovable property' for the purposes of giving a right of pre-emption under Section 13-1(7) of the Punjab Pre-emption Act, 1905. It was urged, that in the case of a Hindu idol (which is also looked upon as a juristic person, in so far as it can be a holder of properties), it has been held that the idol cannot be looked upon as mere moveable chattel or property. Reference was made in this connexion to 38 Cal 284[39] and to 52 Cal 809.[40] In the former case, a suit was instituted, on behalf of the Thakurs (i.e. the idols) suing in their juristic capacity for removing themselves from the custody of the plaintiffs and the question was raised whether the suit was for recovery of 'moveable property' within the meaning of Article 49, Lim. Act. It was held that the suit by the Thakurs for removing themselves from the custody of the defendants to the custody of the plaintiffs 3 to 6 and being placed in their new habitation was not a suit for 'moveable' property within Article 49 and that Article 120 was appropriate. The facts of that case and the form of the suit were peculiar. The suit was by the idols themselves and the relief was not for the recovery of the 'idols,' but for the idols being located in a certain place. In this aspect of the question Article 120 appears to have been held to be appropriate. For, after holding that Article 120 applied, the learned Judges went on to remark:

> In this view on the case, it is not necessary to consider whether the Thakur is to be considered a 'moveable property'.

36. The remarks on the latter point must therefore be treated as 'obiter'. In 52 Cal 809[41] their Lordships of the Privy Council remarked that idols cannot be regarded as mere chattel; but this remark was made with reference to the alleged right of a shebait to locate them anywhere or deal with them in any way he liked and not with reference to the general question whether they can be treated as property for any purpose. The dispute in that case was between rival custodians and there was no question of adverse possession by a third party or of limitation involved. As pointed out by their Lordships of the Privy Council in 2 I.A. 145[41] at p. 152 it is only in an ideal sense that a Hindu idol is looked upon as a "juristic" person. That idea must be therefore kept distinct from the idea of an idol, as a physical object. In Gour's Hindu Code, in his commentary on S. 199, the learned author remarks (*vide* Para. 2072): "An idol is treated by Hindu law, both as a juridical person and as property". In 4 Mad 315,[9] it was held that idols were "property" in the eye of law. In 51 All 621[10] at p. 628, it was remarked that adverse possession can be obtained not only against idols, but over the idols themselves.

37. The contention of the learned counsel for the appellants that a mosque as a juristic person cannot be looked upon as "immovable" property in law would seem to lead to the absurd result that no protection could be claimed for the mosque against torts or crimes relating to property. As stated already, the contention of the learned counsel on this point is not supported by any authority whatever and is opposed to the view taken in 153 P.R. 1884[12] and 59 P.R. 1914.[11] If we keep clear in our minds the two distinct notions, viz the mosque as an institution and the mosque as a building (which is only intended to serve to carry out the purpose of the institution), there is no difficulty in seeing the fallacy underlying the argument that the mosque being a juristic person is not "immovable property". The mosque as a "juristic" person is, of

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course, a "person" (though a fictitious one) and not "property" at all. The "juristic person" is the institution and it is the institution which is the holder of properties attached to it—including the building of the mosque itself. In 41 Cal 57,[42] it was held that where a temple had been washed away by the river and a new one had been erected elsewhere, the religious foundation continued and the endowed properties became automatically attached to the new temple.

In the present instance also although the building of the "Masjid Shahid Ganj" has been demolished, legally it is possible to conceive of the mosque as an institution to be subsisting but this is only in an ideal sense. It is only in this ideal aspect, that the present suit, which has been lodged on behalf of the mosque as a "juristic" person may be held to be maintainable. But this conception can be of no practical importance when the mosque does not possess or cannot legally claim any property as shown below.

38. The question whether the "juristic" person suing in this case can get the reliefs claimed, must depend in the first place on the question whether the suit is within time. For, "juristic" persons like other plaintiffs are subject to the law of limitation and enjoy no special privilege in this respect. There are several decisions of their Lordships of the Privy Council in which properties owned by Hindu idols as "juristic" persons were held to be subject to the law of limitation and adverse possession: see e.g. 32 Cal 129[32] and 37 Cal 885.[17] I am therefore unable to see force in any of the grounds on which it is claimed that the present suit is not governed by the law of limitation and hold that the contention must be overruled. The next point for consideration is the rule of limitation governing the case. The plaintiffs have sued for & declaration and certain consequential reliefs. The suit being on behalf of the mosque as a "juristic" person (i.e. as a religious institution) and also on behalf of the whole of the Mahomedan community, the plaintiffs ought to have sued for possession as will be shown hereafter. But leaving that point for the moment, the declaratory suit as framed would appear to be governed by Article 120, Lim. Act, which prescribes a period of six years. The starting point for limitation would prima facie be the time when the Sikhs took possession of the mosque sometime about 1760 A.D., and the rights of the institution as well as of the Mahomedan community were denied.

39. The appellants however contended that the cause of action accrued to them when the mosque was demolished in July 1935. This contention of the appellants is based on the assumption that the building of the mosque retained its character as a mosque till the date of the demolition. The appellants had alleged that they had exercised their right of saying prayers in the building from time to time till its demolition; but as already stated this allegation was not substantiated. The first question for consideration therefore is whether the mosque retained its character as such, in the hands of the defendants. The defendants contended that the ownership of the building vested in them long ago by "adverse possession" over 12 years since the Sikhs took possession of the building, sometime about the year 1760 A.D.; Considering the circumstances under which the property was taken by the Sikhs, there can be no doubt that their (possession must have originated either in an act of State or trespass. There is no direct evidence as to how the building was used from 1760 up to 1853, when Nur Ahmad instituted his suit for possession of the mosque. But it is scarcely likely that the Mahomedans would have been allowed to have access to the building for any purpose whatever during this period. There is moreover direct evidence to show that in 1853, it was found that the Sikhs had held adverse

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possession of the property for over 20 years (*vide* petition of Nur Ahmad, dated 26th March, 1853, marked as Ex. D.35, and judgments in the suits instituted by him marked as Exs. D.40, D.41 and D.42). It may therefore be safely taken that the defendants had been in adverse possession of the mosque for over 12 years before 1853, and consequently by the combined operation of Section 28 and Article 144 of the Lim. Act all rights of the persons entitled to possession of the mosque or of any interest therein were extinguished. The juristic person, i.e. the "institution" was certainly entitled to claim possession of the building of the mosque on behalf of all interested in it when the Sikhs took possession of it and by their adverse possession Over 12 years the rights of the institution in the building were lost. Further the Sikhs having remained in possession for over 12 years, the ownership of the property vested in them (*cf.*, 3 Cal 224,[1] 3 All 435,[3] 4 Cal 699,[43] etc.). It follows therefore that as the Mahomedans had no rights of any kind left in the building the demolition of the building in July 1935 could give the appellants no cause of action to sue for the reliefs claimed. In this aspect of the question, the defendants' refusal to allow the Mahomedans to pray on the site of

the mosque could not constitute a "continuing wrong" within the meaning of Section 23 of the Lim. Act. For when all rights of Mahomedans in the mosque were extinguished and the Sikhs became the owners of the building, the "right to pray" in the mosque was also extinguished and in refusing that right to the plaintiffs the defendants cannot be held to be guilty of any wrong, much less a "continuing" one 31 P.R. 1917[44] cited on behalf of the appellants is clearly distinguishable, as the mutwalli in that case was in lawful occupation of the hujra and it was only his wrongful user of the place as private residence that was complained of. Consequently, each act of wrongful user was held to give a fresh cause of action in that case.

40. It is significant that the appellants have chosen to sue only, for a declaration of their rights and certain mandatory injunctions. No satisfactory explanation, was given as to why the appellants did not sue or possession, if wakf property was immune from the law of limitation as claimed by them. Plaintiff 1 in the case is the mosque suing as a juristic person, while the remaining plaintiffs are suing on behalf of the whole of the Mahomedan community. The position of a juristic person is not that of a minor (*see*, 32 Cal 129[32] and AIR 1932 Mad 328[45] at p. 333 and it is doubtful if the suit was properly instituted through S. Mohammad Ahmad as a "next friend". For, this gentleman is admittedly not a mutwalli and has no particular connexion with the mosque. But even assuming that the suit on behalf of the 'juristic person' was properly instituted through a "next friend", there seems to be no reason whatever why the 'juristic' person should not have sued for possession. The argument that the 'juristic person' being the mosque, could not sue for its own possession is obviously fallacious; for as pointed out before, the 'juristic' person is the religious institution and not the building of the mosque and the institution was therefore clearly entitled to claim possession of the mosque or its site for the benefit of all persons interested in the institution. As regards the other plaintiffs also, although they may not be individually entitled to claim possession, the suit being on behalf of the whole of the Mahomedan community, they could have sued for possession (*see*, 158 I.C. 916,[46] 71 I.C. 463,[47] and the remarks of their Lordships of the Privy Council as regards the proper relief in A.I.R. 1936 P.C. 834 at p. 89). The possession of the defendants being unlawful according to the allegations of the plaintiffs, this relief was clearly open to them. In the circumstances, it seems to me that it was not even open to the plaintiffs

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to sue for a mere declaration and injunction as they, did and the suit was lible to be dismissed on this short ground. According to Section 42 of the Specific Relief Act, it is not permissible to sue for a mere declaration when further relief in the shape of possession is open to a party. Again, according to Section 56 of the Cl. (1) of the same Act, no relief by was of injunction (which is purely discretionary) can be granted, when an equally efficacious relief could be obtained, by other usual modes of proceeding. It is well established that when it is open to a person to sue for possession, he cannot be granted any relief in the shape of a mere injuction (*see*, 24 I.C. 199[48] and 33 Mad 542[49]).

41. The plaintiffs seem to me to have sued for a mere declaration and injunction owing to their consciousness that a suit for possession, would be barred by time. But they cannot circumvent the law of limitation, by merely suing for an injunction, when they could have sued for possession (*see*, 13 Mad 445[50]). As already stated, all rights of the plaintiffs were extinguished long ago by the operation of Section 28 and Article 144 of the Lim. Act, and the present suit must, therefore, be held to be hopelessly barred. In the end, I may refer to the rather curious argument on behalf of the appellants that the mosque retained its sacred character in the hands of the defendants, although the plaintiffs may not be entitled to recover possession owing, to lapse of time. It was contended that a duty was cast on the Sikh defendants, who were in possession, to maintain the building intact owing to its sacred character and,

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therefore, the demolition of the building in July 1935 by the defendants gave a fresh cause of action to the plaintiffs—or any rate to plaintiff 1, viz the mosque, is a 'juristic' person. This argument appears to be based partly on a misconception as regards the true nature of a 'juristic' person and partly on the assumption that the building retained its sacred character even when the rights of Mahomedans in it were lost and title had passed to strangers.

42. As regards the first point, it has been already pointed out that the 'juristic' person in this case is the institution and not the building of the mosque. The mere fact that the mosque's right to sue as a 'juristic' person was admitted by the defendants does not, therefore, involve any admission that the building of the mosque retained its character as a mosque and was still sacred when it was demolished in 1935. The learned District Judge has, no doubt, found that the building was originally erected as a mosque; but he has also found that the title thereto had passed to the defendants long ago by adverse possession. His finding is therefore of no assistance to the appellants. The essential character of a 'mosque' consists in its being a place of worship for the use of Mahomedans; but the Mahomedans had been denied, and had lost, their right to pray in it long ago. The mere fact that the building was referred to in some comparatively recent documents as a 'mosque' is of no significance whatever, as the description of the building must obviously be attributed to its old associations. There is ample evidence on the record to show that the building had been used by the Sikhs for years for secular purposes.

43. The contention that the mosque retained its sacred character inspite of its adverse possession by the defendants was not supported by any authority and seems to be devoid of any force. The position taken up by the appellants that waqf property being 'extra commercium' retains its character for all time and is not subject to the law of limitation, has been already shown to be wholly untenable. The cases relating to Mahomedan grave-yards on which again reliance was placed in this respect (viz. 18 All 395[36] 40 Cal 548[37] and A.I.R. 1932 Cal 459[38]) have also been dealt with already. The

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decision in these cases, as pointed out before, is based on the wording of S. 297, I.P.C. The mere fact that a person may be guilty of committing an offence under S. 297, I.P.C., with respect to a grave on his own land, cannot show that the land underneath the grave will always remain sacred. In the case of a grave it is the presence of the remains of the dead body that makes the grave sacred. Consequently the grave will be considered to be sacred so long as the remains of the dead body are enshrined in it. But if the grave is dug up and the land is built upon, it cannot be said that the land will still remain sacred for ever. Similarly the buildings a mosque cannot be considered to be sacred, unless it retains its essential characteristics as a mosque, i.e. unless the Mahomedans have a right to say their prayers therein. So long as the Mahomedans have such a right, even a non muslim in possession of it, may be bound to respect it and may be found guilty if he commits any act falling within the purview of S. 297, I.P.C. But once this right is lost and the title passes to a stranger as in this case, it is difficult to see on what possible grounds the building of the mosque could be considered to be sacred.

44. In the present instance I do not see how the defendants could be considered to have had when they demolished the mosque in 1935 the requisite knowledge or intention even for the purpose of an offence under S. 297, I.P.C., as they had been in possession over 150 years, had peaceably used the building for secular purposes, and their title also had been upheld by Courts ever since 1853. It is however unnecessary to go into that question for the purposes of this appeal. All that need be considered for the purpose of the argument under discussion is whether the demolition of the building of the mosque in July 1935 could constitute a "tort" and give any cause of action to the plaintiffs. It seems to my mind, perfectly clear that when the Mahomedans had lost all rights in the building by adverse possession long ago and title had passed to the Sikhs, the building could no longer be held to be a 'mosque' in the true sense of the term and was therefore not sacred. As the plaintiffs had lost all their rights, and ownership had vested in the defendants there could not be any obligation on the defendants to keep the building intact. For, there could be no such obligation in law unless there was a corresponding right in the plaintiffs. I have therefore no hesitation in holding that the demolition of the mosque in July 1935

was not a 'tort' and gave no cause of action to the plaintiffs.

45. On the above findings the appeal must fail on the question of limitation but as the question of res judicata was also argued at length, I shall deal with that point briefly. The defendants' plea of res judicata was based (1) firstly, on the decisions on the petitions filed by Nur Ahmed in the years 1853–1855 to recover possession of the mosque and (2) secondly on the decision of the Sikh Gurdwaras Tribunal dated 20th January, 1930 on the petition filed by the Anjuman-i-Isalmia, Punjab, on behalf of the Mahomedans under Section 5 of the Punjab Sikh Gurdwaras Act.

46. As regards No. (1), it appears that Nur Ahmed filed several petitions but it is sufficient to refer to one of them, viz. the one dated 23rd June, 1855, which was apparently filed as a regular suit in forma pauperis and was dismissed by the Deputy Commissioner of Lahore on 14th November, 1855 (see Ex. D.40). The decision of the Deputy Commissioner was confirmed by the Commissioner on appeal on 9th April, 1856 and by the Judicial Commissioner on 14th June, 1856 (see Ex. D-41 and D-42). It will appear from Ex. D-40, that Nur Ahmed sued for possession of the mosque with seven shops and a 'hamam' and 'khanqah,' valuing the claim at Rs. 17,000. He based his claim on the deed of dedication in favour of his grand-father by Qurban Ali. The

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Deputy Commissioner after considering the evidence produced and the decision in some previous cases with respect to the same property, dismissed the suit. As regards this decision, it was contended on behalf of the appellants that it cannot operate as res judicata, as it does not fall within the ambit of Section 11 of the CPC. It was urged that the procedure followed in the suit, was not regular, e.g. no issues were framed and evidence was not recorded on oath and so forth. It was also suggested that the 'Punjab Civil Code' which was then followed, had not been duly sanctioned by the Government of India. Lastly it was contended that Nur Ahmed was suing in a private capacity on the basis of a gift by Qurban Ali and not as a mutwalli.

47. None of these contentions appears to have any force. The suit was apparently tried according to the procedure then in force and was taken up to the highest Court of Appeal. The mere fact that the procedure then in force was of a summary character seems to be immaterial for the purposes of Section 11 of the CPC. The contention that the Punjab Civil Code, which was then followed by the Courts, had not received the sanction of Government was sought to be supported by a decision reported in 64 P.R. 1867.[51] But that ruling itself shows that the Government of India had subsequently approved of it. The fact remains that the decision of the Deputy Commissioner was upheld by the highest Court of Appeal and this raises a presumption that the suit was properly tried according to the law and procedure then in force. It is clear from the Deputy Commissioner's judgment that Nur Ahmed was suing for possession of the very mosque now in dispute. Nur Ahmed stated that the property was gifted by Qurban Ali, and the deed of dedication produced by him, which is relied on by the appellants, shows clearly that he claimed to be a descendant of the first mutwalli, Din Mohammad, and as such entitled to possession of the mosque. There can be no doubt therefore that he was not claiming the mosque as private property. As a mutwalli, Nur Ahmed was entitled to recover possession of the mosque, for the use of the Mahomedans. His suit was thus of a representative character and the decision therein must be held to be binding on all Mahomedans by virtue of Expln. VI to Section 11 of the CPC, (*cf.*, 46 All 651[52]).

48. The learned District Judge has held that the decisions on the petitions and the suit of Nur Ahmed do not operate as res judicata because the claim in the present suit is not one for possession by ejectment as it was in *Nur Ahmed's case*, but only for a declaration that the Mahomedan community has a right of access to the mosque for purposes of prayer. But this fact alone does not appear to me to be sufficient to take the case out of the operation of Section 11 of the CPC S. 11 applies not only to the final decision but also to issues. The real issue in the present case was whether the mosque in question retained its character as a mosque till July 1935, when it was demolished. The decision of this issue depended upon the question whether the defendants had perfected their title by adverse possession and as a consequence the rights of all Mahomedans in the mosque had been lost. This question was also in issue in *Nur Ahmed's case* in 1855, and it was then

found that Nur Ahmed, although he claimed to be a descendant of the original mutwalli (Sheikh Din Mohammad), was not entitled to recover possession as the Sikh defendants had been in adverse possession for over 20 years. The finding in *Nur Ahmed's case* that the defendants Sikhs were in adverse possession over 20 years before 1855 operates as res judicata and bars the agitation of the same issue in the present case. If that finding stands, it follows that the rights of the Mahomedans in the mosque in question were lost even before 1855, and the present suit must fail on

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that ground.

49. Coming to the decision of the Sikh Gurd waras Tribunal, it seems to me that the present suit would also be barred by the provisions of Section 37 of the Punjab Sikh Gurdwaras Act. According to the provisions of that Act, when the mosque in question was claimed to be the property of the 'Gurdwara Shahid Gunj Bhai Taru Singh' and a notification issued with respect to the claim under S. 3 of the Act, it was incumbent on any person who claimed any right, title or interest in the property to file a petition under S. 5 of the Act to establish his claim. The present plaintiffs did not do so, but the Anjuman-i-Islamia, a well known representative Mahomedan association of Lahore, did claim the mosque on behalf of all the Mahomedans. The claim was dismissed and the learned District Judge has held the decision to be binding on all Mahomedans. On behalf of the appellants it was however argued that (1) the Anjuman-i-Islamia was not a truly representative association (2), that the procedure laid down in O. 1, R. 8 of the CPC, was not followed and therefore the decision of the Tribunal can bind none except the members of the Anjuman-i-Islamia,

50. As regards the first point, the learned District Judge has pointed out that the Anjuman-i-Islamia is an old Mahomedan association of Lahore, duly registered under the law, and one of its avowed objects is the protection of waqf properties. The association is admittedly in charge of the management of some six mosques in Lahore including the Badshahi Mosque. There is in fact no evidence worth the name on the record to show that the Anju-man-i-Islamia cannot properly be considered to be a representative Mahomedan association for the purposes of the question now under consideration. In the course of the arguments, it was admitted before us that when a question arose recently about the restoration of an ancient mosque, which was in the possession of Government, to the Mahomedan community, the Government made over the mosque to this very Anjuman. It is therefore clear that the Anjuman is looked upon as a truly representative Mahomedan association to this day. I have therefore no hesitation in repelling the appellants' contention on this point. It was in the fitness of things that this Anjuman, which takes special interest in the protection of waqf properties, filed a petition under S. 5 on behalf of all the Mahomedans to recover the Masjid Shahid Gunj and it was probably because the Mahomedans in general had full confidence in this Anjuman that no other Mahomedan thought it necessary to file any other petition with reference to the said mosque.

51. The next point for consideration is the effect of the omission to follow the procedure laid down in O. 1, R. 8 of the CPC in connexion with the petition of the Anjuman under Section 5 of the Sikh Gurdwaras Act. It was argued on behalf of the appellants that in consequence of the omission to follow that procedure, the decision of the Tribunal is not binding on them. In support of this contention, reliance was placed chiefly on a decision of their Lordships of the Privy Council in 56 Mad 657,[52] in; which it was held that in a representative suit to which O. 1, R. 8 of the CPC is applicable, the decision will not bind persons who are not parties to the suit unless the procedure laid down in O. 1, R. 8 of the CPC is strictly followed. On behalf of the respondents, on the other hand, it was contended that O. 1, R. 8 of the CPC was not applicable to the petition and even if it were, the Anjuman was a truly representative body and its petition having been fought out bona fide on behalf of all the Mahomedans, the decision of the Tribunal was binding on all of them. In my opinion the contention of the learned counsel for respondents is correct. The Sikh Gurdwaras Act is an enactment of a special nature and is governed by its own procedure. Sub s. 11 of S. 12 of the Act prescribes that the proceedings of the Tribunal shall be conducted according to the Civil Procedure Code, but only 'so far as may be' and 'subject to the provisions of the Act'.

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52. In the present instance the petition under S. 5 was not really in the nature of an independent suit but was a reply to the claim put forward on behalf of the 'Gurdwara Shahid Gunj Bhai Taru Singh' to certain properties. This claim was notified as required by S. 3 in the Gazette and also:published at the head quarters of the district, the tahsil and the revenue estate etc. as required by rules. The publication of the claim with respect to the "mosque" in the above manner was a general notice to the public and it was an invitation to everybody who claimed to have any right, title or interest in the property to establish his claim in the manner prescribed by the Act. The purpose of the notice issued in a suit under O. 1, Rule 8 of the CPC has thus been already served. Only the Anjuman-i-Islamia came forward to claim the Masjid. The presumption is that others did not feel interested or were content to leave the matter in the hands of the Anjuman. The Anjuman claimed the Masjid on behalf of all the Mahomedans and the Tribunal treated their claim as a representative one. There is no suggestion that there was any collusion between the Anjuman and the defendants. The claim appears to have been fought out bona fide and there is no good reason whatever why the decision of the Tribunal should not be held to be binding on all Mahomedans.

53. It was urged that the notification was not proper notice to the Mahomedan public as the Masjid was described as 'Gurdwara Singhnian.' But as the learned District Judge has pointed out, the defendants cannot be considered to be guilty of any fraud or deception in this respect as they did not treat the building in dispute as a mosque and could not be expected to describe it as such. The mere fact that in some rent-deeds executed in favour of the mahants of the Gurdwara, the property was referred to as 'Masjid' was obviously due to its old association and not because the Sikhs still looked upon the building as a Mahomedan place of worship or treated it as such. But, when the property had to be described for the purposes of the claim under S. 3, the defendants naturally described it in the true character in which they held it. The boundaries of the property were given and its location shown in a plan. There was therefore no deception in the matter and the notification and the publication of the claim were enough to give reasonable notice of the claim of the Gurdwara to all concerned. The very fact that the Anjuman-i-Islamia did get such notice and pub forward its claim is significant in this connexion and it appears that certain other Mahomedans also claimed adjacent properties. I have therefore no hesitation in rejecting the argument that the decision of the Sikh Gurdwaras Tribunal was not binding owing to fraud in the publication of the notification under S. 3. Even in 56 Mad 657,[53] their Lordships of the Privy Council recognized that there may be exceptional cases where it could be shown that the omission to follow, the procedure in O. 1, R. 8 of the CPC was a technical irregularity which caused no prejudice and the litigation having been bona fide, the previous decision would be binding. In the present instance, it seems to me in the first place that O. 1, R. 8 of the CPC was not strictly applicable and secondly that even if it were applicable, the case would fall in the category of the exceptional cases referred to by their Lordships of the Privy Council in 56 Mad 657.[53].

54. As the claim of the Anjuman was a representative one and it was decided that the Mahomedans were no longer entitled to recover possession, the decision must be held to be binding on the present plaintiffs. It was urged that every Mahomedan has an individual right to pray iu a mosque (*see*, 7 All 178[54]) but when the Tribunal held that the Mahomedans in general had no rights left in the mosque that finding must be

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held to be binding on all. In this aspect of the case, no question of assertion of a claim on behalf of any individual on the ground of want of knowledge etc. within the purview of Section 30(ii) of the Sikh Gurdwaras Act, arises. According to S. 37 of that Act, no Court can now pass any decree or order which would be in conflict with the decision of the Tribunal on the petition of the Anjuman-i-Islamia under S. 5 of the Act. Consequently that decision bars the granting of the reliefs claimed in the present suit. In my judgment the appeal fails on all the grounds urged before us and must therefore be dismissed with costs.

55. DIN MOHAMMAD, J.:— (After setting out the facts of the case, the issues framed, the findings thereon and the decision of the lower Court, his Lordship proceeded.) Dissatisfied with this decision, the plaintiffs have appealed and, in view of the importance of the

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case and the complicated nature of the issues involved therein, the appeal has been placed before a Full Bench for decision. I may say at once that sitting as a Court of law we are neither concerned with the events which led up to the institution of this suit, nor with the agitation carried on by one community or the other in relation to the subject-matter of the suit. We have merely to determine whether the decision of the District Judge is in accordance with the law as is administered in the British Indian Courts.

56. It is strenuously contended by counsel for the appellants that inasmuch as the subject-matter of the suit has been found by the District Judge to be a mosque and as it is a well-recognized principle of the Islamic law that all proprietary rights of men are extinguished as soon as a building is constructed and consecrated as a mosque, it could not be possessed and owned by the defendants or their predecessors-in-interest in the sense in which mundane belongings are possessed and owned by human beings and that consequently it did not cease to be a mosque irrespective of the fact that it remained in the possession of the defendants for more than the prescribed period of limitation and had all along been put to profane use. It is further added that the use of the building by the defendants in a manner inconsistent with its original object was a continuous wrong and that the worshippers who are now represented by plaintiffs 2 to 18 were entitled to seek the reliefs they have claimed in spite of the lapse of time. It is next urged that, in any circumstances, a fresh cause of action accrued both to plaintiff 1 and the other plaintiffs on the day when the building of the mosque was demolished and that as that event happened on the night between 7th and 8th July, 1935, the present suit was well within time.

57. Counsel for the respondents concedes that the building in suit was originally built and used as a mosque and does not challenge the finding of the District Judge that the plaintiff 1 as juristic person is competent to sue in its own right. He, however, lays stress on the fact that the defendants' predecessors in title came into possession of the building as long ago as 1762, that the object of the Sikhs from the very beginning was to rob the building of its sanctity, that since then the Muslims have never been allowed to offer their prayers in it and that, on the other hand, it has mainly been used as residential quarters and in one of its rooms Granth Sahib was read for some time and in another room fodder had been stacked. He further contends that the building in suit, even if it was a religious institution at its inception, is as much subject to the law of limitation as any other property endowed or attached to a religious institution and that the rights of the mosque as well as of the Muslims having been extinguished by virtue of S. 28, read with Article 144, Lim. Act, long ago, it lost

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its, religious character and became a wordly possession of the defendants and their predecessors-in-title with which they could deal in any manner they liked. According to him, there was no question of the applicability of Section 23 of the Lim. Act, inasmuch as the defendants' title matured into full ownership long before the advent of the British Rule in the Punjab and the use of the building or its site by the defendants in a manner inconsistent with its original character constituted no wrong so as to afford the plaintiffs a new cause of action, and consequently no new cause of action arose even on the demolition of the building.

58. It may be mentioned here that after the case was first argued before us, we considered that certain matters, which were very material for the proper disposal of the case, had not been sufficiently argued. We consequently called upon the parties to address further arguments on the following points: (1) Whether a new period of limitation starts to run from the date of the demolition of the mosque; (2) if so, has the mosque or the worshippers the right to seek relief from the Command ask for a mandatory injunction to issue to the defendants to rebuild the mosque; (3) if such a right exists, can the Court issue such an injunction; and (4) will the Court issue such an injunction, and if such an injunction is issued, can this injunction be enforced?

59. Both parties fully availed themselves of the opportunity so granted and placed before us their respective points of view in connexion with the questions set out above. The appellants reiterated their former position and urged that the demolition of the mosque gave both the mosque and the worshippers a fresh cause of action and that both or either of them could sue for a mandatory injunction which, in the circumstances of the case, was the only proper relief that could be granted. Our attention was further drawn to O. 21, R. 32 of the CPC, which clearly empowered the Court

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to enforce any decree that it might pass in this respect. The respondents demurred to this proposition and stated that in the first instance no fresh cause of action arose on the demolition of the building inasmuch as no right subsisted in the plaintiffs at that time; secondly that neither the mosque nor the worshippers could sue for a mere injunction as they were admittedly out of possession; and thirdly that a relief by way of injunction would be both impossible and impracticable.

60. From the arguments advanced before us on the case in general, two principal questions arise for decision in the first instance: (1) whether the defendants or their predecessors-in-interest had not acquired an indefeasible right by prescription or otherwise in the subject-matter of the suit and if they had, what was the nature of that right considering that the building in suit had been originally constructed and consecrated as a mosque; and (2) whether Section 23 of the Lim. Act, applies and even if it does not, whether the suit of any of the plaintiffs is within limitation in respect of any of the reliefs claimed in view of the recent demolition of the building.

61. Before dealing with these questions, however, it is necessary to determine how fax the rules of the Islamic law relied upon by the appellants can be invoked in this matter. They have based their arguments on Sections 5 and 6 of the Punjab Laws Act, the material portions of which are reproduced below:

Section 5. — In questions regarding... any religions usage or institution, the rule of decision shall be

(a) * * *

(b) the Mahomedan law, in cases where the parties are Mahomedans, and the

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> Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.
>
> *Section 6.*— In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

62. Seeing that the party in possession of the religious institution in suit happens to be a non-muslim, the question naturally arises whether the personal law of the plaintiffs would still apply in the present case. As long ago as 1885 a similar question came up for decision before five Judges of the Allahabad High Court in a pre-emption case reported in 7 All 775[55] where one of the parties to the suit was a non-muslim and although the statute which governed the case was different, it was couched in the same language in its material portions as Section 5 of the Punjab Laws Act, 1872. The principal judgment was delivered by Mahmood J. who, after discussing the matter in all its aspects, came to the conclusion that rights derived from members of the Muslim community, whether by Hindus or by other non-Mahomedans would be governed by the Mahomedan law, inasmuch as the inception of the right and not the array of the parties to the suit was the determining, point, of the decision in such cases. The other four Judges did not adopt the reasoning employed by Mahmood J. but accepted his conclusion on the grounds of equity, remarking that it would not be equitable that persons who are not Mahomedans, but who have dealt with Mahomedans in respect of property knowing perfectly well the conditions and obligations under which the property is held, should merely by reason that they are not themselves subject to the Mahomedan law, be permitted to evade those conditions and obligations. Reference in this connexion may also be made to the dissentient judgments of Norman and Macpherson JJ. in 4 Beng L.R. 134.[56] Norman J. observed:

> In a country like British India, where Hindus and Mahomedans are living side by side, each governed by their own personal law, a person of one persuasion dealing with a person belonging to the other is bound to take notice of the law which regulates the extent of the power of disposition of property possessed by the person with whom he contracts. I think it clear that a Hindu who purchases the property of infants from the elder brother in a Mussalman family would not be allowed to contend that he acted in good faith, and did not know that the elder brother acting as guardian for the infants had not the same authority as the karta in a Hindu family possesses. If a Mussalman purchased property belonging to a member of a joint Hindu family governed by the Mitakshara, I think he could not plead that he bought in ignorance of the provisions of that law, so as to give himself a title at the expense of the children or coparceners of the vendor.

63. I may also refer in this connexion to the remarks made by Ameer Ali, Ghose and Prinsep JJ. in 20 Cal 116,[20] which again was a case between a Muslim and a Hindu. At p. 137 of the report Ameer Ali J. observed as follows:

> The first question therefore which one has to consider is whether the disposition in question is to be discussed upon the basis of the Mahomedan law, or of any other system of law. From the year

1798 downwards, the Courts of justice have uniformly applied the Mussalman law to the determination of questions affecting the validity of dispositions made by Mahomedans. In 2 M.I.A. 390,[22] the defendant was a Hindu and the question was whether the property which formed the subject matter of the suit was wakf or not.

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Their Lordships in the Privy Council decided the case on the basis of the Mahomedan law. And every case before and since has proceeded upon the same principle. Whilst on this point, I would refer to the words of Levinge and Steer JJ. in (1864) W.R. 185[57] at p. 186.

64. For facility of reference I may reproduce here the words referred to by Ameer Ali J.:

> It may be remarked that the Courts of this country have invariably applied in practice the Mahomedan law to a variety of cases other than those coming under the denomination of inheritance, marriage and caste, and even if immemorial and recognized practice did not legalise the action of the Courts, it cannot be said that when this Court administers to Mahomedans their own laws, they do otherwise than administer justice according to equity and good conscience.

65. At p. 179 of the report Ghose J. said:

> I should here premise that the case before us is not between two Mahomedans, but between a Hindu, who is the creditor, and a Mahomedan, the debtor. S. 37 of Act 12 of 1887 provides as follows:
>
> Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans and the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished.
>
> (2) In cases not provided for by sub-s. (1), or by any other law for the time being in force, the Court shall act according to 'justice, equity and good conscience'.
>
> This case is governed by Cl. 2 of the section, and the Court has here to act according to 'justice, equity and good conscience'.
>
> Cases often occur in our Court where the parties to a suit are of different persuasions, and one of them relies upon the particular law which governs him as the inception of his title, and the Court has to consider that law..... But while the Court goes into these questions, it does so, not because the Mahomedan law applies to the Hindu, hut because 'justice, equity and good conscience' require that they should he considered. In like manner, in the case before us we have to consider whether the property which the creditor desires to Bell is still the property of *B*, and as such, is liable to be sold for his debts, or whether he has made a valid dedication of it as wakf, and as such, it is inalienable.

66. PRINSEP, J.; at page 212 remarked:

> The matter for our decision in these appeals is simply whether the deed of 4th Aughran 1281 constitutes a ??? wakf such as is binding under the Mahomedan law.

67. It may be added that Petheram C.J., also referred to the *Mahomedan law* books alone in order to determine the validity of the wakf relied on by the Mahomedan debtor.

68. I am in respectful agreement with the opinions expressed by the learned Judges referred to above and have no hesitation in holding that, in spite of the fact that the defendants are non-muslims, the character of the building in suit and the incidents attaching to it would, on the principles of justice, equity and good conscience alone, if on no other ground, be decided on the basis of the Mahomedan law; and no rule of decision derived from any other law would come into play in respect of these matters. This is what happens every day in the British Indian Courts. Muslims when they happen to deal with the property of the Hindus, are faced with the Hindu law and similarly Hindus, when they choose to acquire any property from the Muslims, have to contend with the Mahomedan law as soon as their acquisitions are challenged in a

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Court of law. As remarked by Mahmood J., in 7 All 775[55]:

> It is to be remembered that Hindu and Mahomedan laws are so intimately connected with religion that they cannot readily he dissevered from it. As long as the religions last, the laws founded on them last.

69. In determining, therefore, the rights, if any, acquired by the defendants in the subject-matter of the suit on account of their long possession, we shall have to ascertain first the true position of the mosque under the Mahomedan law.

70. The plaintiffs have examined several Muslim theologians representing different schools of thought and they all have unanimously stated that a place once consecrated as a mosque remains a mosque for ever and that its character is never lost even if it is deserted or falls into ruins, or is obliterated from the face of the earth. They have further stated that as soon as a building is consecrated as a mosque, it vests in God and all proprietary rights of human beings are extinguished in it. They have even declared that it is not only the visible structure that constitutes mosque but from the lowest point in the earth up to the highest point in the heavens it is all a mosque and remains as such till eternity. It is therefore that it can neither be alienated, nor partitioned, nor inherited. It can never be used as a place of human habitation and even if the building collapses, its materials cannot be utilized or

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sold. These opinions have been based on the Quran, the Hadis (the traditions of the Prophet), and the standard works of the Muslim jurists. Maulana Mufti Muhammad Kifayat Ullah, P.W. 3, who is president of the All India Jamiat-ul-Ulema (a body of theologians) has placed P.W. 3/A on the record, which contains all the authorities on which he has relied for his evidence. Shamas-ul-Ulema Sayyed Ali-ul-Hairi is Mujtahid (religious leader) of the Shias of the Punjab and has produced P.W. 5-A mentioning the various authorities on which his statement is based. Maulvi Sana Ullah, P.W. 6, is Secretary of the All India Jamait-i-Ahl-i-Hadis and the authorities, on which his opinion is founded, are contained in P.W. 6-A and P.W. 6-B. In one of the books quoted by him, the author says:

> It is unlawful to sell or auction or demolish any waqf property, especially a mosque or to give it away for its being included in a temple or Shivala of the Hindus, no matter whether the creator of the waqf himself or the ruling authority intends to do so. Such property is subject to the same rules as a free man and just as a free man cannot be converted into a slave, so cannot a mosque be changed into private property.

71. Maulvi Muhammad Ali, P.W. 7, is President Ahmadiyya Anjuman-i-Ishait-i-Islam and his evidence is also in the same strain as that of the others. Maulvi Muhammad Ismail, P.W. 8 is Khatib (Preacher) Jami Masjid, Ahl-i-Hadis. In one of the authorities cited by him, in order to emphasize the interminable nature of a wakf like a mosque, the illustration of the Holy Temple in Jerusalem is recorded which according to the author, was demolished by Nebuchadnezzar and desecrated by him by the throwing of sweepings and the slaughter of swine but on the ruins of which one of the descendants of David was enjoined by God to put up a place of worship later. In another authority it is stated that even if no visible trace is left of the building used as a mosque, its site remains a mosque for ever (P.W. 8-A). Maulana Ghulam Murshid, P.W. 9, is Honorary Professor of the Ishait-i-Islam College and has referred to several authorities of which extracts are given in P.W. 9-A and P.W. 9-B. One of the theologians referred to in P.W. 9-B has cited the example of Kaaba, to which every

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Muslim in the world turns his face five times a day for prayers and which, according to the Muslims, is the first mosque built on this earth by the Prophet Abraham. The building of Kaaba was for centuries used as a temple for idols but it lost neither its sanctity as the first house of God nor its status as a mosque. It is evident that the opinions alluded to above have not been invented for the occasion and it cannot be urged that they do not represent the true views of Islam on the character and status of a mosque. That this rule of Muslim law has been accepted without any modification in British India is amply borne out by authoritative text books like Baillie's "*Digest of Muhammadan Law*" on the subjects to which it is usually applied by British Courts of Justice in India, as well as by Ameer Ali's Muhanu madan Law which again is a popular book of reference on all questions of the Islamic law which arise in the British Indian Courts. Some of the passages that are relevant to our inquiry are reproduced below:

1. "When a musjid (mosque) has fallen to decay and is no longer used for prayer, nor required by the people, it does not revert to the appropriator or his heirs and cannot be sold, according to the most correct opinions." (*Baillie's Digest*, 1865 Edition, page 606.)
2. "According to Abu Hanifa and Abu Yusuf, the land which has once been dedicated to a mosque continues wakf even though it has become waste and the building has fallen into ruin." (*Ameer Ali's Muhammadan Law*, Edn. 4, Vol. 1, page 403.)
3. "If a person were to make a wakf of a piece of land for the purpose of erecting a mosque, be cannot afterwards resume or sell it, neither can it be inherited, because this ground is altogether alienated from the right of the individual and appertains solely to God.'5 (Ibid, page 404.)
4. "A masjid for which there no longer remained a congregation and all around it had gone to decay, it was not lawful to convert it into a cemetery." (Ibid, page 406.)
5. "A dedication in favour of a mosque is absolutely lawful according to Abu Yusuf, for a mosque exists for ever until the Day of Judgment and can never revert to private proprietorship even though it be ruined and wholly disused, nor can its material be taken to any other mosque." (Ibid, page 407.),
6. "Though a mosque may be ruined and be never used, still it is a mosque, for ever consecrated to the eternal worship of God until the Day of Judgment." (Ibid, page 408.)
7. "But whether a mosque has become ruined or dilapidated, or the people have no farther need owing to another mosque close by, still it will not revert to the ownership of the wakif, nor will it be lawful to take it or its property to another mosque." (Ibid, page 409.)
8. "It must be remembered that the failure or non-existence of the initial or primary object of a wakf does not, under the Hanafi law, affect the operative character or validity of the wakf, or avoid it." (Ibid, page 412.)

9. "When once a dedication has been duly effected, the right of the person making the wakf in the property dedicated 'drops' absolutely. Thenceforth the property is 'tied up in the ownership of the Almighty, and nobody has a right to deal with it in any shape—neither the wakif nor his heirs, nor the beneficiaries under the wakf. In other words, all right of proprietorship ceases, the property cannot be alienated, or transferred by sale or gift, nor is it subject to the rights of

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inheritance." (Ibid, page 482.).

10. "As a general rule therefore private alienation temporary or absolute, by mortgage or other wise of wakf lands, even though for the repair or other benefit of the endowment, is illegal according to the Mussalman law." (Ibid, page 485.)
11. "No alteration made in a wakf building by the purchaser or anybody else can change the character of the wakf." (Ibid, page 491.)
12. "A wakf property is inalienable, because it belongs virtually to Almighty God, being intended for the benefit of mankind." (Ibid, page 541.)
13. "The second effect of the consitution of wakf is to render the property imprescriptible, that is, it cannot be subject to the rights of the sovereign as private property." (Ibid, page 543.)
14. "The third effect resulting from the constitution of wakf is that it renders the property so dedicated non-heritable." (Ibid, page 543.)
15. "The proprietorship of wakf property is transferred to God, that is to say, such property ceases for ever to be subject to the right of private proprietorship of....." (Ibid, page 547.)

72. It is not peculiar to the Muslims alone to attach eternal sanctity to their mosques. A house of God in every religion that worships God is treated on similar lines. Take for example a church of the Christians. At p. 846 of *Halsbury's Laws of England*, (Edn. 2), Vol. II, it is said that after con-secretion a church continues to exist as A church in the eye of the law, even though the material building is destroyed. At p. 860 it is remarked that property once consecrated will retain the ecclesiastical character thus bestowed upon it, whoever may be actual-owner and whatever may be the nature of his tenure. At page 861 it is observed that property consecrated is separated for ever from the common uses of mankind and is set apart solely for sacred purposes for all time. At p. 863 it is, stated that when the fabric of a church has once become devoted *in sacros usus*, it cannot ever be used as a habitation for man, nor has a Judge any power to sanction the use of it for secular purposes. It would thus appear that under English law a church stands on the same footing as a mosque under the Mahomedan law, the only difference being that, while under the former an Act of Parliament can divest a church of its sanctity, under the latter this authority, is vested in no human being in the world, even if he is a ruler of the State and in no human institution, even if it is a law making body. Besides, a mosque is held in exceptional reverence and esteem and is treated as a house of God in the real sense of the term. None who is unclean can enter its precincts and even the mightiest potentate on earth is bound to take his shoes off when visiting it and must rub his shoulders with the humblest of his subjects, when in prayers, for he stands there in the presence of the King of all kings. By virtue of the transcendent character that a mosque thus holds it 13 ranked far above every other kind of property whether secular or sacred.

73. Such being the inherent characteristics of the building in dispute, and such the conditions and obligations attaching thereto under the Mahomedan law, the question is how far the provisions of the Limitation Act affect the case. It is contended on behalf, of the respondents that the Mahomedan law has been altered and abolished within the meaning of Section 5 of the Punjab Laws Act (4 of 1872) by the Limitation Act to this extent that if the possession of a mosque is acquired by a person whose interests are hostile to those of the Muslims and who does not believe in the sanctity of the building, it becomes adverse to the Muslims and that unless somebody interested in the mosque takes any step to; recover its possession from the adverse possessor within the period of twelve years, all rights in the mosque are extinguished and its sacred character is lost as well. The Limitation Act being the law of the land, all the provisions of the Mahomedan law relating to a mosque are to be read subject to the modifications and improvements introduced by that statute. The law of limitation

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makes no exception in favour of any sacred property as such and consequently in the eye of the law so far as limitation is concerned, sacred property stands on the same footing as secular property. The only cases, which are immune from the operation of the Limitation Act are specified in the Act itself and those that are not so specified are not entitled to claim exemption on any basis. In order to illustrate that the Mahomedan law has been partially altered by the Limitation Act, counsel for the respondents has referred us to Articles 103 and 104 which prescribe a fixed period of limitation for recovery of dower. Under the Mahomedan law a claim for dower cannot be barred by time, as limitation

is not known to the Mahomedan law; but under the Limitation Act if any wife or widow, as the case may be, seeks to recover her dower through Courts, she is compelled under the law to bring her suit within the period prescribed therefor by the Limitation Act. It is further argued that by enacting Articles 134-A, 134-B and 134-C the Indian Legislature has expressed its clear intention to bring the endowed property, of whatever nature it may be, within the purview of the Limitation Act. This being so, Article 144, Lim. Act has barred the remedy of the Muslims to recover the building in suit for ever and Section 28 of the Lim. Act has extinguished their right to do so.

74. It is conceded on behalf of the respondents that a mosque is a juristic person, but it is contended that in relation to a mosque this legal fiction comes into existence only when any property takes a wordly shape and inasmuch as this fiction cannot exist divorced from property, it vanishes along with the property which brings the fiction into existence.

75. On behalf of the appellants it is not denied that the Limitation Act is the law of the land, nor is it asserted that Section 3 of the Lim. Act, is not applicable to any suit which is brought in a Court of law. It is however contended that the Limitation Act does not touch a religious institution like a mosque inasmuch as a mosque is not immovable property in the crude sense of the term but is something different from it. It is a juridical person and a juridical person as such cannot be treated as property, what to say of its being treated as immovable property. They further urge that a mosque is 'extra commercium' and as it cannot be purchased or sold, it cannot be adversely possessed. Even if the Limitation Act applies, and a mosque is covered by Article 144, Lim. Act and is adversely possessed, it is in its nature incapable of being owned in the sense in which other worldly properties are owned. Its sacred character is never lost nor are the conditions and obligations attaching to it destroyed. An adverse possessor takes it subject to all the burdens which are imposed upon it and all the privileges to which it is entitled. Moreover, the mere fact of its being possessed by a non-muslim or its being used in a sacrilegious manner, is not such an act of hostility as would start the adverse possession of the non-muslim possessor in the legal sense of the term. Whether it remains in its original shape and form or whether it falls into crumbles, it continues to be a mosque and every person who professes the Muslim Faith, is entitled to treat the building as of right as a mosque and to say his prayers therein. Under the Mahomedan law a zimmi (a non-muslim fellow subject) can be the custodian of a mosque and the religious faith of the custodian therefore does not matter. Every time that any Muslim belonging to any generation is prohibited from using the building or the site of the mosque as a mosque, a fresh cause of action arises to him to seek his remedy in a Court of law.

76. Both parties have relied on a large number of decided cases and even though I am disposed to think that most of them have no direct bearing on the question at

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issue, yet in view of the importance of the case and the complex nature of the issues involved, I consider it advisable to refer to them all and to comment upon them wherever Decessary. I shall first discuss the authorities relied upon by the appellants. In 2 M.I.A. 390[22] decided in 1840, which was referred to with approval in a later judgment of their Lordships of the Privy Council reported in 44 Mad 831,[33] a sajjada nashin of a khankah entered into a contract with a Hindu of the name of Jewun Doss Sahoo for the loan of a certain sum of money and as security for the repayment thereof transferred certain lands comprised in and constituting part of the grants made to the khankah under a royal decree. It was stipulated that if the sum was not repaid within the prescribed period, the lands would become the absolute property of the said creditor. Later, another deed was executed in the creditor's favour by his Muslim debtor. On the debtor's death the successor challenged the alienations made by his predecessor and insisted that the lands in question were wakf property of which neither a conditional nor a bona fide sale could be made. The opinions of the law officers upon the tenure of the lands in suit were taken by the Sudder Dewany Adawlut and they were to the effect that by the Mahomedan law the sale or mortgage of wakf lands was illegal and on that ground the Sudder Dewany Adawlut decreed the claim. On appeal, their Lordships of the Privy Council came to the same conclusion and held that the property in suit was wakf and that inasmuch as a mutwalli, had no right to alienate such property, the transfer was illegal. In the

course of their judgment, their Lordships referred to *Hidaya*, Book XV, as translated by Hamilton in support of their conclusions. Limitation was pleaded as a bar in this case by the Hindu alienee, but his contention was repelled on the basis of a different enactment which is not now in force.

77. In 27 P.R. 1913,[21] certain Mahomedan residents of Multan sued for an injunction restraining the defendants from selling a piece of land forming part of the area known as Mai Pak Daman grave yard and entered in the settlement record as ghair mumkin kabristan in the possession of the Mahomedans and owned by Makhdum Hassan Bakhsh. Their Lordships of the Privy Council held that on the facts found the land in suit formed part of a grave-yard set apart for the Mahomedan community and that the Makhdum had no private rights of ownership over any part of the grave-yard. It may be remarked that the decision of this case was mainly influenced by the fact that the defendant was the trustee and custodian of the shrine of the Saint Mai Pak Daman. Their Lordships inter alia observed:

> It is obvious that if it were held that within the area of the grave-yard, land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government in setting aside land as an open grave-yard for the Mahomedan community in Multan would be frustrated.

78. This case for the reasons stated above cannot serve as a useful authority for the proposition advanced by the appellants. In 44 Mad 831,[33] their Lordships of the Privy Council at p. 840 of the report observed as follows:

> The conception of a trust apart from a gift was introduced in India with the establishment of Muslim Rule..... But the Mahomedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet or Islam; and means, 'the tying up of the property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'. When once it is declared that a particular property is wakf, or any such expression

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is used as implies wakf, or the tenor of the document shows, as in 2 M.I.A. 390,[22] that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty, ... The manager of the wakf is the mutwalli, the Governor, Superintendent, or Curator..... The head of these khankas which exist in large numbers in India, is called a sajjada nashin..... But neither the sajjada nashin nor the mutwalli has any right in the property belonging to the wakf: the property is not vested in him, and he is not a "trustee" in the technical sense.

79. This judgment too beyond making a general exposition of the nature of a Mahomedan wakf does not advance the appellants' case any further. It may also be remarked in passing that Section 10 of the Lim. Act has been amended since and the managers of religious or charitable endowments have been declared to be the trustees thereof.

80. In 38 P.L.R. 182,[4] the suit under appeal concerned a plot of land in the city of Lucknow. In the words of their Lordships of the Privy Council, the purpose of the suit was to establish that plot of land was a grave-yard in the sense of the Mahomedan law, that is to say 'extra commercium' and dedicated for the benefit of the Mahomedans in general in such sense that private ownership therein did not exist. In 1928 that plot of land was sold by one Mt. Musaheb Khanum to Ballabh Das, a Hindu. Thereupon certain Mahomedans sued in a representative capacity to recover the land from the defendants. In the course of the litigation that followed it was found that after the Mutiny of 1857 and by virtue of Lord Canning's Proclamation of 15th March, 1858, all lands in Oudh were confiscated and every right in the soil in the city of Lucknow was vested in the Grown. By the letter of the Financial Commissioner of Oudh, dated 7th August, 1868, lands were granted to people whom the Crown liked to grant. It was then that one Kale Khan from whom Mt. Musaheb Khanum derived her title, was entered as a proprietor by virtue of possession of this land. It was admitted by the defendants that in 1868 and prior thereto some few persons had been buried in the land. In 1870 the land was closed for the purposes of a cemetery by order of the Municipal Board. It was proved that in 1913 there were some thatched houses of some tenants on the land for which rent was received by a daughter of Kale Khan. In 1919 a map of that plot of land was produced in Court in another legal proceeding and it showed a number of thatched; huts and five or six latrines. On these facts the Subordinate Judge held that Kale Khan was neither a manager nor a takiadar of the land in suit and that the land was his private property. The District Judge agreed in this view. On appeal, the Chief Court reversed the judgments of the Courts below and decreed the suit. Ballabh Das appealed to their Lordships of the Privy Council but his appeal was dismissed with

a certain modification in the decree. In the course of their judgment, their Lordships observed at p. 187 of the report:

> If however account is taken of the fact that the particular plot No. 108 is described as a grave-yard it becomes difficult indeed to suppose that the fact of possession or custodianship is not the basis of the entry.... The khasra can hardly mean that it was the intention of Government at the First Regular Settlement, to vest the ownership of such a cemetery as is described in the map in a private individual, thereby destroying its character as a qabristn according to ordinary conception of the Mahomedan law.

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81. At p. 188 their Lordships have remarked:

> If the materials in the present case fell to be looked at as a mere question of evidence, their Lordships are satisfied that the true inference to fee drawn from the evidence as a whole would be that the suit land is a cemetery in the ordinary Mahomedan sense and is no longer the subject of private ownership.

82. In the result, their Lordships granted a declaration that the suit land was dedicated for the purposes of a grave-yard according to the Mahomedan law and that defendant 1 had no title thereto. In 1906 A.W.N. 159,[23] a plot of land had been used as a cemetery for a number of years before the Mutiny of 1857. Subsequently the whole village in which the land was situated, was confiscated by Government id consequence of the misconduct of the Muslim owners of the village during the Mutiny and was sold to the defendants who were Hindus. Some time afterwards the Muslims brought a suit for a declaration that the plot of land referred to above was a public burial ground and was not the property of the Hindu purchasers of the village and further asked for an injunction restraining the defendants from making encroachments on the land. The Court of first instance dismissed the suit on the ground that an actual dedication of the land had not been proved. The lower Appellate Court found that the land was a cemetery and had been used as such for upwards of 100 years. The defendants appealed and Banerji J. who heard the appeal observed as follows:

> In *Mr. Amir Ali's Mahomedan Law*, Vol. 1, Edn. 3, p. 315, it is stated that 'when a person erects an aqueduct for Musalmans or an inn for the occupation of travellers or a caravan-sarai' or constitutes his land into a cemetery, the right of property according to Muhammad (a disciple of Imam Abu Hanifa) abates when people have used the aqueduct, or have occupied the inn or caravan, sarai or buried in the cemetery'.... The Court below was therefore right in holding that the defendants had no longer any proprietary right in the land in suit by the confiscation which took place after the Mutiny, only such rights were confiscated as existed in the rebels at the date of the confiscation, and it is those rights only which have been acquired by the defendants. If a valid wakf had been created in regard to the land in question before the confiscation, the original owners had ceased to have any right to the said land. Therefore the defendants by acquiring the-rights which had been confiscated, could not acquire the ownership of the land.

83. On the basis of the Privy Council judgment referred to above as well as on that of the Allahabad judgment, the appellants urge that even an act of State is not sufficient to rob the sacred property of its sanctity. They further argue that if a person acquires any rights in the sacred property which is so confiscated, he takes the property along with the burden which is imposed upon it, and that the only position that can be conferred by law on the transferee by virtue of such an acquisition is that of a mere possessor and not of an absolute owner. To this extent these judgments lend support to the appellants contentions. In the Privy Council case, land had been confiscated and re-conferred upon-Kale Khan and his name had also been entered as a proprietor by virtue of possession. He had built thatched huts on the land and had rented them to certain tenants. He had also constructed some latrines on it. Such use of the land was obviously inconsistent with its use as at grave-yard and these acts had been committed more than 12 years before the institution of the suit. There was not a scintilla of evidence to show that Kale Khan had anything to do with the original takiadars of the land and it was only in view of the subject-matter of the suit that their Lordships of the Privy Council appear, to have held that the entry as regards his ownership indicated mere possession and custodianship and not proprietorship in the ordinary sense of the term. Similarly, in the Allahabad judgment the whole village had been confiscated including the graveyard and sold by the Government to non-Muslims. From the fact that the appeal had arisen in 1904 and that the confiscation had taken place in 1857, it appears that the suit by the Mussalmans had been instituted long

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after the ordinary period of limitation had expired. In spite of this lapse of time, the learned Judge presumably in view of the nature of the subject-matter of the suit concluded that it could not be owned either by the Government or by its assignee, inasmuch as the property in its very nature was incapable of being owned.

84. In A.I.R. 1930 Oudh 245,[25] Srivastava J. observed:

> Once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery unless for any reason the land turns out to be unfit for use as a cemetery. Once a wakf is established either by evidence of dedication or by evidence of user it is an essence of the wakf that it should be permanent.

85. In arriving at this conclusion the learned Judge referred to a passage in Baillie's Digest which reads as follows:

> And being asked with regard to a cemetery in a village where it had gone to decay and there refrained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered "No" for in legal effect it is still a cemetery.

86. In A.I.R. 1931 Oudh 45,[58] Pullan J. adopted the observations made by Srivastava J. in the case cited above. These two judgments obviously emphasise the permanent nature of a Mahomedan wakf. In 35 Mad 681,[3] the suit in which the second appeal had arisen was instituted by the plaintiffs representing the Shafei residents of a place called Pudunagaram against the defendants as representatives of the Hanafis of the same locality, praying for an injunction restraining the latter from enlarging a certain reservoir attached to a mosque which had been found by the Courts below to be in their exclusive management ever since another mosque had been built a long time before by the Shafeis in the same compound, from using some granite stones lying in the compound in the construction of the reservoir and from obstructing a pathway extending from the gate of the older mosque by the side of its reservoir to the mosque which was in the exclusive possession of the plaintiffs. One of the questions that arose for decision was whether the mosque in which the Hanafis generally said their prayers and the reservoir attached thereto which was intended to enable the congregation to perform ablutions, were the common properties of the plaintiffs and the defendants. The trial Court found that as the Hanafis had been in exclusive possession of and using the mosque ever since the other mosque was built by the Shafeis, that is for a period of more than 12 years, the latter had lost their right in the older mosque and its reservoir. The Subordinate Judge in appeal confirmed that finding. A further appeal was presented to the High Court and in the course of their judgment, Abdur Rahim and Ayling JJ. observed:

> It seems to us that the finding must be understood with reference to the subject matter of the litigation..... It will suffice for us therefore to point out that according to the accepted view of the Sunni Schools which comprise the followers both of Imam Abu Hanifa and Imam Shafie it is in the very conception of a wakf which is the name for a grant by which mosques and similar institutions are dedicated—that all proprietary rights of men should be extinguished in the property so dedicated. The result according to the theory of Muhammadan law is that proprietary rights in the subject matter of wakfs become re-vested in God inasmuch as. He is originally the owner of all created things and it is by His permission that men acquire rights therein so that when men's right ceases in a particular thing, it reverts to the

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proprietorship of God. (See *Hamilton's Hidaya*, Grady's edition, pages 231, 232.) Further as it is the object of a dedication of the nature of a mosque that the public should say their prayers therein, it is not open to those who are charged with the superintendence and management of a mosque to exclude any Mahomedan who wishes to say his prayers in it, except on the-ground of misbehaviour.

87. In arriving at their conclusions, the learned Judges relied on a Privy Council judgment reported in 18 Cal 443[59] and on two cases from the Allahabad High Court, each decided by five Judges, reported as 12 All 494[60] and 13 All 419,[61] respectively. This judgment no doubt was between Muslims themselves and may not go a long way to help the appellants; but the principles enunciated therein are (1) that proprietary rights in a mosque are extinguished as soon as it is consecrated, and (2) that sol long as a mosque exists as a mosque, every Muslim has a right to offer his prayers in it. In 37 Cal 128,[62] at p. 161, Mookerjee J. in connexion with the case of a Hindu endowment, states:

> The Hindu law recognises dedication for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed extra, commercium and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments.

88. In 12 Bom 247,[30] which again is a case of a Hindu endowment, West J. observed at p. 264 of the report:

> Property dedicated to a pious purpose is, by the; Hindu as by the Roman law placed extra commercium..... Mr. Macpherson admitted for the defendants in this case that they could not sell

the lands bestowed on the idol Shri Ranchhod Raiji. This restriction is like the one by which the Emperor forbade the alienation of dedicated lands under any circumstances. It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dakor. It is not consistent with this juridical person's being conceived as a mere slave or property of the shevaks whose very title implies not ownership, but service of the god. It is indeed a strange, if not wilful, confusion of thought by which the defendants set up the Shri Ranchhod Raiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but, as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin* v. *Griffin*.[63] .... They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration.....

89. It may be remarked that this judgment was confirmed on appeal by their Lordships of the Judicial Committee in 24 Bom 50.[64]. In 52 Cal 809,[40] the idol in suit was established as a household god and the founder gave funds in order to continue the upkeep and maintenance of the deity. During his lifetime the founder acted as shebait and after his death his widow officiated similarly as a ministrant of the worship. An adopted son of the founder attained the age of 20 years in the lifetime of the widow and became defacto the person charged with the same duties as his

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adoptive father and mother had performed. He executed a deed of trust providing particular premises for the location and worship of the deities. Some time afterwards the widow died and it came to light that she had made a very large endowment in favour of the family idol and by her will had appointed her adopted son her executor and trustee. In the course of the litigation that ensued after the death of the adopted son, one of the questions that arose was as to the location of the idol. On behalf of one of the litigants it was argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to his adopted son. This proposition was rejected by the Appellate Court and their Lordships of the Privy Council remarked that they could give no countenance to it and approvingly referred to the following passage from the judgment under appeal:

> The inclusion of the idola however among items of property, moveable and immovable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property.

90. At p. 821 of the report their Lordships observed:

> An argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principle.

91. And at page 822 the following remarks occur:

> Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognized.

92. At page 825 it was remarked:

> The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the she bait, it be thought that a family idol should change its location, the will of the idol itself, expressed through his guardian, must be given effect to....
>
> A fortiori it is open to an idol acting through his guardian, the shebait, to conduct its worship in its own way at its own place always on the assumption that the acts of the shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship.

93. In 38 Cal 284,[39] an old temple in which certain Thakurs were located was blown off by a storm and they were placed in another temple near by. Some disputes arose between the shebaits in whose temple the Thakurs had been placed and the shebait of the original temple. Consequent upon these disputes, the old shebait rebuilt the temple which had been demolished and wanted to bring the Thakurs to the new temple. There, upon a suit was instituted by the Thakurs in their juristic capacity that they might be taken out of the temple of the defendants and placed in their own new temple. The trial Court dismissed the suit under Article 49, Limitation Act, which applies to suits for specific moveable property not covered by Articles 48, 48-A and 48 -B or for compensation for wrongfully taking or injuring or wrongfully detaining the same. Chatterjee J. who delivered the judgment re-marked:

> In this view of the case it is not necessary to consider whether the Thakur is to be considered a

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moveable property. Besides, a Thakur has been held to be a juridical person, and, considering the claim as it is made in this case, I do not see why it should not be held that the Thakur is a juridical person, and is therefore not amenable in any sense to the mischief of Article 49.

94. RICHARDSON, J. concurred in the order proposed by Chatterjee J. These authorities have been relied upon by the appellants in support of the proposition that a mosque is not property in the crude sense of the term and it is argued that a mosque, although made of bricks and mortar, cannot be treated as immovable property in the same way as an idol which is made of wood or stone cannot be treated as moveable property. The mosque is as much a juristic person as an idol and similar sanctifcy attaches to it as attaches to an idol. The respondents contend that these authorities are not in point, inasmuch as a mosque is not placed on the same footing by the Muslims as an idol is by the Hindus. A mosque is only a house of God, while an idol is God himself. It is a personification of God, or, in other words, it is God symbolised. But I do not agree. The ratio decidendi of the judgments alluded to above was not whether an idol as a symbol of God could be treated as moveable property or not but whether as a juridical person it could be held as such and the reason that prevailed with the learned Judges for holding an idol to be outside the description of moveable property was, as appears from the remarks quoted from 38 Cal 284,[39] that at was a juridical person.

95. In 20 I.C. 78[42] the allegation of the plaintiff was that the land in dispute was made over to the predecessor of the defendant in order that the income might be applied for the worship of the image established by an ancestor of his more than half a century before the institution of the suit. About 40 years before commencement of the litigation, the site on which the temple stood was washed away and the image it self was broken to pieces. Since then, the broken image had been worshipped by the predecessor of the defendant. The plaintiff however established a new image in a newly constructed temple in the same village. He consequently prayed that the defendant might be compelled to perform the worship of the newly established image and to provide out of the income of the land in his possession the articles necessary for the worship of the image and if the defendant refused to perform the worship or to supply the articles necessary in that behalf, a decree might be made against him for ejectment. The learned Judges observed:

> The question arises whether this trust came to an end when the temple was washed away and the image was broken..... This text shows that when an image has been mutilated or destroyed, the religious purpose does not come to an end... and the endowment is not affected by the destruction or mutilation of the image. The religious purpose still survives and a new image may be established and consecrated in order that it may he worshipped as intended by the original founder;

96. On the analogy of this case the appellants seek to establish that the religious purpose, for which the mosque was constructed, did not come to an end by the destruction of the mosque and that it still survived. The appellants have further relied on 26 Bom 198,[24] 18 All 395,[36] 40 Cal 548,[37] A.I.R. 1932 Cal 459,[38] 138 I.C. 309[65] and Reg. Second Appeal 1391 of 1936,[66] in support of their contention that the sacred character of wakf property is not lost merely by being possessed or owned by persons holding faiths different from those of the original dedicators or from those of the persons for whose benefit the wakf is intended.

97. In 26 Bom 198,[24] certain land at Dharwar, which had formerly been used as a grave-yard by the Mahomedan community residing there but which had not been used as such for 20 or 30 years, was sold by the owner to a Hindu named Ramrao Narayan Bellary who thereupon began to prepare the foundation of a house which he proposed

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to build upon it. The Mahomedan residents of Dharwar brought a suit alleging that they were accustomed to perform religious rites and ceremonies at the graves in the said land and prayed for a declaration that they were entitled so to do and for an injunction restraining the defendants from obstructing them. Both the Subordinate Judge and the District Judge decreed the suit. Ramrao appealed and the appeal came on for hearing before a Division Bench composed of Fulton and Crowe JJ. Fulton J. in delivering the judgment observed as follows:

> The land in dispute, it has been found, is a grave-yard, disused, it may be, for 20 or 30 years, but retaining nonetheless its character as such. By the custom of the country founded on a sentiment which may almost be described as universal, the

ground in which human remains are interred is regarded as for ever sacred. The members of the families of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land granted as it must he subject to the custom of the community carries with it the right to perform all customary rights. The District Judge may have gone too far in inferring from the facts which he found proved that the land was the property of the Mahomedan community. But those facts certainly justified him in confirming the decree of the Subordinate Judge which directed that the plaintiffs whose relatives have been there buried, have the right of performing; all such worship and ceremonies near the makan and the graves on the ground in dispute as are enjoined by the Mahomedan custom and religion.

98. This judgment clearly shows that even if land under graves is sold to a Hindu, he does not acquire such rights of ownership on the graves themselves as he does in connexion with ordinary property. He is bound to keep the graves as they are and cannot in any manner interfere with them. If a purchaser for valuable consideration with notice cannot assert his rights of ownership on the property purchased by him, it is difficult to comprehend that an adverse possessor would be able to exercise the rights of absolute ownership in the sacred property which he has acquired by a wrongful act of his.

99. In 18 All 395,[36] certain persons who had entered upon a burial place and ploughed up the graves were held liable to be convicted of an offence under S. 297, I.P.C., notwithstanding that their entry on the land was proved to have been by the consent of the owner thereof. In 40 Cal 548,[37] there existed a visible grave in a disused grave-yard which was claimed by a Hindu owner as his private property. He built a chabutra there and caused disturbance of the grave, thus wounding the feelings of the person whose mother was buried there. He was convicted and the matter came before a Division Bench composed of Sharfuddin and Bichard son JJ. The contention raised on behalf of the convict was that the land in question was his ancestral land, that it belonged to him and was in his possession, that he was in enjoyment of the fruits of the trees standing upon it and that the land was no more a burial ground or depository for the remains of the dead, inasmuch as it had not been used for burying purposes for a great many years. Sharfuddin J. who delivered the principal judgment observed:

> In my opinion however it is not necessary for the purposes of S. 297, I.P.C. that a burial ground should be in use. If it has been a burial ground and if there are visible graves in it, it becomes a depository for the remains of the dead. It is possible that the bodies in those graves may have disappeared, but the remains of those bodies are still there, although they may have crumbled to dust.

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100. Richardson J. concurred in the view held by Sharfuddin J. and remarked:

> It is said that at any rate the petitioner had the possession and custody of the land in which the tomb stood and that the mere entry upon the land would not therefore amount to a trespass. That no doubt is so, but what is found here is that the petitioner did more than merely enter upon this, land. It is not contended that he had the right; to use the land for all purposes as land in its natural state. It is not suggested, for instance, that he could remove the tombs and plough up the whole surface of the land. It is not denied that the place was at one time lawfully used as a place of sepulture. So far at any rate as it was so used, it was set apart as a depository for the remains of the dead and is entitled therefore to the protection afforded by S. 297.

101. In A.I.R. 1932 Cal 459,[38] Patterson J. in a case in which an owner of the land had demolished certain structures erected over the graves of the complainant's relatives observed:

> Although the petitioners have been found by the Civil Court to be the owners of the land in question and although they have been given khas possession thereof by the Civil Court, that does not entitle them to disturb any graves that may be found existing in the land or to damage any structure that may have been raised over such graves, if by such act or acts the feelings of any person interested in the graves are likely to be wounded.

102. In connexion with the three judgments cited above, it is objected that they do not touch the point at issue before us, inasmuch as they relate to criminal law and proceed on different grounds. I am not however impressed by this argument. No criminal Court can ordinarily punish a person for encroachment upon his own land or for exercising his legitimate rights in connection with a property which he can call his own. It is only when, in spite of his being, an ostensible owner, the property cannot be deemed under the law to belong to him that his interference with it can be culpable. These judgments clearly show that whoever the possessor, the sacred character of graves is not lost and to that extent they go a long way to support the case of the appellants. It needs no authority to say that under the Mahomedan law, a mosque is held more sacred than a graveyard inasmuch as one is the house of God, while the other is a mere depository of mortal remains. In almost all standard works on the Mahomedan law, mosques

have been dealt with separately from every other kind of wakf property merely on the ground of their sanctity. What applies to grave yards therefore applies with greater force to mosques. If, in spite of the fact that a recognized owner of the land, which has been used as a grave-yard, cannot treat the graves as his personal property, it passes one's comprehension that a person coming into possession of a mosque can be said to be in law entitled to claim it as a private house of his and nothing more. Moreover if the sacred character of a graveyard is not altered by the lapse of time, how can the sanctity attaching to a mosque vanish in similar circumstances? The possessor in these cases possesses the sacred property, be it a grave-yard or a mosque, subject to all the burdens or privileges attaching to it, and is bound under the law to treat it as such. To hold otherwise would be completely to disregard and override the provisions of the Mahomedan law which the Courts are bound to follow in this respect so long as the guarantee given by the British Government in the shape of proclamations and legislative enactments lasts.

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103. In this connection I may mention that under English law, from which we have mostly derived our notions and conceptions of property, the rule is that even though the title of the former owner is extinguished by the efflux of time, the property remains subject to the rights which are not merely incidental but paramount to his estate. As stated in *The Time Limit on Actions by Lightwood*, 1909 Edn. at p. 80:

> On the other hand, in (1852) 4 H.L.C. 1065,[67] Lord Cranworth C., suggested that a legal estate got by disseisin would not affect the rights of parties equitably entitled, and this suggestion has recently been embodied in an authoritative decision in (1906) 1 Ch 386 (C.A.),[68] It follows from that case that equitable interests rank as independent estates in the land, and continue to be enforceable against the legal owner of the land for the time being, whether he has acquired it by assignment or by disseisin, unless, in the former case, he can claim to be a purchaser for value without notice—a claim which of course cannot be made by a disseisor. The actual point in (1906) 1 Ch 386[68] related to restrictive covenants. It was decided that these created in favour of the covenantee an interest in the land which was independent of the estate of the Covenantor, and that they were binding upon the land in the hands of an adverse possessor who had gained a legal title in consequence of the lapse of the statutory period and the extinction of the title of the covenantor. But the interest in land created by a restrictive covenant is at most equitable, and the same considerations apply with greater force to trusts which confer upon the cestui que trust a direct interest in the land itself.

104. At p. 117 of the same book the learned author says:

> Of this nature are legal easements, and also the restrictions on the use of the land — or negative easements—created by restrictive covenants entered into by the former owner or one of his predecessors-in-title. Such covenants confer upon the covenantee an equitable interest in the land which is binding on all persons to whom the land comes, until there is a purchaser for value without notice. They are binding therefore on persons acquiring a title by possession, and on purchasers from them who have either actual or constructive notice.... And upon the same principle apparently, express trusts create interests paramount to the estate of the trustee, and are not necessarily extinguished at the same time as the trustee's title.

105. These passages have been quoted with the object of showing that law recognizes certain rights which are not extinguished with the extinguishment of the original owner's title and that even where legal title passes to an adverse possessor, he may in certain circumstances, be bound under the law, by those obligations by which the property adversely possessed by him is bound. In the present case, I am not prepared to accept for a moment that any legal title passes to a non muslim possessor of a mosque merely by virtue of possession or that the rights of Muslims are extinguished unless certain other things happen to which I shall allude later. The rights of a mosque to be treated as such as well as the right of worshippers to use it as such are rights not only incidental but, in the words of the Author, "paramount to the estate," and what appears to me to be deducible from these passages is that such rights stick to the mosque even if it passes into the hands of a non-muslim. It may be urged by the respondents that the rights, possessed by the beneficiaries of a mosque are covered by the words "any interest in immovable property" as used in Article 144; but in my view this Article cannot be invoked inasmuch as no suit for possession of such interest as is possessed by beneficiaries of a mosque can be brought.

106. In 138 I.C. 309,[65] a Division Bench of this Court composed of Sir Shadi Lal C.J. and Hilton J. observed:

> Finally it was said that there are no idols in the property and that the temple has for a long time been used as a residential house, but there is, authority in 20 I.C. 78[42] for the view that a temple

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is still a temple even if the idol is thrown away or the building has become dilapidated. In my judgment the use of the property as private property cannot in any way detract from its character as dedicated property.

107. In R.S.A. 1391 of 1936[66] the dispute related to a piece of land used as a graveyard which in the revenue records had been described as the property of an ancient Hindu temple in the city of Multan. The managing body of the temple instituted a suit for a declaration that the temple was owner of the land and the defendants had no right to interfere with its rights. The trial Court found that the land had been established as a grave-yard long before the first land revenue records of 1868 described it as such and it consequently held that the plaintiff temple had no right whatever in the land. The District Judge came to a different conclusion and decreed the suit. On appeal, a Division Bench of this Court reversed the judgment of the District Judge and restored that of the trial Court. Coldstream J. who delivered the judgment, observed:

> From the history of the land given in the Settlement records it appears that during the time of the Sikhs a Bairagi applied to be given the land, which was uncultivated and unclaimed, and appropriated it... From the fact that the whole area was described as a grave-yard in 1868, it is certain that the grave-yard had been in existence a long time and the admitted fact that since then it has been a kabristan is by itself presumptive evidence that the land had been set apart for use as a burial ground....
>
> The Mahomedans may have been apathetic or, probably enough, were content at that time to live in amity with an important Hindu landlord and such conduct will not alter the nature of the wakf if there was a wakf.

108. The remarks made in this judgment are clearly helpful to the appellants inasmuch as the facts on which the judgment was pronounced were to some extent similar to those now before us. In the case cited, a Mahomedan grave-yard had during the Sikh regime been attached to a Hindu temple and here too it is contended by the respondents that a similar treatment was meted out to the mosque. In spite of the graveyard having been attached to the Hindu temple by an act of State so to say, it was held that the sacred character of the graveyard was not lost. It is true that the grave-yard was being used as such; but, as remarked above user or non-user makes no difference in the matter of sacred places.

109. On the question of continuing wrong the appellants have relied on 31 P.R. 1917,[44] A.I.R. 1935 Cal 405[69] and A.I.R. 1933 P.C. 193.[70] In 31 P.R. 1917,[44] the dispute between the parties related to a mosque, over which the defendants had built a balakhana in which they both resided with their families. The plaintiffs sued for a declaration that the defendants had no right to reside there and for a perpetual injunction restraining them from so residing and thereby causing desecration of a place of worship. The Subordinate Judge granted the relief prayed for but the Divisional Judge dismissed the suit on the ground that it was barred by limitation inasmuch as one of the defendants, who was a mutwalli of the mosque in question, had been occupying the balakhana as a private residence for more than six years prior to the institution of the suit. On appeal a Division Bench of the Punjab Chief Court observed as follows:

> The occupation by the defendants of the balakhana over the mosque for purposes of private residence is an act of desecration of a place of worship which indisputably amounts to a "wrong" and the wrong is a "continuing wrong" so long as the

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occupation lasts in the same sense in which for instance a nuisance is a continuing wrong which gives rise to a cause of action *de die in diem*; and therefore under S. 23 aforesaid, a fresh period of limitation began to run in favour of the plaintiffs in this case at every moment of the time during which the defendants' occupation of the balakhana has continued. The plaintiffs' cause of action is not the erection of the balakhana by the defendants in 1903, which took place once and for all in that year; but it is the occupation of the balakhana by the latter for a purpose inconsistent with the use of the mosque as a place of worship after its dedication to Divine service. Their occupation is an actionable wrong which may be objected to at any moment of time by any Mahomedan who has a right to use the mosque as a place of worship; and the circumstance that the balakhana was first erected in 1903 and has, it may be assumed, stood in the same condition ever since, did not give rise to a cause of action which can be said to have exhausted itself; a fresh right to sue accrues to every worshipper at the mosque who objects to the balakhana being used for purpose of private residence and whose objection is disregarded by the person in occupation of that balakhana. In our opinion therefore Section 23 of the Lim. Act, applies to the present case.

110. On the strength of this judgment, the appellants urge that the respondents' using the mosque in a manner inconsistent with its sacred character is a continuing wrong and consequently the appellants can avail

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themselves of the benefit of Section 23 of the Lim. Act. As against this, the respondents contend that inasmuch as the person desecrating the mosque in the judgment cited was the mutwalli himself, and not an outsider, the principles enunciated there are inapplicable to the present case where the desecrators are trespassers. I am however disposed to think that the judgment relied upon does lend support to the appellants' contention. In the first place, one of the defendants there did not occupy any position of trust in relation to the mosque. Secondly, had the case been considered in the light of the desecrators being trustees, Section 10 of the Lim. Act may have been invoked and not S. 23. Even if it be said that S. 10 was not relied upon as it did not apply to Mahomedan endowments prior to 1929 when the Limitation Act was amended expressly to include the Hindu and Mahomedan endowments, the appellants' position remains unaffected.

111. In A.I.R. 1935 Cal 405,[69] Section 23 of the Lim. Act was held applicable to a case where the plaintiff was found to have a right to use certain land as a passage and the defendants had erected certain sheds which were obstructing him in the exercise of his right. In A.I.R. 1933 P.C. 193,[70] the passage on which the appellants have relied, reads as follows:

> The charans in the old shrines were impressions of the foot-prints of the saints, each bearing a lotus mark. The Swetambaris who prefer to worship the feet themselves, have evolved another form of charan not very easy to describe.... This the Digambaris refuse to worship.... Both the lower Courts have held that the action of the Swetambaris in placing charans of the description in three of the shrines is a wrong of which the Digambaris are entitled to complain. As regards limitation, the Subordinate Judge held on rather insufficient grounds that the acts complained of took place within six years of suit so that this part of the claim could not be barred by Article 120, but he also held that it could not be barred under that Article as it was a continuing wrong, as to which under Section 23 of the Lim. Act, a fresh period begins to run at every moment of the day on which the wrong continues. The

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High Court on the other hand were of opinion that it was not a continuing wrong and that the claim was barred under Article 120. In their Lordships' opinion the Subordinate Judge was right in holding that the acts complained of were a continuing wrong and consequently that this part of the claim is not barred.

112. The respondents contend that the principles enunciated in these judgments do not apply to the present case, but in my view on the question of determining what a continuing wrong is, they do afford a good deal of help to the appellants. Reference has further been made in this connexion to Salmond on Torts. At page 165 the following passage occurs:

> When the act of the defendant is a continuing injury, its continuance after the date of first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued.
>
> An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement;..... and a trespass continues so long as the defendant remains present upon the plaintiff's land.

113. At p. 210 the learned author says:

> That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrong-doer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. 'A continuation of every trespass is in law a new trespass.'

114. The appellants contend that the principles enunciated above apply to this case and that so long as acts of desecration are committed by the defendants, they give rise to a new cause of action at every moment of the day that the desecration continues.

115. I shall now take up the authorities relied on by the respondents. In 51 All 621,[10] a suit was instituted for a declaration that the house in dispute was trust property and was not alienable. It originally belonged to the ancestor of one Chittaranjam Mukharji but was put to auction and purchased by a stranger in 1878. Sometime afterwards, it was transferred by the auction-purchaser to Mukharji's father and had been held by the family since then. In 1908 Mukharji executed a deed of endowment dedicating the house in dispute in favour of three family idols and appointing his own mother as the shebait of the said idols. No application for change of names in the Municipal Board was however made, nor was any mutation effected in the revenue papers. In 1909 Mukharji and his mother jointly executed a mortgage deed of this house. They purported to mortgage the property in their own right as well as the shebait of the idols. In 1914 a second mortgage of the same property was made in favour of another person. In, the meantime a deed of revocation was also executed by Mukharji. When the suit was instituted, the contesting defendant pleaded that there had been no valid dedication, that the deed of endowment had never been acted upon or given effect to, that it had been duly revoked and that in any case there had been adverse possession for more than 12 years against the idols. The

learned Judges upheld the plea of adverse possession and made the following observations:

> The view of the Court below that there could not be any adverse possession because the idols themselves remained in the house cannot for a moment be accepted. As a matter of fact there can be adverse possession, not only as against the idols but

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over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour is fully clear from several cases decided by their Lordships of the Privy Council.... In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such possession is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

116. Counsel for the respondents has urged that this is a clear instance of a case where adverse possession was established against a house of God and that the case was on all fours with the case before us; but I do not consider that his contention is sound. Neither was the house a temple nor was it treated as such in the case and the remarks made by the learned Judges that adverse possession could be established over the idols themselves were clearly obiter. In 32 Cal 129[32] a suit had been instituted to recover possession of land as Shebait of an idol. It was resisted on the ground of limitation. In the course of their judgment their Lordships observed:

> There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law....
>
> But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries wish it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age. The case therefore falls within the clear language of Section 7 of the Lim. Act.

117. In 48 All 348,[21] the decision proceeded on the basis of the authority referred to above and it was held that if property belonging to an idol is alienated by the manager, adverse possession runs against the idol just as against any other person. In 23 Cal 536,[16] the appeal arose out of a suit brought by the plaintiff appellant in 1892 to recover khas possession of certain immovable property with mesne profits, and to obtain a declaration that a pottah and a kabala executed in 1857 and 1875, respectively, set up by the defendants, were illegal and collusive, upon the allegation that the property constituted the debutter of an idol. The defence was that the suit was barred by limitation. It was held that the suit coming either under Article 134 or under Article 144, Limitation Act, was barred. The learned Judges in the course of their judgment observed as follows:

> The idol is a juridical person capable of holding property as has been authoritatively settled by the decision of the Privy Council in 13 M.I.A. 270,[22] and the possession of the defendants who profess to derive title, not from the idol, but ignoring its rights, must be taken to have become adverse to the idol from the dates of the two alienations which are both more than 12 years before the date of the present suit.... The succeeding shebaits as was observed in the case just referred to, formed a continuing representation of the idol's property. If we were to hold otherwise, it would lead to a most anomalous result; for, then it would follow that, although after any alienation of the idol's property, ten successive shebaits may not take any steps to recover the idol's property, the eleventh shebait, it may be after a 100 years or more, would still be in time to institute a suit for recovery of possession. Such a result the Legislature could not have contemplated.

118. In my view, neither this case is in point nor are the previous cases inasmuch as the property involved in all these cases was property attached to a religious institution and not the religious institution itself. It is in fact not disputed by the

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appellants that so far as the property attached to a religious institution is concerned, there is a mass of authority in support of the view that it is subject to the law of adverse possession.

119. In 37 Cal 885[17] on which much stress was laid by counsel for the respondents, the mahant of the math of a Hindu deity who was in possession of two maths died leaving two chelas between whom a controversy arose as to the right of succession to the maths and the property annexed to them. The dispute was settled by an arrangement embodied in an ekrarnama, dated 3rd November, 1874, executed by the senior chela in favour of the junior chela by which the math at one place was allotted in perpetuity to the elder chela and his successors, while the math at the other place and the properties annexed thereto were allotted to the younger chela and his successors for the purposes connected with

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his math subject to an annual payment of a small sum of money towards the expenses of the first math. Their Lordships of the Privy Council remark:

> The learned Judges of the High Court have rightly held that in point of law the property dealt with by the ekrarnama was prior to its data to be regarded as vested not in the mahant but in the legal entity, the idol, the mahant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the ekrarmama the possession of the junior chela by virtue of the terms of that ekrarnama, was adverse to the right of the idol and of the senior chela as representing that idol, and that therefore the present suit was barred by limitation.

120. In my opinion this case instead of helping the respondents helps the appellants, inasmuch as what was conceded to the person alleging adverse possession was mere possession of the property in suit and nowhere was it laid down that he had squired such rights in the property in suit as to enable him to convert it into his private property. In spite of the adverse possession, the religious character of the math or the waqf nature of the properties attached thereto was not altered in any manner.

121. In 23 Mad 271,[19] a suit was brought by the respondent to establish his right to the management of an endowment connected with a temple situate in Madras and the only question that arose for determination was whether the suit was barred by the law of limitation. Their Lordships of the Privy Council applied Article 124, Lim. Act, as well as S. 28, and observed:

> In 1 Mad 235,[73] this committee held that an assignment by the managers of a pagoda of the right of management thereof was beyond their legal competence under the common law of India and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in *C* and *N* and the possession which was taken by the purchaser was adverse to them.....
>
> Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Article 144 of the same Schedule is applicable to the property. That bars the suit after 12 years' adverse possession.

122. Here again the subject-matter of the suit was not such as could claim the same incidents as are attached to a mosque under the Mahomedan law.

123. In 46 Mad 751,[74] the suit out of which the appeal had arisen was instituted to

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recover, as against a purchaser under an execution sale and those who claimed under him certain property which had by two deeds dated 21st February, 1890 and 13th December, 1894 been devoted to charitable purposes. The settlor died in 1895 leaving him surviving a widow and an only son. A creditor of the son sued him and obtained a decree in execution of which the endowments of the charity were attached. The settlor's widow, on behalf of the judgment-debtor's son who was then an infant, filed an objection to the attachment, but it was dismissed on the ground that during the lifetime of his father he had no locus standi. In the same year, another suit was instituted by the minor acting through the same next friend seeking to establish the Validity of both the deeds, and while this suit was pending, the property was brought to sale under the decree against the judgment-debtor on 22nd March, 1898. The sale was confirmed on 11th August, 1898 and delivery of possession was made to the purchaser. From the day of the sale until the institution of the suit, the purchaser and his legal representatives remained in uninterrupted possession of the property. On 31st December, 1900, it was declared in the second suit brought by the minor that the properties including those seized under the execution sale formed a trust estate for the purpose specified in the deed. In 1910 the minor attained majority and in 1913 he obtained a decree removing his father from the office of trustee, and two days later brought the suit out of which the appeal arose, to recover the property. Their Lordships remarked:

> There is no doubt that whatever period of limitation be assigned, the full period had run before these proceedings were instituted.

124. A further argument was put forward before their Lordships to the effect that the statute of limitation began to run afresh as each new trustee succeeded to the office, but their Lordships did not agree to this contention and held, that the suit was barred under Article 134 or Article 144, Lim. Act. It is obvious that the property involved in the suit was property attached to a Hindu institution and the same observations as I have made above apply to this case.

125. In 2 Luck 239,[75] the headnote reads as follows:

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> An idol installed in a particular Asthan is a juridical person capable of holding property and getting it managed through its manager, shebait or mahant. Such a manager, shebait or mahant would represent the idol or the institution for the time being completely, and possession, if adverse, against the mahant for the time being must be deemed to be adverse against the idol or the institution, unless the character of the alienation under which possession was taken could be deemed, to enure only for the lifetime of a particular manager shebait or mahant. The adverse possession in such a case begins to run from the date when the alienee takes possession of the property alienated and each succeeding manager, shebait or mahant cannot get a fresh start, so far as the question of limitation is concerned, upon the ground of his not deriving title from any previous manager, the reason being that the succeeding managers, shebaits or mahants form a continuing representation of the idol or the institution to which the endowed property has been dedicated.

126. In 5 Pat 341,[76] a Division Bench of the Patna High Court held that the possession of a purchaser of the property of a math from its mahant became adverse to the math from the date of the transfer and was not interrupted or affected by the

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death of the transferor or the succession of a new mahant even though the latter did not derive his title from the previous mahant. The observations made in this case as well as in the previous case are of no use to the respondents in the present case on the grounds stated above.

127. In 11 Pat 701,[77] the only passage relied upon by the respondents is at page 737 and reads as follows:

> It is well settled that properties vested in an idol may be lost by the adverse possession of another and that the possession of an out-and-out purchaser from the manager of an idol will be adverse to the idol even if the sale be effected for an unauthorized purpose.

128. This observation was mainly based on 37 Cal 885[17] and 46 Mad 751,[74] both of which have been discussed above. In 41 Mad 124,[18] it is observed that possession which was adverse to the institution was equally adverse to the disciples who sued on its behalf, but it is apparent that the property involved in the case was not the institution but the property attached to it. In 36 Bom 135,[13] the plaintiff, a manager of a temple, brought a suit in the year 1908 to recover possession of certain endowed property which the defendant; had purchased at a Court sale in 1870 in execution of a decree against the then manager; and it was held that the defendant's possession was adverse to the idol. This case is obviously distinguishable on the grounds stated above.

129. In A.I.R. 1935 Oudh 425,[5] a representative suit was brought for possession of a house which was alleged to have been, built on a part of the land which was used as a grave-yard. The house had stood there since 1912 and its materials had been sold by one Lal Mohammad to one Amir Ali. In 1915 the site of the house too was sold to one Jawad Ali, nephew of Amir Ali. In 1926, Jawad Ali sold the khandhal or the ruined house to the defend ant respondent. On these facts the Subordinate Judge had held that the suit was time-barred under Article 134, Lim. Act. It was contended before the learned Judges that the lower. Court was wrong in applying that Article inasmuch as under certain Privy Council judgments that Article did not apply to Mahomedan wakfs. The learned Judges upheld this contention and applied Article 142 instead on the following grounds:

> This Article is clearly applicable as the plaintiffs or the Muslim community whom they represent were dispossessed of the land in question belonging to the grave-yard by the erection of a house thereon.

130. It is obvious that there were no graves on the land sold and this case therefore is no authority for holding that the title of an adverse possessor could be perfected on graves in the same manner in which it could be perfected on other mundane holdings. In A.I.R. 1936 Oudh 207,[6] a takiadar claimed adverse possession over a graveyard on the ground of his having made certain alienations in respect of certain portions of the grave-yard and also by virtue of his having constructed certain kothris on a portion of the grave-yard. Subsequently another portion of the graveyard was sold by the takiadar upon which, a representative suit was instituted by certain Muslims. King C.J. observed:

> The main question is whether the predecessors in interest of the defendants had perfected their title to the land by adverse possession. The defendants' case was that eleven kothris had been built on the land in dispute by the predecessors-in-interest of the defendants more than twelve years before the date of the suit. On this point we have a clear finding of fact by the lower Appellate Court to the effect that only four kothris had been built on the land in suit more than twelve years before the date of the institution and those kothris were of a temporary nature. On this finding it seems to me that it is impossible for the appellants to succeed in their claim, based upon adverse possession, in respect of any part of the land in

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suit, which is not covered by the four kothris mentioned.

It has been argued that the cemetery must be taken as a whole and as it has been shown that the takiadars have been alienating portion of the cemetery from time to time and that certain portions have been permanently alienated more than twelve years before the date of the suit, it must be held that the takiadars had perfected their title by adverse possession over the whole area of the cemetery. I am unable to accept this contention.

131. It may be mentioned that even in relation to the four kothris referred to above, the learned Judge decreed the suit on the ground that the mere building of kothris would not imply renunciation of the takiadar's permissive possession or the open and public assertion of a hostile title. In the course of this judgment the learned Judge had further observed:

> If a takiadar in possession of a grave-yard sells a portion of it to some other person who builds a house and if the Mahomedan community are apathetic in the matter and allow the encroachment to remain for more than twelve years, then it might well be held that the person in possession had perfected his title by adverse possession for more than twelve years over the portion of the grave-yard sold to him.

132. Counsel for the respondents has laid much stress on this passage but counsel for the appellants has urged that, in the first instance, it is obiter and, secondly, it does not appear to be the considered opinion of the learned Judge. I am however disposed to think, as I shall explain below, that an encroachment by way of demolition or in the shape of a new construction can be taken to be an act of hostility that may be a determining factor in such cases and that if no suit is brought within twelve years of the assertion of such a hostile title, the right of the interested persons is lost.

133. In 38 Cal 526,[78] their Lordships of the Privy Council, basing their judgment on a previous judgment of their own reported in 36 Cal 1003,[79] discussed Article 134, Lim. Act, in connexion with a permanent lease of debutter lands and held that Article did not apply. This judgment is of no use to the respondents.

134. In support of his contention that a mosque, in spite of its being a juristic person, is immovable property in the ordinary acceptation of the term, counsel for the respondents has referred to two judgments of the Punjab Chief Court.

135. In 153 P.R. 1884,[12] the mutwalli of a mosque had, on behalf of and for the benefit of the mosque, purchased a house adjoining the mosque. The house in question adjoined the house of another person who happened to be a Hindu. The Hindu brought a suit for pre-emption alleging that the mosque or its guardian had no right on the ground of the mosque's vicinage, inasmuch as the mosque was the property of the deity and not of any earthly owner and had no right of the kind contemplated by the Pre-emption Act attaching to it. Tremlett and Powell JJ., who heard the appeal, remarked:

> As to the second point, we are of opinion that though theoretically wakf property belongs to no human owner, nevertheless a mosque as a concrete example of wakf is an institution, and its possession is legally maintained by its lawful guardian for the time being: in virtue of his position, the guardian can resist trespass, recover debts make purchases and mortgages all in virtue of the right which resides in the institution. In the same way, we think that the mosque, as an institution, might acquire an easement by prescription; and that being so, we cannot think of any rule

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or principle by which we could deny to the mosque (as an institution) the same right of preventing strangers approaching its walls by the exercise of a right of pre-emption, as other house-holders have....

We have no hesitation in deciding, on this principle, that the mosque as an institution has practically proprietary rights exercised through the guardian, and that one of the rights is to claim, on the ground of vicinage, a right of pre-emption in the case of sales of adjoining properties....

A mosque is in our opinion as much an estate as a house owned by a private owner.

136. In 59 P.R. 1914,[11] it was argued that since a Mahomedan mosque was not a juristic person and could not hold property as a Hindu dharamsaia or temple can, no right of pre-emption could be exercised by the mutwalli of such a mosque. This-argument did not find favour with the learned Judges. After holding that the-mosque is a juristic or an artificial person, they observed as follows at page 201 of the report:

Under the said clause [S. 13(1) clause seventhly] it is not, in our opinion, an essential condition of the valid exercise of the right of pre-emption by the present plaintiff that he should be proprietor of the mosque in the same sense in which he would be, for instance, proprietor of his own private dwelling house; all that it is necessary for him to establish is, that be is the sole guardian and manager of the mosque,... that the legal owner ship in the mosque... does not vest in any other person, and that he alone deals and is entitled to deal with the outside world on behalf and for the benefit of the mosque in all its legal relations. It is in this sense that the mutwalli of a mosque or the manager of a Hindu religious institution, by whatever name he may be called, can be appropriately said to he "a person whose immovable, property," though it is not his private property,

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clothes him with a right of pre-emption regarding property contiguous to the mosque or temple.

137. The learned Judges further approvingly referred to the passage quoted above from 153 P.R. 1384.[12] In so far as a right of pre-emption could be claimed only on the basis of owning immovable property, these two judgments obviously lend support to the contention of the respondents that, in spite of a mosque being a juristic person, it is immovable property, but it is clear from these judgments that the word "own" in relation to a mosque does not carry the same signification as it does in ordinary cases. In the judgment of 1884 the mosque is throughout described as an institution and inasmuch as the judgment of 1914 merely follows that of 1884, no special significance is attached to the words "immovable property" used therein.

138. In support of their contention that there could be no continuing injury in this case the respondents have relied on 49 I.C. 93,[80] 19 Mad 154[81] and 3 L.L.J. 128,[82] In 49 I.C. 93,[80] the Corporation of Calcutta objected to a certain platform which had been erected on a piece of land claimed by the Corporation as its own. The owner of the platform sued for a declaration of his right to the land upon which the platform stood. It was found that the platform had been in existence for about 50 years. On these facts the learned Judges observed that the Corporation had lost its right to that portion of the land upon which the platform stood from the date of its dispossession or the discontinuance of possession. They further repelled the contention of the Corporation that it was a continuing wrong, on the ground that the injury was complete on the erection of the wall and even though the effect continued, this did not extend the period of limitation.

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139. In 19 Mad 154.[81] the Municipality of Madras sued to recover as forming part of a highway, a strip of land adjoining the house of defendant, on which a "pial" had been erected more than 45 years before the suit. It was held that the defendant had acquired a title by adverse possession against the Municipality. In 3 L.L.J. 128[82] the defendants had erected a thatched shed in front of their house and the plaintiffs on the basis of joint ownership asked for a perpetual injunction to issue to the defendants directing them to remove those sheds. It was held that Section 23 of the Lim. Act, was inapplicable inasmuch as the moment the sheds were erected the injury complained of and sought to be removed by the issue of an injunction was complete and there was no continuing injury within the meaning of the statute.

140. The principle enunciated in these three judgments is not applicable to the present case as they proceed on their own facts and besides deal with property which is secular and not sacred. As observed in 31 R.R. 1917[44] in the case of an encroachment on a mosque, the cause of action does not exhaust itself the moment an encroachment is committed but continues so long as the encroachment continues.

141. Counsel for the respondents contended that in two of these cases the person against whom judgments were given was a juristic person, but the fact that it was so does not advance his case any further. Reference may also be made to L.P.A. No. 109 of 1935[83] decided by the Hon'ble Chief Justice and Monroe J. on 11th December, 1935, where relying on the three Privy Council judgments reported in 6 Cal 394,[84] 1 C.W.N. 96[85] and 29 I.C. 385,[86] it was held that the wrong done by the defendant in constructing a house which obstructed the light and air of the plaintiff was a continuing wrong and that no period of limitation applied. It may be remarked that 49 I.C. 93[80] had been relied upon by the learned single Judge of this Court but his judgment was reversed on appeal. In 2 Pat 391[87] at pp. 402 and 403 the learned Judges observed:

> The principle of Section 23 of the Limitation Act, which deals with continuing wrongs, can have no application to a declaratory suit and there is no recurring cause of action for a declaratory relief.

142. In 54 Bom 4,[88] these observations where referred to with approval and reference was

further made to 26 Mad 410,[89] in which it was held that the cause of action for a declaratory relief was the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession and the criterion was not whether the right was a continuing one but whether the wrong was a continuing one within the meaning of S. 23.

143. A perusal of the two judgments cited above shows that the circumstances in which those remarks were made were dissimilar to those now before us and cannot be utilized in defeating the claim of the present appellants. In cases of continuing wrong, the nature of the subject-matter of the suit as well as the nature of the injury complained of is always material and no hard and fast rule can be laid down as to when a wrong is a continuing wrong. Moreover in the view that I take of the case, the rights of the appellants had not been extinguished and both the right and the wrong were continuing.

144. I have already observed that most of the cases relied upon by either side do not directly touch the question at issue and those that have any bearing on the facts of the present case can be used only by way of analogy and not by way of direct

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authority. After giving due weight and full consideration to the cases cited and the arguments advanced before us, I have arrived at the following conclusions:

(1) That under the Mahomedan law, (a) a mosque is a place of worship solely and exclusively dedicated to the worship of God in accordance with the tenets of Islam and it remains as such till eternity; (b) all proprietary rights of men are extinguished in a mosque as soon as it is consecrated as such and can never be revived or resuscitated afterwards, whatever may happen to the building and whosoever may have its custody; and (c) it can never be treated as private property by any human being in the world, even if he is a Sovereign of the State.

(2) That British Courts in India cannot ignore the provisions of the Mahomedan law altogether while dealing with a mosque and that the special features which it possesses and the peculiar privileges which it enjoys are always to be determined under the Mahomedan law and under no other law, even though one of the parties to the suit before them may be a non-muslim.

(3) That although Section 5 of the Punjab Laws Act, contemplates that Mahomedan law can be altered or abolished in certain respects, in regard to the privileged position that a mosque occupies under the Mahomedan law, it has neither expressly nor impliedly been altered or abolished by the Limitation Act, or, for that matter, by any other enactment.

(4) That inasmuch as a mosque is placed 'extra commercium' and is in its very nature incapable of being owned by human beings, it cannot be considered "property" in the sense that it can be the object of a right of ownership. It is possible therefore to argue that a mosque is outside the mischief of the Limitation Act, even though that Act purports to deal with properties comprised in a Hindu or Mahomedan endowment in the circumstances mentioned in Articles 134-A, 134-B and 134-C. It can also be argued that a mosque as a juristic person is not property and is thus not touched by the Limitation Act; but for the purposes of this case it is not necessary to decide whether this is so.

(5) That on the assumption that a mosque is covered by the provisions of the Limitation Act, it continues to retain its sacred character wherever it may be and in whatever condition it is placed so long as it retains its original shape and form and that its sacred character is never lost by any act of desecration, however profane and sacrilegious it may be.

(6) That the only act of hostility that the Courts in India can countenance in the case of a religious institution like a mosque is an act of direct physical interference with its building and that anything short of it cannot be taken into account inasmuch as all through the period that a so called adverse possessor does not throw such an open challenge as is indicated above, he continues to remain under a heavy burden of which he is never relieved. By taking possession of a religious institution and not using it for the purpose for which it is intended, he merely imposes upon himself the duties and obligations of a quasi-manager or a custodian and any breach of those duties in the shape of not using the institution in the manner for which it is intended does not benefit him in any way nor does it extinguish the right of the beneficiaries of that institution just as a breach of duty on the part of a recognized custodian or manager would not entail these consequences. A beneficiary aggrieved

by his act may seek relief against him if he so chooses to do but his inaction does not prejudice the other beneficiaries.

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(7) That so long as the original shape and form of a mosque remain intact, the trespass by a wrongdoer is a continuing injury giving rise to a cause of action at every moment of the day that the trespass continues, and that this cause of action accrues not only to the mosque itself as a juristic person but also to its beneficiaries who in the very nature of the wakf are not confined to any place or period of time but are spread over all places and all ages.

(8) That both the quantity and the quality of the rights of an adverse possessor cannot in law exceed those that exist in the person dispossessed by him and he cannot accordingly prescribe for a title higher than that of the person whom he has dispossessed.

(9) That the rights and obligations attaching to a mosque are paramount to the estate and they cannot be lost merely by the efflux of time and that such rights and obligations follow the property and adhere to it wherever it goes.

(10) That the case of an adverse possessor, who is a wrong-doer, does not stand on the same footing as that of a purchaser for valuable consideration without notice and cannot therefore be considered in the light of those decisions which deal with the latter.

(11) That even if it be considered that the right of beneficiaries of a mosque to offer their prayers in it is an interest in immovable property which I doubt, this right cannot be extinguished under Section 28 of the Lim. Act, inasmuch as that section deals with the effect of not instituting suits for possession of any property and not with that of not instituting suits for possession of any interest therein as contemplated by Article 144, Lim. Act, and consequently such rights are never extinguished under the provisions of the Limitation Act.

(12) That to enforce the Mahomedan law to the extent indicated above is in consonance with the principles of justice, equity and good conscience, but the Courts in British India can only go thus far and no further. Where therefore owing to the apathy or inaction of the Muslim community, an adverse possessor alters the outward shape or form of a mosque or destroys its building or replaces it by another building of his own without being challenged within a period of 12 years from the date that he takes that step, he cannot be ousted from that property after the lapse of that period, as his ouster in those circumstances even though permissible under the Mahomedan Jaw, would be both unjust and inequitable under the law of the land.

(13) That inasmuch as the defendants or their predecessors-in title had not committed any adverse act of the nature indicated above, their possession never became adverse either to the mosque or to its beneficiaries and that consequently Article 144, Lim. Act, does not bar the remedy of the present appellants.

(14) That on the grounds stated above the demolition of the building in dispute on the night between 7th and 8th July, 1935 gave a valid cause of action both to the institution and the beneficiaries and that the suit of both is well within time.

145. In the course of arguments, reference was repeatedly made to the awkward situation that might arise if the Hindus also put forward a claim to-day to resume all those temples which had long ago been demolished and converted into mosques by the Muslim Kings, as under the Hindu law too the principle applies that when once a temple is dedicated, it always remains a temple. Apart from the fact that it is an extraneous matter which should not be considered in the determination of this case, no complications are likely to arise if the views set forth above are adopted. If any temples were seized and desecrated by the Muslim Kings, they were not allowed to retain their outward shape and form. They ceased to be temples long ago and no

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temple exists now in relation to which it can be said that to all appearances it is a temple and that it has been treated as such throughout the period of its seizure.

146. It follows from the conclusions formulated above that the subject-matter of the suit was nothing but a mosque when it was demolished, irrespective of the vicissitudes of fortune through which it had passed and regardless of the profane uses to which it had been put and it is clearly established on the record that everybody concerned, including the parties to the suit, relized this position full well and treated the building as a mosque right up to the moment it was razed to the ground. So far as the Muslims are concerned, they never ceased to revere it as a mosque and throughout the period of the British Rule made several efforts to regain it. Similarly the defendants' predecessors-in-title never

for once called it by any other name. It was described by them as a mosque in the previous litigation that ensued soon after the annexation of the Punjab by the British Government. In the pleas put in by Ganda Singh in 1855, he clearly stated that the mosque was granted to him along with the khankah, etc., before the reign of Maharaja Panjit Singh. His witnesses made a statement to the same effect describing the building in suit as a mosque (pages 18 and 19 of Part 3 of the printed record). In the order that was passed in connexion with this mosque in 1850, the words that "the mosque could not be released" are significant. In 1879 Ganda Singh executed a will in which he described the building as a mosque (p. 36 of Part III). In 1883 when a report was submitted by an Extra Assistant Commissioner to the higher authorities, he stated that the mosque was still standing and even went to the length of saying that it was unusual that a mosque which should ordinarily be in the custody of the Mahomedans should remain in the possession of the Akalis and that the Akalis using it in a manner opposed to the tenets of Islam exacerbated the feelings of the Muslims.

147. In 1885 in a suit instituted by Mt. Khem Kaur, widow of Ganda Singh, against her son Asa Singh, the latter put in his written pleas where he expressly stated that the mosque was wakf property (p. 45 Part III). In his statement before the Court he once more gave the same appellation to the building in, suit and stated that ten shops adjoined the mosque and that the mosque was lying vacant (p. 47, Part III). In the Municipal khasra prepared in 1890 (Ex. P. 15) the site in dispute was described as masjid (mosque). In certain applications submitted to the Lahore Municipality by the then mahants, Gian Singh and Lal Singh, the building in dispute was described as a masjid. In the petition submitted by Harnam Singh to the Sikh Gurdwaras Tribunal he described the building in suit as a mosque (pp. 64 and 65, Part III). In the rent deeds produced by the defendants themselves, which were executed in favour of their predecessors-in-title, this building was always mentioned as a mosque. Harnam Singh who was the last mahant in possession of the mosque appeared in this case as a witness for the plaintiffs and made a clear admission to the effect that the building was a mosque. It is noteworthy that the present defendants themselves described the building in suit as a mosque when they submitted a plan of the property claimed by them before the Sikh Gurdwaras Tribunal. Their own witness Mohar Singh, D.W. 3, in the present case has stated that during the time he lived there, some of the mahants and Sikhs used to call it a masjid (mosque) and that on the night that it was demolished the persons who were engaged in demolishing it said: "It is a mosque of the Muslims, knock it down," (page 85, part I).

148. Further in the summer of 1935, when the agitation on the part of the Muslim community for the restoration of the mosque took a serious turn, the building

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demolished was throughout described as a mosque in the various communiques issued by the Government from time to time (pp. 26 to 35, part II). The Deputy Commissioner who was in charge of the city of Lahore in those days and who is shown as a Sikh in the History of Services of Gazetted Officers, has stated as P.W. 25 in this case:

> To the Muslim deputation of 3rd July (1935) who complained that the mosque was likely to be demolished any moment, I gave an assurance that I was responsible for the safety of the mosque until the Punjab Government had examined the dispute: page 61, part I.

149. The obvious fact that those Sikh gentlemen who are said to have seized the mosque by way of resentment never thought for a moment to demolish it and that throughout the regime of Maharaja Ranjit Singh it was allowed to stand as a mosque and that even after the annexation of the Punjab by the British, it never came into the head of any of the mahants in charge of the mosque to alter its shape or form or to demolish it and that not until the time that the mosque came into the possession of the Akalis that the act complained of by the appellants was committed, speaks volumes in favour of the appellants' contention.

150. That even Mr. Cale, the District Judge came to the same conclusion is clear from the following passage in his judgment: (P. 141, Part 1)

> The cumulative effect of all these documents is to establish that the building in dispute has been regarded throughout as a mosque. In the litigation before the Gurdwaras Tribunal the fact that, this building was a mosque, though formally denied in the jawab-i-dawa of the Shiromani Gurdwaras Parbandhak Committee, was apparently accepted without question. Hilton J. in his judgment refers to 'the mosque, the building of which still stands on the disputed property'. Again, in dismissing the petition of the Anjuman Islamia, Hilton J. assumes that the building is a mosque but refused to give the Anjuman Islamia possession

on the same ground that the suits of Nur Ahmad in 1853 and 1855 were dismissed, viz that the claim was time-barred.

151. Again, at p. 144, he says:

> I am of opinion that the arguments in favour of the building being a mosque remain unimpaired.

152. The question now arises whether the relief prayed for by the appellants in the form of an injunction can be legally granted to them. The appellants contend that in view of the highhandedness displayed by the defendants in demolishing the mosque, the injunction claimed by them should be granted in the terms prayed for. The respondents, on the other hand, urge that, in the first instance, no suit for injunction lies inasmuch as a suit for possession is the only remedy available to the plaintiffs if aggrieved, and secondly, that the relief by way of injunction should not be granted to the appellants because (a) a person out of possession cannot claim such relief, (b) the relief sought by the appellants is impracticable and unenforceable, and (c) the plaintiffs had in a way acquiesced in the act of demolition and delayed their suit. Both sides have relied on various decided cases and text-books on the subject concerned and I shall discuss below all those authorities which have been cited at the Bar.

153. The matter of perpetual injunction is governed by Sections 54, 55 and 56 of the Specific Relief Act (1 of 1877). S. 54 deals with the circumstances in which a perpetual injunction can be granted, S. 55 treats of mandatory injunctions; and S. 56

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enumerates certain cases in which injunction should be refused. While dealing with the subject of injunctions, Salmond in his treatise on "The Law of Torts," at p. 173, observes:

> The jurisdiction thus conferred upon the High Court to issue injunctions is discretionary..... The general principle however in accordance with which this judicial discretion must be exercised is that an injunction should be granted in all cases of continuing or threatened injury, unless in the particular instance there is some special reason why it should be refused. In other words, an injunction, though not a matter of right, is a matter of course, unless the Court in the exercise of its judicial discretion and on special grounds considers that this remedy would not be just or convenient.

154. At p. 176 the same learned author says:

> Conversely, if the defendant has himself acted with wilful and highhanded disregard of the plaintiff's rights, an injunction will be granted even in cases which would otherwise have been deemed too trivial for this remedy.

155. In "Kerr on Injunctions", p. 1, a writ of injunction is described as a judicial process whereby a party was required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ. At p. 688, the same learned author, while dealing with the consequences of the breach of an injunction, remarks:

> A man who does not obey it to the letter so long as it exists, is guilty of contempt.

156. Woodroffe in "The Law Relating to in junctions", says at page 23:

> By the Specific Relief Act the Courts are expressly given power to grant injunctions to do substantive acts when such injunctions are necessary to prevent the breach of an obligation.

157. At page 114 of the same book it is said:

> In addition to the preventive jurisdiction there is superadded the power of the Court to grant a mandatory injunction, that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made.

158. At page 152 it is remarked:

> The remedy for the enforcement of decrees granting permanent injunctions lies in execution of the decrees and the procedure laid down by the Code relating to the execution of decrees is to be observed.

159. At page 310 the following passage is relevant:

> Though the jurisdiction by mandatory injunction to compel the restoration of matters *in status quo* is sparingly exercised, yet a trespass irreparable in its character and of a continuing nature may be restrained by a mandatory injunction, thus restoring things to their original condition.

160. In "The Principles and Practice of Injunctions in British India" by Basu, the following observations at page 151 are pertinent:

> So even in England where the jurisdiction to grant mandatory injunction was formerly questioned is now granted as a matter of fact and in a positive form..... In British India since the passing of the Specific Relief Act, the mandatory injunction is always in the direct form ....
>
> And with rare exceptions the mandatory form will not be decreed for other purposes than to restore and maintain a condition that has been wrongfully changed.

161. In (1875) L.R. 20 Eq 500,[90] at page 504, Sir G. Jessel, M.R. observes:

> At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The Court seems to have thought that there was some wonderful virtue in that

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form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution.

Where therefore money could not adequately reinstate the person injured, the Court said, as in cases of specific performance, 'we will put you in the same position as before the injury was done,' When once the principle was established, why should it make any difference that the wrongdoer had done the wrong, or practically done it before the bill was filed. It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence,

162. In (1869) L.R. 9 Eq 28,[91] a certain company which had undertaken an obligation to make a road was called upon to construct it. Sir W.M. James, V.C., in delivering his judgment, remarked:

Rather than allow such a gross piece of dishonesty to go unredressed, the Court would struggle with any amount of difficulties in order to perform the agreement. I can easily conceive if there were a difficulty about the statutory power that the Court might see its way by ordering the company to permit the plaintiffs to do these works at the expense of the company because the company have got the land and the Court might say, 'You must allow the plaintiff to do so, but you must pay all the costs that the plaintiffs have been put to.'

163. It may be remarked that in this country no such difficulty arises in view of the provisions of law contained in sub-r. (5) of R. 32 of 21 of the CPC. If a decree for an injunction has not been obeyed, the Rule says that the Court may in lien of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may he ascertained in such manner as the Court may direct and may be recovered as if they were included in the decrees.

164. In (1872) 13 Eq 44,[92] a Railway Company which had agreed to construct and for ever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner, was enjoined so to do. In that case too it was pleaded that a decree for damages would meet the ends of justice; but this contention was repelled. In (1922) 2 Ch 1,[93] Scrutton L.J., at page 20 of the report, says:

A wrong-doer who has either broken his contract or committed a tort may be ordered by the Court not to pay the damages thereby caused, but to do acts either to fulfil his contract, sometimes known as specific performance and sometimes by a mandatory injunction to do certain works, or to put right the tortious wrong that he has committed .... As a matter of jurisdiction it seems, that the Court has the right to make any such order, but in practice it does not make certain orders and does make others.

165. In that case an order had been made requiring the defendants to execute such works as may be necessary to restore the remedial works by clearing out the manhole at the top of the drain and the order so made was not interfered with on appeal. As indicated above, the respondents' main objection is that inasmuch as a suit for possession lies in the present case, no relief by way of declaration or injunction, is

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permissible. In support of their contention that a suit for possession is competent in the circumstances of this case, the respondents rely on 13 Mad 445,[50] 33 Mad 452,[49] 41 Mad 124,[18] 2 Pat 391[87] and A.I.R. 1932 Lah 394.[94].

166. In 13 Mad 445,[50] a suit was instituted for a perpetual injunction restraining the defendant from preventing the plaintiff from entering a house attached to a certain temple. The defendant alleged that he had been in exclusive possession of the house prior to the institution of the suit and that a previous suit by the father of the plaintiff for a declaration of his right to exclusive possession had been dismissed. On these allegations the suit was dismissed as time-barred. The learned Judges of the High Court, after agreeing with the Courts below that the suit was so barred, further remarked that as the plaintiff was out of possession, it was open to him to sue for such possession as he might be entitled to and that the exceptional form of relief by way of perpetual injunction was not open to him.

167. In 33 Mad 452,[49] a trustee of a temple on being ousted from possession by his co-trustees sued for a declaration that his dismissal was invalid and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as trustee. He claimed no-consequential relief in the nature of possession against his co-trustees. It was held that a suit for a mere declaration was-not maintainable and that an injunction could not be claimed by a plaintiff out of possession when he did not ask for possession against defendants who were actually in possession. In 41 Mad 124,[18] it was

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held that if a mutt property had been alienated, the disciples of the mutt could claim a decree directing possession to be given to the head of the mutt for the time being and that it was immaterial whether the head of the mutt was a trustee or only a life-tenant.

168. In my opinion, none of these cases is in point. In the earliest Madras judgment the remarks are obiter. Moreover the plaintiff there was suing in respect of a house which could be owned and possessed by him as an owner and not in respect of property which in its nature was incapable of being so owned. In the second Madras judgment the plaintiff was a trustee and could claim possession of the trust properties in his capacity as a trustee. In 41 Mad 124[18] again, the suit was for a decree directing possession to be given to the head of the mutt. The proposition as laid down in the Madras judgments holds good where a person who is bound to sue for possession seeks to circumvent the law and has recourse to this extraordinary remedy. Where however this is not the case, the principles enunciated therein do not apply. Neither did the learned Judges intend to lay down any proposition of universal applicability, nor is it applicable in this case. In 2 Pat 391,[87] it was held that every Mahomedan who derived any benefit from a wakf was entitled to maintain an action against the mutwalli to establish his right thereto, or against a trespasser to recover possession of the wakf property which had been misappropriated, without joining any other person who might participate with him in the benefit. In the course of their judgment the learned Judges observed:

> Where, in such a case, the plaintiff is entitled to consequential relief, he is not entitled to sue for a mere declaration. Even when the only consequential relief which the plaintiff is entitled to ask for is that the Court shall deliver the alienated trust property to the offending mutwalli, a suit for a mere declaration is not maintainable.

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169. In A.I.R. 1932 Lah 394,[91] the judgment cited above was followed. In both these cases the property trespassed upon was property attached to a mosque and not the mosque itself. A beneficiary in some cases may be entitled to recover endowed property for the benefit of the trustee; but I consider that it is not necessary for the beneficiaries of a mosque to bring a suit for possession of the mosque itself and that they cannot be compelled so to do if they merely seek to establish their right to offer payers in it. This right they can exercise irrespective of the fact that the mosque is in the custody of a non-muslim, inasmuch as under the Mahomedan law a non muslim can be a custodian of a mosque. To deny the beneficiaries a relief by way of declaration in the circumstances of this case would be to limit the scope of the substantive part of Section 42 of the Specific Relief Act, within a very narrow limit and to extend that of the Proviso beyond legitimate bounds. The Proviso to S. 42 comes into play only where the plaintiff being able to seek further relief than a mere declaration of title omits to do so; and, in my view, the beneficiaries of a mosque are not able to sue for possession of the mosque within the meaning of the Proviso.

170. In 75 I.C. 549,[95] the suit appears to have been instituted by a person in the position of a trustee who claimed the gaddi for himself as also a declaration of his right of ownership to certain property known as the Jacobabad tikana to which several shops were attached and a factory too. Evidently that suit is distinguishable from the one now before us. In (1905) 1 Ch 386,[96] it was held that no mandamus would lie against a local authority to do any particular works, nor would the Court prescribe what particular works were necessary for the maintenance of the roads. Apart from the fact that in almost all the English cases relied on by the appellants in this case and alluded to above this judgment was referred to in the counsel's arguments and not followed, the principles on which it was decided do not hold good in India. In 18 I.C. 394,[96] a Division Bench of the Calcutta High Court observed that a person could not sue for a declaration of his right unless he had an existing right and a mere contingent right which might never ripen into an actual existing right, was nob sufficient to ground an action for such a declaration. These observations are evidently not in point. Besides, I have already held that the appellants have an existing right and on that ground this ruling will not harm the plaintiffs. I am of opinion therefore that neither were the appellants bound to sue for possession nor are they debarred from claiming relief by way of injunction against the defendants. In fact the beneficiaries of a mosque are entitled only to

the right of saying prayers in it and to gain that object a relief by way of declaration or injunction is the only relief that they can claim.

171. In the present case, the beneficiaries have asked for the reconstruction of the building as it originally stood and they can achieve this end only by obtaining a mandatory injunction against the respondents. To this the respondents demur on the ground that it is difficult on the record to determine what the original condition of the building was when it was demolished and that consequently it is impossible for this Court to grant the relief prayed for. I however do not agree. A person who takes upon himself the responsibility of demolishing the building of a mosque cannot escape his liability to restore it to its original shape merely on the ground that it, is physically impossible to reconstruct it in the exact shape, form and condition in which the building stood when it was demolished. What the defendants have to restore in this case is abundantly clear from the evidence led by the plaintiffs. The dimensions of the mosque are well known and so are its outward features including the dome and the

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minarets. It has also been reliably established that if a new building is erected on the same lines as before with the materials now available, it would cost about thirteen to fourteen thousand rupees (page 71, Part 1). As already pointed out, under O. 21, R. 32, sub-r. (5) of the CPC, if the defendants refuse to obey the injunction issued, this Court, can direct even the plaintiffs, or any other person, to do the act required to be done so far as practicable, at the cost of the judgment-debtors, and the expenses incurred thereon can be recovered as if they were included in the decree. In my view therefore there is no substance in the objection raised by the defendants on this score.

172. Taking into consideration the circumstances in which the mosque was demolished, the conclusion is irresistible that the act of the defendants was most high handed. They were fully aware of the fact that they would injure the feelings of the whole Muslim community if they demolished the mosque. They knew that His Excellency the Governor was making every possible effort to find the best solution of the difficult situation that bad arisen. They were aware of the undertaking given by the Deputy Commissioner that the mosque would be protected until the Punjab Government had examined the dispute. In spite of all this, the mosque was demolished before any decision could be arrived at by the Punjab Government. This act of demolition involved a clear breach of obligation which the defendants owed to the Muslim community in general and there was no delay or acquiescence on the part of the plaintiffs or the community whom they represent, as the circumstances brought on the record clearly show. I would therefore grant an injunction against the defendants to reconstruct the building in the same shape and form as it possessed prior to its demolition and to allow the members of the Muslim community to exercise their right of worship in it. I would further restrain the defendants from using the site as it is at present or the building when constructed, in any manner which is inconsistent with its sacred character.

173. There still remains the question whether the suit is barred by any provision of law relied on by the defendants. As stated above, the bar pleaded was three fold (a) on account of the previous decisions between 1850 and 1883; (b) on account of the decision of the Sikh Gurdwaras Tribunal; and (c) on the strength of Sections 32 and 37 of the Sikh Gurdwaras Act. I shall take up these points in the order in which they are stated above.

174. The bar pleaded in (a) was based on Section 11 of the CPC. It was stated that certain suits were instituted by one Nur Ahmed, who claimed to be the mutwalli of the mosque, against the predecessors in title of the present defendants from 1850 to 1885, and that inasmuch as his claim for possession of the mosque was defeated on every occasion, the present suit was barred by the rule of res judicata. It was also alleged that on a report made by an Extra Assistant Commissioner in 1883 the Government declined to restore the mosque to the Muslims. The material portion of S. 11 reads as follows:

> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

175. Before a suit can be held to be barred under Section 11 therefore several conditions must be satisfied, and it is apparent

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that in the suits relied upon, most of the requirements mentioned in the section are lacking. So far as the case of 1850 is concerned, it is stated in Exhibit D.40, which is a robkar, dated 14th November, 1885, issued by the Court of the Deputy Commissioner, Lahore, that was a criminal case in respect of the mosque and the land attached thereto. The order passed therein was that the mosque could not be released. That order was upheld on appeal by the Commissioner, Lahore. That suit clearly is not a suit contemplated by Section 11 of the CPC. In 1853 a regular civil suit appears to have been instituted by Nur Ahmed, which was dismissed on the ground that his suit of 1850 had been dismissed. On 11th December, 1854 Agha Kalb Abid Khan, Extra Assistant Commissioner, Lahore, made an order on the record of the muafi estate measuring 13 bighas of culturable land with a well and a mosque, wherein he remarked that the building was a mosque and the land sued for was attached thereto and that interference by the Akalis or Hindus was most improper. He however declined to interfere on account of some order which had been previously made in the suit of one Muhammad Bakhsh and others.

176. It appears from a copy of the order, Exhibit D.37, that the subject-matter of the petition before him was culturable land and his decision was that he could not award the applicant the muafi land sued for. Ex. D.39 is a copy of the order made in appeal from the order of Agha Kalb Abid Khan. Besides, there are certain other orders passed by the Appellate Courts in the matter of *Nur Ahmed*, which have been duly exhibited in the case. It would however appear that in none of these orders had any finding been arrived at as to whether Nur Ahmed was a mutwalli or whether the mosque had ceased to be a mosque or the rights of the Muslims to say prayers therein had been extinguished. All that was decided was that Nur Ahmed could not recover possession of the mosque from the persons in possession on the ground that they had been in possession of the mosque along with the appurtenant building and the other property attached thereto since the time of the Sikh rulers. No decision was consequently arrived at on the questions now in issue, nor were they ever raised in the form in which they have now been raised. All that the defendants' predecessors-in-title contended in those cases was that they could not be deprived of the possession of the mosque and the other properties attached to it on the ground of their old possession. They never for-once denied that the subject-matter of the suit was a mosque. In fact if the plea of res judicata can be allowed to prevail on the basis of those judgments, it would debar the present defendants from denying, that the building they demolished was a mosque.

177. Further, as remarked by the District Judge; "The subject-matter of the suit is not the same as it was in the previous litigation". In all the cases instituted by Nur Ahmed he sought to recover possession from the Sikhs of the property to which he laid claim as mutwalli, while here the suit is by the mosque itself as well as the beneficiaries for the restoration of the mosque to its original shape and form, with the additional prayer that the beneficiaries may be allowed to use it as a mosque. On this ground too the rule of res judicata does not operate. So far as the report of 1883 is concerned, no question of res judicata arises at all, as it was not a decision given in a suit but an order passed in an executive capacity.

178. We were also referred to 47 P.R. 1870[97] where 64 P.R. 1867[51] was dissented from and it was held that the Civil Code which was in force at the time of the annexation of the Punjab had no legal sanction. On the strength of this judgment it was urged that inasmuch as all the previous decisions were given when the only law in force was that Code and no other Code, they could not operate as res judicata. This argument is not without force. Decisions, which are contemplated to operate as res judicata under S. 11, are those which are given after a complete observance of the procedure laid down by the law and not those which are more or less orders passed in

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an executive capacity. To found the decision of a Civil Court entirely on the findings arrived at in a criminal judgment, in my view, robs it of all its sanctity and binding force, and it is obvious that all the judgments relied upon by the respondents appear to have taken their cue from the criminal, judgment alone which was passed in 1850.

179. In support of his position, counsel for the-respondents has relied on A.I.R. 1926 Mad 267,[98] 39 Cal 887,[99] 12 C.W.N. 739,[100] 46 All 651[52] and 59 Cal 636.[101].

180. In AIR 1936 Mad 267,[98] Venkatasubba Rao J. observed:

> When in a suit, where the trust is properly represented, after real and genuine contest a decision is given, it will be absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be re-tried.

181. There has been no such contest in the suits relied upon as contemplated in this judgment, nor is the question in the present case the same.

182. In 39 Cal 887,[99] the headnote says:

> The widow of a shebait of a certain temple, who succeeded her deceased husband in that office, mortgaged some land, as also her interest in the temple income to one J. who obtained a decree on his mortgage on 24-9-1880. In execution thereof he put up the temple income for sale, purchased it himself and obtained delivery of possession in 1892. The widow and the next reversioner then brought a suit to set aside the sale on the ground that the property sold was not saleable. That suit was withdrawn with liberty to bring a fresh suit. The widow alone then brought another suit which was dismissed on the ground that it was barred by Section 244 of the CPC. She having died, the reversioner brought a suit against the said J., on 3rd January, 1910, for a declaration that he was entitled to the temple income inasmuch as it was not saleable. On objections taken by the defendant that the suit in so far as it related to the temple income was barred by the rule of res judicata and by limitation: Held that inasmuch as there was no collusion or dishonesty about the former suits, and as in one of them the plaintiff himself was a party, the decree passed in the suit against the shebait would bind her successor, the plaintiff, and that therefore the present suit was barred by the rule of res judicata.

183. A mere perusal of the headnote shows that the facts of that case were clearly distinguishable from those of the present case. In 12 C.W.N. 739,[100] the respondents relied on the following passage appearing at p. 742 of the report:

> It is sufficient to hold that in 1883, when the previous litigation was commenced, S.K. under the arpannamah of 1879, had authority to represent the debutter estate and that as a matter of fact she did represent that estate. She undoubtedly sued in her capacity as representative of the estate and there can be no question that the Court of Wards who carried on the suit as her next friend, held possession on her behalf and was in fact and in law the administrator of the estate. Under such circumstances it is impossible to hold that the estate in the hands of the appellant is not hound by that judgment. If the previous litigation had been brought by the then shebait, there could not have been any possible controversy that the decision would be binding upon the present appellant as shebait, on the principle explained by their Lordships of the Judicial Committee in 2 I.A. 145,[41] and by this Court in 11 C.W.N. 489[102] that the successive shebaits formed in effect a continuing representation of the property of the idol.

184. Apart from the fact that the circumstances of that case are different, it is noteworthy that the learned Judges have appended a condition to the observations made by them in the fallowing terms:

> This is of course subject to the qualification that the judgment relied on is untainted with fraud and collusion and that the necessary and proper issues were raised, tried and decided in the suit.

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185. It is obvious that none of the issues which have now been raised by the appellants, were ever raised, tried or decided in the previous suits.

186. In 46 All 651, 62 which is based on 2 I.A. 145,[41] it was observed:

> A decree obtained by one of the trustees on behalf of a trust against the other trustees, either for a declaration that the property in dispute was trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property, is binding as much on the trustees who are parties to the suit as on all persons interested in the trust; for, as observed by their Lordships of the Privy Conncil in *Prosunno Kumari Debya* v. *Golab Ghand Baboo*[41] the shebaits of a trust form a continuing representation of the idol's property. Each of the above suits was instituted by Mt. S.K. not in her private right but on behalf of the trust, and as such the decision arrived at in those suits is conclusive between the parties thereto within the meaning of Expln. 6 to Section 11 of the CPC.

187. The principle enunciated in this judgment however does not advance the case of the respondents any further.

188. In 59 Cal 636,[101] the following propositicn was laid down:

> Where the plaintiff or the defendant sues or is sued in a representative capacity, which attaches to him under the general law, the decision binds the entire body whom he represents. These are cases of administrators, trustees, shebaits, mutwallis.....

189. It is no doubt true that in certain circumstances decrees made in favour of or against a mutwalli may bind the beneficiaries; but those circumstances do not exist in the present case. Besides, Nur Ahmed had all along been claiming that his ancestors were mutwallis of the mosque, but his status as such was never recognised in the orders referred to above. Inasmuch as it was never denied that the building was a

mosque, the present appellants are not affected by the principle laid down in this judgment even if it be admitted that it applied to their case.

190. For the reasons given above, I consider that the judgments relied upon by the respondents do not bar the present suit. Even if those decisions carry any binding force, they will not operate as res judicata as the issues involved in the present case were never raised or decided by them against the Muslim community. The decision that the mosque cannot be released does not, as explained above, extinguish the rights of the Muslim community to use it as a place of worship or deprive the mosque of a right to continue as such.

191. The respondents have next urged that the judgment of the Sikh Gurdwaras Tribunal, in the petition of the Anjuman Islamia operates as res judicata and that inasmuch as the decisions of the Tribunal are as binding as the decisions of a Civil Court and that the issues now under controversy were raised before the Tribunal and decided there, the present suit of the appellants based on the same facts and raising the same questions is barred. The appellants on the other hand contend that the decision of the Sikh Gurdwaras Tribunal does not operate as res judicata because (a) it is a special Tribunal not contemplated by the Code of Civil Procedure; (b) the issues which have been raised in the present case were not raised and decided in that form by the Tribunal; and (c) even if grounds (a) and (b) were decided against them, (1) the Anjuman Islamia, on whose petition the decision was given did not hold a representative capacity despite the fact that it purported to make the petition on behalf of the entire Muslim cornmunity, and the community could not be bound by the

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decision inasmuch as the formalities laid down by O. 1, Rule 8 of the CPC, were not observed; and (2) the only order that the Gurdwaras Tribunal could pass was that of rejecting the petition under; Section 5 and it could not confer any title on the Sikhs.

192. The petition of the Anjuman Islamia was made under Section 5 of the Sikh Gurdwaras Act under, which any person claiming any right, title or interest in any property included in the list submitted under S. 3 is empowered to put forward a counter claim. It was stated therein that the petition was being presented on behalf of the Mahomedans and it was prayed that the property included in the list be excluded. Hilton J. who delivered the principal judgment, while disposing of this petition remarked:

> The claim is based on the allegation that all this property was waqf of the mosque and that the Sikhs took forcible possession of it. Similar claims were made on behalf of the Mahomedan community in 1352, 1855 and 1833. These claims failed on the ground that the Sikhs had adverse possession..... The learned counsel for the petitioners based his argument before us on the claim that the mosque having been built as a mosque by Mir Mannu about 1750 must always remain a mosque and that property once dedicated to waqf can never be lost by adverse possession. He did not, however, cite before us any authority to support this proposition, and in my judgment there is not sufficient ground upon which we can depart from the view which was taken in the suits of 1852, 1855 and 1883, which are relevant under S. 12 of the Act. In my judgment the claim of the Anjuman Islamia has no valid foundation and the mere fact that the building is shaped as a mosque does not justify us in granting them a decree. I would therefore dismiss petition No. 1282.

193. I shall deal first with the point (c) raised by the appellants inasmuch as if the decision on that point goes in their favour, no other question arises. It is admitted that no such action was taken by the Tribunal on the petition of the Anjuman Islamia as is laid down under O. 1, R. 8 of the CPC. By Section 12(11) of the Sikh Gurdwaras Act, it is provided that the proceedings of a Tribunal shall, so far as may be, and subject to the provisions of the Act, be conducted in accordance with the provisions of the Code of Civil Procedure 1908, and it is clear therefore that in order to make its decision binding of the entire Muslim community, the Tribunal was bound to follow the procedure laid down in respect of representative suits in the Code of Civil Procedure. The respondents refer to Section 15 of the Sikh Gurdwaras Act, and urge that inasmuch as by that section power is conferred on the Gurdwaras Tribunal to inquire if any per son desires to be made a party to any proceeding and to join in any proceeding any person who it considers ought to be made a party thereto, O. 1, R. 8, does not apply to the proceedings before the Sikh Gurdwaras Tribunal and that if no action under S. 15 is taken by the Gurdwaras Tribunal, no person, however aggrieved he may be by its decision, can re-agitate the same matter. This however does not appear to me to be a true exposition of law. No doubt S. 15 empowers the tribunal to summon any person and join him as a party in the proceedings, but that section does not in any way make the tribunal independent of the provisions of O. 1, R. 8, in those suits

there the decision is likely to affect persons other than those who are not before it. It will be seen that power to strike out or add parties is conferred upon all Civil Courts by O. 1, R. 10(2) of the CPC, yet they are bound to take action under O. 1, R. 8, whenever a suit purports to have been instituted in a representative capacity. The

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power conferred on the Tribunal under Section 15 of the Sikh Gurdwaras Act, is similar to the one conferred upon the Civil Courts by O. 1, R. 10(2) and does nob absolve it from the necessity of following the procedure as laid down in O. 1, R. 8. It was incumbent therefore upon the Tribunal to observe all the formalities laid down there in order to make its decision binding on the general Muslim community. As the Tribunal failed to do so, its decision cannot bind the present appellants.

194. It may be remarked that a suit by a beneficiary to establish the right of offering prayer is not a representative suit. In 7 All 178,[54] a case decided by five Judges of the Allahabad High Court, it was held that every Mahomedan who had a right to use a mosque for purposes of devotion was entitled to exercise such right without hindrance and was competent to maintain a suit against anyone who interferes with its exercise, irrespective of the provisions of S. 30 and S. 539, now corresponding to O. 1, R. 8, and Section 92 of the CPC 1908, respectively. It was further decided that Section 30 of the CPC, applied only to cases in which many persons were jointly interested in obtaining relief, and not to cases in which an individual right had been violated. Petheram C.J., who delivered the principal judgment, observed as follows:

> The question has arisen in consequence of the peculiar way in which property of this kind is held. According to Mahomedan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Mahomedan community are entitled to use it for purposes of devotion whenever the mosque is open. ... Every one who has such a right is entitled to exercise it without hindrance, and has a right of action against anyone who interferes with its exercise. It is not a joint right; it is a right which belongs to many people.

195. In this connexion our attention was further drawn to the remarks made by the learned Judges of the Punjab Chief Court in their judgment under appeal before their Lordships of the Privy Council in 27 P.R. 1913.[21] At p. 101 of the report they say:

> Plaintiffs sue as members of the Mahomedan community each and every member of which is entitled to bury his dead anywhere in the whole grave-yard ... It is not necessary for such a member to show that he has used the grave-yard; a newcomer, for instance, if a Mahomedan, has an equal right with the oldest resident.

196. In A.I.R. 1931 Oudh 45[58] Pullan J. in a case relating to a grave-yard remarked:

> Any Mahomedan interested in the burial of the dead on this plot was at liberty to bring a suit objecting to the sale of the property ..... This property is inalienable and whether it belongs to the public or not, there is no bar to the present objector filing a suit to contest the sale even if if be held that as a party he is debarred from making an objection under Section 47 of the CPC.

197. It follows from these judgments that the right of a Muslim to use a mosque is an individual right and can be exercised whenever he chooses so to do, so long as the mosque exists.

198. In 56 Mad 657[53] it was held by their Lordships of the Privy Council that in a representative suit instituted under O. 1, R. 8 of the CPC, the decision in a former suit, did not operate as res judicata by force of S. 11, Expln. 6, if the former suit was not instituted in compliance with the above rule, namely by permission of the Court; the Court giving notice as therein prescribed to all persons interested. The only possible exception that their Lord: ships contemplated was where the former suit had been litigated bona fide on behalf of the plaintiff and others with a common right and the omission to comply with the rule had been inadvertent and no injury therefrom had

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been sustained by the plain, tiff in the second suit. This exception however would not be applicable in this case in view of the observations made by Petheram C.J. in 7 All 178[54] to the effect that a right exercisable by a Mahomedan in connexion with a mosque is not a joint right in the ordinary sense of the term. The District Judge while dealing with this judgment of their Lordships of the Privy Council referred to the interpretation put upon it by a Division Bench of this Court in a judgment reported in A.I.R. 1936 Lah 13,[103] but the same Bench in a later judgment, reported in 18 Lah 629,[104] had thrown further light on the matter and after discussing the judgment of their. Lordships at length had come to the following conclusion:

> A decision in a representative suit binds all peri sons other than the plaintiffs expressly named, in

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the plaint only when, (a) if the suit relates to a private right, the formalities as laid down in O. 1, R. 8, are observed and (b) if the suit relates to a public right, the formalities laid down in Section 91 of the CPC, are observed.

199. Both the judgments were delivered by me and in the later judgment I explained what was laid down in A.I.R. 1936 Lah 13.[103] The view expressed in 18 Lah 629,[104] therefore, represents the considered view of this Court so far as the interpretation of 56 Mad 657[53] is concerned.

200. If a suit ceases to be a representative suit, it does not operate as res judicata. It was remarked by their Lordships of the Privy Council in A.I.R. 1928 P.C. 16[105]:

> In so far as the nature of the suit was changed by the amendments mentioned, viz., by adding strangers be the trust as defendants and by prayers for relief not covered by S. 92, the suit ceased to be one of a representative character and the decree based on the compromise such as it was, viz by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, Expln. 6, has no application to such a case.

201. In 12 Lah 497,[106] the principle of res judicata was not applied to a case where there had been a change in the parties. Johnstone J. who delivered the judgment in concurrence with Broadway J., observed:

> In view of the difference in personnel between the plaintiffs in the suit and the parties in the present appeal, I do not think that the principle of res judicata can be properly applied.

202. On the grounds stated above, I am satisfied that the judgment of the Sikh Gurdwaras Tribunal does not bar the present suit. Firstly even if the Tribunal be held to be a Court within the meaning of S. 11, inasmuch as it failed to take any action in accordance with the provisions of O. 1, R. 8, Civil. P.C., its judgment cannot be treated as a judgment in a representative suit. Secondly, a suit instituted by a beneficiary for the exercise of his right of devotion in a mosque is as laid down in 7 All 178[54] and the other judgments alluded to above, a suit for the enforcement of an individual right and is not covered by the provisions of O. 1, R. 8. The Anjuman Islamia can at best be treated as a beneficiary and no more. This being so, the present appellants cannot be said to be claiming under the Anjuman as contemplated by S. 11, so as to be bound by the decision in its petition.

203. In this view of the matter it is not necessary to determine whether the Sikh Gurdwaras Tribunal is a Court within the meaning of S. 11, or whether the issues raised before it were the same as are raised in this suit.

204. Before I leave this subject, I may refer to 16 Lah 968,[107] where a Division

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Bench of this Court held that on the hearing of a petition under S. 10, which is analogous to S. 5, the Tribunal had no power to make a declaration that the property in suit belonged to a Sikh Gurdwara, and that all that it could do was to reject the claim as put forward in the petition. On this ground too the decision of the Tribunal-would not be of much use to the respondents.

205. The third ground on which it is contended that the present suit is barred is based on the provisions of the Sikh Gurdwaras Act itself. For facility of reference it will be necessary to reproduce here these sections on which this objection is founded. The material portion of S. 30(ii) reads as follows:

> If any right is claimed for any person in connexion with a Notified Sikh Gurdwara and the Court finds that the right might have been made the subject of a claim in a petition forwarded to the Local Government under the provisions of S. 5, ... and that no such claim was duly made within time, the Court shall decide the claim against the person claiming the right:
>
> Provided that in the case of a claim that might have been made under the provisions of S. 5 or S. 10, the Court need not so decide, if it is satisfied that the failure to make the claim was owing to the fact that the person who might have made the claim ... had no knowledge of the fact that the right, title or interest had been included in a list published under the provisions of sub-s. (2) of S. 3. ... and could not by the exercise of reasonable diligence, have come to know ... of the fact that such right, title or interest, was so included.

206. The relevant part of S. 32 reads as follows:

> Where in any suit or proceeding pending at the commencement of this Act or instituted after its commencement, in a Civil or Revenue Court it has become or becomes necessary to decide any claim in connexion with a Notified Sikh Gurdwara which the Court finds might be made under the provisions of S. 3, 5, ... within the time prescribed therein, the Court shall frame an issue in respect of such claim and shall forward the record of the suit or proceeding to a Tribunal.

207. Section 37 reads as follows:

> Except as provided in this Act, no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect

of such order, decree or execution would be inconsistent with any decision of a Tribunal, or any order passed on appeal therefrom under the provisions of this part.

208. Relying on the provisions which have been reproduced above, the respondents contend that inasmuch as the present appellants failed to put in a claim under Section 5 of the Sikh Gurdwaras Act, the present suit cannot but be decided against them under the substantive part of sub-s. (ii) of S. 30 and that even if they are entitled to claim the benefit of the proviso to that sub-section, the proceedings must be referred to the Sikh Gurdwaras Tribunal under S. 32. They finally urge that at any rate no decision favourable to the appellants can be made in the present suit inasmuch as such decision would offend against the provisions of Section 37 of the Sikh Gurdwaras Act. The appellants resist these propositions of law and contend that the Proviso to S. 30l(ii) is clearly applicable to their case inasmuch as, firstly, they had no knowledge of the fact that the right, title or interest in the property in suit had been included in any list published under the provisions of S. 3(2) and, secondly, they could not by the exercise of reasonable diligence have come to know of the existence of the fact that such right, title or interest was so included. In the list put in by the Shromani

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Gurdwara Parbandhak Committee the property claimed by the committee, so far as it relates to the present suit, was described as Shahid Ganj Singhnian and no member of the Muslim community could ever guess that this appellation was intended for the mosque in suit. The Shromani Gurdwara Parbandhak Committee had intentionally used this mysterious appellation so as to lead the Muslims astray and that they cannot now be allowed to take advantage of this wrongful act of theirs. They further urge that the Proviso to S. 30(ii) was not controlled by S. 32, inasmuch as S. 32 applies to the transfer of those suits only which were pending in Courts at the time that the Sikh Gurdwaras Act came into force and does nob apply to suits which may subsequently be instituted. So far as S. 37 is concerned, the appellants' position is that the section itself makes an exception in favour of suits contemplated by the Proviso to S. 30(ii) and that consequently it does not affect their case.

209. On giving due weight to the arguments advanced on both sides, I am of opinion that the case of the appellants is covered by the Proviso to S. 30(ii). It is not denied by the respondents that the description of the property given in the list was as stated by the appellants. They, however, urge that by the exercise of due diligence, the Muslims in general could come to know of the fact that description referred to the mosque in suit and that, in fact, the Anjuman Islamia was apprised of it and did put in a petition under S. 5. I am not, however, impressed by this argument. The Anjuman Islamia may have utilized its own resources claiming as it does several resourceful members, but the community in general had no such resources at their disposal and could nob be put on their guard in view of the wrong description of the property claimed. The cases relied upon by the respondents in this respect are not in point. In A.I.R. 1930 Lah 717,[108] it was observed:

> The publication of the list and notifications is undoubtedly intended to give notice to the general public of what was being claimed and the Proviso to S. 30(ii) can only be availed of on proof of what is therein required.

210. This does not in any way militate against the position of the appellants, inasmuch as the list here did not mention the mosque in suit at all and the publication of such list can in no manner defeat the claim of the present appellants.

211. In A.I.R. 1933 Lah 828,[109] Addison J. who delivered the principal judgment remarked:

> Gurbakhsh Singh was in fall physical possession of the bunga and service upon him was proper service within the meaning of S. 3. Nor can it be said that in this case Proviso 1, S. 30(ii) of the Act can be applied....
>
> The defendants other than Gurbakhsh Singh were entered as in possession of 31 kanals 17 marlas of land and a muafi in the same list as the list in which the bunga was entered. There was an entry as regards the muafi and as regards the land in the revenue papers so that with respect to them the defendants other than Gnrbaksh Singh were given notice under S. 3 of the Act and a complete list was sent to them in which of course the bunga was also entered. They knew that action had been taken as regards all land attached to the Golden Temple. It is true that they only directly received notice with respect to the muafi and the land but if they had exercised any diligence at all they would have seen that the bunga was entered in the list.

212. This case is clearly distinguishable from the case now before us as the recital of the facts stated above would indicate. The

persons who were held to be barred under the substantive part of S. 30(ii) were those

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to whom the lists had actually been despatched and the mere fact that they, being interested in the land only did not notice that the bunga was also mentioned in the list, could not serve as an excuse for not making a claim under S. 5. In the case before us, there is no allegation that any notice was sent to the Muslim community in general or that the property claimed by the Sikhs was even remotely described as a mosque.

213. Reference in this connexion may be made to 15 Lah 66.[110] There the property claimed by the Sikhs was shown in possession of two persons who were servitors of the Gurdwara. No mention was made of the land being shamilat nor was a copy of the relevant entry of the Record of Rights attached thereto. Notice was accordingly issued to the two persons said to be in possession and as they made no claim, a notification by the Government was issued under S. 5(1). The village proprietary body then instituted a suit and the trial Court found that the land belonged to them and was in their possession. On these facts it was held by a Division Bench of this Court that as the village proprietary body had no knowledge of the fact that their shamilat land had been included in the list and as they could not by the exercise of reasonable diligence have come to know of the fact that their land had been so included, the Proviso to S. 30(ii) applied. The case of the appellants is much stronger than the case cited above.

214. The question now arises whether under S. 32 it is necessary to forward the proceedings to the Sikh Gurdwaras Tribunal. In this matter also the contention of the respondents, as stated above, does not appear to me to be in consonance with law. The language of the section is unambiguous. It is intended to apply only to those suits which were pending at the commencement of the Act or in which, though instituted after its commencement, the claim could be made under the sections mentioned therein within the time prescribed. It does not obviously cover such suits as are instituted long after the time during which the petitions could be made has expired. A comparison of the language employed in S. 30(ii) and S. 32, respectively, would lend support to this conclusion. In both sub-ss. (i) and (ii) of S. 30 the words used are "might have been made the subject of a claim," while in S. 32 the words are "might be under the provisions;" and interpreted in their plain grammatical sense, the words "might have been made" refer to the time that has passed, while the words "might be made" contemplate that the time is still running during which the claim can be made. It is true that the interpretation put by the respondents upon. S. 32 is in accordance with the construction put upon the section in a judgment, reported in 15 Lah 66;[110] but with all respect I venture to differ from the conclusion arrived at there. In a later judgment, also, to which I was a party, the section, was interpreted in the same manner; but it appears that the point was conceded by the opposite side and not discussed at all. The Full Bench judgment, reported in A.I.R. 1931 Lah 85,[111] does not advance the case of the respondents any further, inasmuch as in that case S. 32 was applied to a pending suit as would appear from the referring order at p. 86, col. 2 of the report. In my opinion therefore it is not necessary to refer these proceedings to the Sikh Gurdwaras Tribunal under S. 32. Section 37, Sikh Gurdwaras Act, too is Debar in the way of pronouncing a judgment favourable to the appellants in this case. That section begins with the words "Except as provided in this Act", and inasmuch as the appellants bring their case under the Proviso to Section 30(ii), it is permissible under the law to decide the case in their favour in spite of the decision of the Sikh Gurdwaras Tribunal, even, if that decision runs counter to their interest. But here this question does not arise, as the Sikh Gurdwaras Tribunal did not pronounce any decision which can come into conflict with the reliefs now claimed by the appellants. The Tribunal merely decided that the mosque was adversely possessed by the Sikhs. Neither was it called upon to adjudicate upon the rights of the worshippers, nor did it hold that the Sikhs were entitled to treat it as a private house of their own or to deny the Muslims the right of offering prayers. Having decided all the points raised at the Bar in favour

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of the appellants, I would accept

the appeal, set aside the decree of the District Judge and grant the appellants a decree in terms of the reliefs prayed for. In view of the peculiar circumstances of the case however I would leave the parties to bear their own costs.

K.S./R.K.

215. *Appeal dismissed.*

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1. *Gossain Dass Chunder* v. *Issur Chunder Nath*, (1877) 3 Cal 224.
2. *Jagram Bibi* v. *Ganeshi*, (1881) 3 All 435.
3. *Kuttayan* v. *Mammanna Ravuthan*, (1912) 35 Mad 681 : 18 I.C. 195.
4. *Ballabh Das* v. *Nur Mohammad*, (1996) 23 A.I.R. P.C. 83 : 160 I.C. 579 : 38 P.L.R. 182 (P.C.).
5. *Wahid Ali* v. *Mahboob Ali Khan*, (1935) 22 A.I.R. Oadh 425 : 156 I.C. 92 : 1935 O.W.N. 815 : 11 Luck 297.
6. *Ramzan* v. *Mahomed Ahmad Khan*, (1936) 23 A.I.R. Oudh 207 : 165 I.C. 104 : 1935 O.W.N. 96.
7. *Wright* v. *Ingle*, (1885) 16 QBD 379 : 55 LJMC 17 : 54 LT 511 : 34 WR 220 : 50 JP 436.
8. *Reg* v. *Sir Travers Twiss*, (1869) 4 QB 407 : 38 LJQB 228 : 10 B & S. 298 : 20 LT 522 : 17 WR 765.
9. *Subbaraya* v. *Chellappa*, (1882) 4 Mad 315.
10. *Dasami Sahu* v. *Param Shameahwar*, (1929) 16 AIR All 315 : 116 IC 433 : 51 All 621 : 1929 ALJ 473.
11. *Jindu Ram* v. *Hussain*, (1914) 1 AIR Lah 444 : 24 IC 100 : 59 PR 1914 : 147 PLR 1914.
12. *Shankar Das* v. *Said Ahmad*, (1884) 153 PR 1384.
13. *Huran Bibi* v. *Hinghan Bibi*, (1912) 36 Bom 135 : 12 IC 926 : 13 Bom LR 1160.
14. *Dattagiri* v. *Dattatraya*, (1903) 27 Bom 363 : 4 Bom LR 743.
15. *Saguon* v. *Kaji Hussein*, (1903) 27 Bom 500 : 5 Bom LR 303.
16. *Nilmony Singh* v. *Jagabandhu Roy*, (1896) 23 Cal 536.
17. *Damodar Das* v. *Lakhan Das*, (1910) 37 Cal 885 : 7 IC 240 : 37 IA 147 : 14 CWN 889 : 12 CLJ 110 (PC).
18. *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*, (1918) 5 AIR Mad 464 : 42 IC 366 : 41 Mad 124 : 33 MLJ 357.
19. *Gnanasambanda Pandara Sannadhi* v. *Vela Pandaram*, (1900) 23 Mad 271 : 27 IA 69 : 10 MLJ 29 : 7 Sar 671 (PC).
20. *Bikani Mia* v. *Suk Lal Poddar*, (1893) 20 Cal 116 (FB).
21. *Court of Wards* v. *Ilahi Baksh*, (1913) 40 Cal 297 : 17 IC 744 : 40 IA 18 : 27 PR 1913 (PC).
22. *Jewun Doss Sahoo* v. *Shah Kubeerooddeen*, (1837-41) 2 MIA 390 : 6 WR 3 : 1 Suther 100 : 1 Sar 206 (PC).
23. *Salig Ram* v. *Amjad Khan*, (1906) AWN 159 : 3 ALJ 546.
24. *Bam Rao* v. *Rustum Khan*, (1902) 26 Bom 198 : 3 Bom LR 717.
25. *Abdul Ghafoor* v. *Rahmat Ali*, (1930) 17 AIR Oudh 245 : 122 IC 326 : 7 OWN 382.
26. *Shah Mahomed Naim Ata* v. *Mahomed Shamshiuddin*, (1927) 14 AIR Oudh 113 : 100 IC 241 : 2 Luck 109 : 4 OWN 116.

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27. *Abdur Rahim* v. *Narayan Das Aurora*, (1923) 10 AIR PC 44 : 71 IC 646 : 50 IA 84 : 50 Cal 320 (PC).

28. *Allah Rakhi* v. *Shah Mahomed Abdur Rahim*, (1934) 21 AIR PC 77 : 147 IC 887 : 61 IA 50 : 56 All 111 (PC).

29. *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*, (1904) 27 Mad 435 : 14 MLJ 105.

30. *Manohar Ganesh* v. *Lakshmiram Govindram*, (1888) 12 Bom 247.

31. *Collector of Thana* v. *Hari Sitaram*, (1881) 6 Bom 546 (FB).

32. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*, (1905) 32 Cal 129 : 31 IA 203 : 8 CWN 809 : 8 Sar 698 (PC).

33. *Vidya Yaruthl Thirtha Swamigal* v. *Balu swami Ayyar*, (1922) 9 AIR PC 123 : 65 IC 161 : 48 IA 302 : 44 Mad 831 (PC).

34. *Mahadeo Prasad Singh* v. *Karia Bharthi*, (1935) 22 AIR PC 44 : 153 IC 1100 : 62 IA 47 : 57 All 159 (PC).

35. *Daivasikhamani Ponnambala Desikar* v. *Periyannen Chetti*, (1936) 23 AIR PC 183 : 162 IC 465 : 63 IA 261 : 59 Mad 809 (PC).

36. *Queen-Empress* v. *Subhan*, (1896) 18 All 395 : 1896 AWN 119.

37. *Jhulam Sain* v. *Emperor*, (1913) 40 Cal 548 : 18 IC 677 : 17 CWN 534 : 14 Cr LJ 117.

38. *Abdul Kadar* v. *Abdul Kasim*, (1932) 19 AIR Cal 459 : 1932 Cr C 449 : 137 IC 872 : 33 Cr LJ 517 : 36 CWN 544.

39. *Bali Panda* v. *Jadu Mony Sontra*, (1911) 38 Cal 284 : 7 IC 475 : 15 CWN 36.

40. *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*, (1925) 12 AIR PC 139 : 87 IC 305 : 52 IA 245 : 52 Cal 809 (PC).

41. *Prosunno Kumari Debya* v. *Golab Chand Baboo*, (1874) 2 IA 145 : 14 Beng LR 450 : 23 WR 253 : 3 Suth 102 : 3 Sar 449 (PC).

42. *Bejoy Chand Mohatap* v. *Kali Pada Chatterjee*, (1914) 1 AIR Cal 200 : 20 IC 78 : 17 CWN 1013 : 41 Cal 57 : 18 CLJ 347.

43. *Goluck Chunder* v. *Nundo Coomar Roy*, (1879) 4 Cal 699 : 3 CLR 450.

44. *Muhammad Ahmad* v. *Muhammad Fazul*, (1917) 4 AIR Lah 160 : 39 IC 116 : 31 PR 1917.

45. *Periyanan Chetty* v. *Govinda Rao*, (1932) 19 AIR Mad 328 : 137 IC 487 : 62 MLJ 496.

46. *Muhammad Abid* v. *Haji Baksha*, (1936) 23 AIR Oudh 133 : 158 IC 916 : 1935 OWN 1149.

47. *Rengaswami Nayudu* v. *Krishnasami Aiyar*, (1923) 10 AIR Mad 276 : 71 IC 463 : 44 MLJ 116.

48. *Bhramar Lal Banduri* v. *Nanda Lal*, (1915) 2 AIR Cal 23 : 24 IC 199 : 18 CWN 545.

49. *Rathnasabapathi Pillai* v. *Ramasami Aiyar*, (1910) 33 Mad 452 : 5 IC 630 : 20 MLJ 301.

50. *Kanakasabai* v. *Muthu*, (1890) 13 Mad 445.

51. *In re, Bick*, (1867) 64 PR 1867.

52. *Thakur Sri Gat Ashram Narainji* v. *Jaishth Madho Acharin*, (1924) 11 AIR All 504 : 80 IC 406 : 46 All 651 : 22 ALJ 641.

53. *Kumaravelu Chettiar* v. *Ramaswami Ayyar*, (1933) 20 AIR PC 183 : 143 IC 665 : 60 IA 278 : 56 Mad 657 (PC).

54. *Javrahra* v. *Akbar Husain*, (1834) 7 All 173 : 1834 AWN 325 (FB).

55. *Gobind Dayal* v. *Inayatullah*, (1885) 7 All 775 : 1885 AWN 182 (FB).

56. *Sheikh Kudratullah* v. *Mahani Mohan Shaha*, (1870) 4 Beng LR 134 : 13 WR 21 (FB).

57. *Zohorooddeen Sircar* v. *Baharoollah Sircar*, (1864) WR 185.

58. *Chhutkao* v. *Gambhir Mal*, (1931) 18 AIR Oudh 45 : 130 IC 117 : 6 Luck 452 : 7 OWN 1159.

59. *Fuzl Karim* v. *Maula Baksh*, (1891) 18 Cal 448 : 18 IA 59 : 6 Sar 19 (PC).

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60. *Atahallah* v. *Azimullah*, (1890) 12 All 494 : 1890 AWN 179 (FB).

61. *Jangu* v. *Ahmadullah*, (1891) 13 All 419 (FB).

62. *Bhupati Nath* v. *Ramlal*, (1910) 37 Cal 128 : 3 IC 642 : 10 CLJ 355 : 14 CWN 19 (FB).

63. (1804) 1 Sch & Ref 352 : 9 RR 51.

64. *Chotalal* v. *Manohar*, (1900) 24 Bom 50 : 26 IA 199 : 2 Bom LR 516 : 7 Sar 559 (PC).

65. *Lachhman Das* v. *Arya Pratinidhi Sabha' Punjab*, (1932) 19 AIR Lah 603 : 138 IC 309.

66. *Imam Bakhsh Monawar Din* v. *Mandar Nar singh Puri Parhalad Rai*, reported in (1938) 25 AIR Lah 246.

67. *Scott* v. *Scott*, (1852) 4 HLC 1065 : 18 Jur 755.

68. Re Nisbet & Pott's Contract, (1906) 1 Ch 386 : 75 LJ Ch 238 : 94 LT 297 : 54 WR 286 : 22 TLR 233.

69. *Sarat Chandra* v. *Nerode Chandra*, (1935) 22 AIR Cal 405 : 156 IC 390.

70. *Hukum Chand* v. *Maharaj Bahadur Singh*, (1933) 20 AIR PC 193 : 144 IC 346 : 60 IA 313 : 12 Pat 681 (PC).

71. *Chitar Mal* v. *Panchu Lal*, (1926) 13 AIR All 392 : 93 IC 652 : 48 All 348 : 24 ALJ 351.

72. *Shibessuree Dabia* v. *Mothoora Nath Acharjo*, (1869-1870) 13 MIA 270 : 13 WR 18 : 2 Suth 300 : 2 Sar 528 (PC).

73. *Rajah Vurmah Valia* v. *Ravi Vurmah*, (1877) 1 Mad 235 : 4 IA 76 : 3 Sar 687 (PC).

74. *Subbaiya Pandaram* v. *Mohamad Mustafa Maracayar*, (1923) 10 AIR PC 175 : 74 IC 492 : 50 IA 295 : 46 Mad 751 (PC).

75. *Parkasdas* v. *Janki Ballabha Saran*, (1926) 13 AIR Oudh 444 : 95 IC 27 : 2 Luck 239 : 3 OWN Sup 1.

76. *Badri Narain Singh* v. *Kailash Gir*, (1926) 13 AIR Pat 239 : 93 IC 303 : 5 Pat 341 : 7 PLT 453.

77. *Chaturbhuj Singh* v. *Sarada Charan*, (1933) 20 AIR Pat 6 : 141 IC 157 : 11 Pat 701 : 14 PLT 509.

78. *Ishwar Shyam Chand Jui* v. *Ram Kanai Ghose*, (1911) 38 Cal 526 : 10 IC 683 : 38 IA 76 (PC).

79. *Abhiram Goswami* v. *Shyam Charan Nandi*, (1909) 36 Cal 1003 : 36 IA 148 : 4 IC 449 : 10 CLJ 284 : 14 OWN 1 (PC).

80. *Ashutosh Sadukhan* v. *Corporation of Calcutta*, (1919) 6 AIR Cal 807 : 49 IC 93 : 28 CLJ 494.

81. *Municipal Commissioners of Madras* v. *Sarangapani Mudaliar*, (1896) 19 Mad 154.

82. *Lal Singh* v. *Hira Singh*, (1921) 8 AIR Lah 242 : 60 IC 20 : 3 LLJ 128.

83. *Moti Ram* v. *Hans Raj*, reported in (1936) 28 AIR Lah 334 : 1621 C 303.

84. *Rajrup Koer* v. *Abdul Hossein*, (1881) 6 Cal 394 : 7 IA 240 : 7 CLR 529 : 4 Sar 199 (PC).

85. *Soojan Bibi* v. *Shamed Ali*, (1897) 1 CWN 96.

86. *Nazimulla* v. *Wazidulla*, (1916) 3 AIR Cal 733 : 29 IC 385 : 21 CLJ 640.

87. *Muhammad Fahimul Huq* v. *Jagat Ballav Ghose*, (1928) 10 AIR Pat 475 : 74 IC 403 : 2 Pat 391 : 4 PLT 675.

88. *Krishnaji Annajee* v. *Annajee Dhondajee*, (1930) 17 AIR Bom 61 : 124 IC 773 : 54 Bom 4 : 31 Bom LR 1240.

89. *Rajah of Venkatagiri* v. *Isak Palli Subbiah*, (1903) 26 Mad 410.

90. *Smith* v. *Smith*, (1875) LR 20 Eq 500 : 44 LJ Ch 630 : 32 LT 787 : 23 WR 771.

91. *Wilson* v. *Purness Railway Co.*, (1869) LR 9 Eq 28 : 21 LT 553 : 18 WR 89.

92. *Greene* v. *West Cheshire Ry. Co.*, (1871) LR 13 Eq 44 : 41 LJ Ch 17 : 25 LT 405 : 20 WR 54.

93. *Kennard* v. *Cory Brothers and Co., Ltd.*, (1922) 2 Ch 1 : 91 LJ Ch 452 : 127 LT 137 : 38 TLR 489.

94. *Pir Bakhsb* v. *Mahomed Ibrahim*, (1932) 19 AIR Lah 394 : 138 IC 69 : 33 PLR 468.

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95. *Manoherdas* v. *Ramdas*, (1923) 10 AIR Sind 17 : 75 IC 549.

96. *Kali Das* v. *Probal Chandra*, (1913) 18 IC 394 : 17 CWN 964.

97. *Mt. Atter Koer* v. *Atma Singh*, (1870) 47 PR 1870.

98. *Narasimha* v. *Lakshminarasimham*, (1926) 13 AIR Mad 267 : 91 IC 924 : 49 MLJ 746.

99. *Jharula Das* v. *Jalandhar Thakur*, (1912) 39 Cal 887 : 14 IC 142.

100. *Ranjit Sinha Bhadur* v. *Basunta Kumar*, (1908) 12 CWN 739 : 9 CLJ 597.

101. *Lal Mohan Dhupi* v. *Ram Lakbmi Dassya*, (1932) 19 AIR Cal 271 : 137 IC 46 : 59 Cal 636 : 35 CWN 1203.

102. *Gora Chand* v. *Makhan Lal*, (1907) 11 CWN 489 : 6 CLJ 404.

103. *Bishan Singh* v. *Bakhshish Singh*, (1936) 23 AIR Lah 13 : 158 IC 540 : 38 PLR 785.

104. *Mehr Mahomed Khan* v. *Jamadar Adalat Khan*, (1937) 24 AIR Lah 425 : ILR (1937) 18 Lah 629 : 39 PLR 707.

105. *Abdur Rahim* v. *Abu Mahomed Barkat Ali*, (1928) 15 AIR PC 16 : 108 IC 361 : 55 IA 96 : 55 Cal 519 (PC).

106. *Ram Prasad* v. *Shiromani Gurdwara Parbandhak Committee*, (1931) 18 AIR Lah 161 : 135 IC 657 : 12 Lah 497 : 32 PLR 910.

107. *Shiromani Gurdwara Parbandhak Committee, Amritsar* v. *Jagat Ram*, (1935) 22 AIR Lah 279 : 156 IC 1042 : 16 Lah 968 : 38 PLR 44.

108. *Dial Singh* v. *Gurdwara Tahli Sahib*, (1930) 17 AIR Lah 717 : 123 IC 543.

109. *Gobind Singh* v. *Managing Committee of Gurdwara*, (1933) 20 AIR Lah 823 : 147 IC 54 : 15 Lah 55 : 36 PLR 438.

110. *Bishna* v. *Committee of Gurdwara Sudhal*, (1934) 21 AIR Lah 390 : 151 IC 890 : 15 Lah 66 : 36 PLR 426.

111. *Committee of management for Gurdwara Punja Sahib* v. *Fazal Khan*, (1931) 18 AIR Lah 85 : 131 IC 89 : 12 Lah 204 : 32 PLR 967 (FB).

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PRIVY COUNCIL.

Present : Lord Thankerton, Lord Russell of Killowen, Sir George Rankin, Lord Justice Goddard and Mr. M. R. Jayakar.

1940

May 2.

THE MOSQUE, MASJID SHAHID GANJ AND OTHERS—Appellants,

versus

SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR, AND ANOTHER—Respondents.

Privy Council Appeal No. 91 of 1938.

On Appeal from the High Court at Lahore.

Muhammadan law — Punjab Laws Act (VIII of 1872) — Application of Limitation Acts to suits by Muhammadan institutions — Indian Limitation Act (IX of 1908), S. 144 — Mosque (the building itself), whether juristic person — Res judicata — *Sikh Gurdwara Act (Punjab Act, VIII of 1925), S. 37.*

In 1722 a mosque built in Lahore was dedicated by a deed in which provision was also made for the appointment of mutawalis.

From the commencement of the Sikh power in 1762, the building with its appurtenances was in the occupation of Sikhs and it was in the occupation of Sikh Mahants at the time of the annexation of the Punjab by the British in 1849. One Nur Ahmad, claiming as mutawali, tried to recover the property in a criminal proceeding in 1850, a suit in the Settlement Department in the same year, a civil suit in 1853 and another civil suit in 1855 but was unsuccessful in all these cases.

In 1927, by a notification by the Government under the Sikh Gurdwaras Act of 1925, the mosque and its adjacent land were included in a Sikh Gurdwara as belonging to it and, in 1930, the Sikh Gurdwara Tribunal established by the Act dismissed a claim to the property by the Anjuman Islamia " on

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THE MOSQUE, MASJID SHAHID GANJ v. SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR.

behalf of the Mohamedans," and the judgment of the Tribunal was affirmed by the High Court in 1934.

The building was demolished by the Sikhs in July, 1935.

The present suit was instituted in October, 1935, by "The Mosque" as plaintiff No.1 and a number of Mohamedans, including women and children, for a declaration that the building was a mosque in which the plaintiffs and all followers of Islam were entitled to worship and for other reliefs.

Held, that a mosque, (in the sense of the building itself), is not a juristic person by, or against, whom a suit may be brought.

Jafri Begum v. *Amir Muhammad Khan* (1) *Jagadindra Nath Roy* v. *Rani Hemanta Kumari Debi* (2), *Bhupati Nath* v. *Ram Lal* (3), Gopalchandra Sarkar Sastri's Hindu Law (7th ed.), p. 865, *Shankar Das* v. *Said Ahmad* (4), *Jinda Ram* v. *Husain Baksh* (5), *Maula Bukhsh* v. *Hafiz-ud-din* (6), Tyabji's Principles of Muhammadan Law (2nd ed)., p. 401, and Abdur Rahim's Muhammadan Jurisprudence, p. 218, referred to.

There is a presumption that a change of sovereignty does not affect private rights, but the plaintiffs, on whom the onus lay, had failed to show what law was in force immediately prior to the British annexation.

West Rand, etc., Ltd. v. *The King* (7), referred to.

Muslim law is applied by Courts in British India under legislative enactments to certain classes of cases and in such cases it is to be interpreted by the Courts themselves as a part of the law of the land and it is not to be ascertained by evidence.

Collector of Madura v. *Mootoo Ramalinga Sathupathy* (8), referred to.

Dictum of Sulaiman J. in *Aziz Bano* v. *Muhammad Ibrahim Hussain* (9), approved.

By the Punjab Laws Act, 1872, Muhammadan law is made applicable to the religious institutions of Muslims, but only in so far as it has not been modified by legislation.

(1) I. L. R. (1885) 7 All. 822, 841 (F.B.).
(2) L. R. (1905) 31 I. A. 203 : I. L. R. 32 Cal. 129.
(3) I. L. R. (1910) 37 Cal. 128, 153 (F.B.).
(4) 153 P. R. 1884.
(5) 59 P. R. 1914.
(6) 1926 A. I. R. (Lah.) 372.
(7) L. R. (1905) 2 K. B. 391.
(8) (1868) 12 Moo. I. A. 397, 436—9.
(9) I. L. R. (1925) 47 All. 823, 835.

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THE MOSQUE, MASJID SHAHID GANJ
v.
SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR.

In British India the Courts do not follow the Muhammadan law in matters of procedure. Limitation is a matter of procedure and the Limitation Act of 1908 applies to immoveables made wakf under Muhammadan law.

Abdur Rahim v. *Narayan Das Aurora* (1), *Damodar Das* v. *Lakhan Das* (2) and *Sri Sri Iswari Bhubenshwari Thakurani* v. *Brojo Nath Dey* (3), referred to.

The right of an individual Muslim worshipper to use a mosque for the purposes of devotion is not a sort of easement in gross, but an element in the general right of a beneficiary to have the wakf property recovered by its proper custodians and applied to its proper purpose. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the wakf and every interest thereunder, the rights of all beneficiaries are gone: the land cannot be recovered by or for the mutawali and the terms of the endowment can no longer be enforced.

Jawahra v. *Akbar Husain* (4) and *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (5), referred to.

Held, on the facts, that the suit was barred not only under Article 144 of the Limitation Act of 1908, but also by the rule of *res judicata* by the decisions in the earlier suits and under section 37 of the Sikh Gurdwara Act by the decision under that Act.

Appeal (No.91 of 1938) from a decree of the High Court (January 26, 1938), which affirmed a decree of the District Judge of Lahore (May 25, 1936).

The material facts are stated in the judgment of the Judicial Committee.

1940, April 4, 5, 8, 9. L. E. PUGH, K. C. and J. M. PRINGLE for the appellants. A mosque under Muhammadan law is the property of God. There can be no human ownership of it. It is a juristic entity

(1) L. R. (1922) 50 I.A. 84: I. L. R. 50 Cal. 329.
(2) L. R. (1910) 37 I. A. 147: I. L. R. 37 Cal. 885.
(3) L. R. (1937) 64 I. A. 203: I. L. R. [1937] 2 Cal. 447.
(4) I. L. R. (1885) 7 All. 178.
(5) I. L. R. (1917) 41 Mad. 124, 136.

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and, in that respect, it is on the same footing as a Hindu idol which can sue or be sued: *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1) and *Pramatha Nath Mullick* v. *Pradyumna Mullick* (2).

Once it is dedicated, it is always a mosque like other property that is dedicated as wakf: *Court of Wards* v. *Ilahi Baksh* (3) and *Ballabh Das* v. *Nur Mohammad* (4).

On the question of limitation, though I do not contend that Muhammadan law is entirely unaffected by the statutes of limitation, I submit that they do not apply to a mosque. They are inapplicable in the case of religious trusts: *Vidya Varuthi Thirta's case* (1). But even if the mosque, the 1st plaintiff, is hit by limitation, the right of the worshippers is not, in this suit, for they are not suing for possession but are only claiming the right to worship. Section 28 of the Limitation Act has, therefore, no application and it is not necessary for me to attack, and I am not attacking the finding of the Tribunal that the Gurdwara has been in possession many years and is now the owner. A change in ownership would not affect the right claimed here and Article 144 of the Limitation Act is not applicable; nor is Article 134.

Even if the building is used for improper purposes, the right of the individual worshippers to worship there would not be affected.

This is not a suit to recover immoveable property and so it does not come within the Gurdwara Act. If it does, I submit, it would fall within the exception to section 30 (*ii*) Proviso.

(1) L. R. (1921) 48 I. A. 302, 310-12. I. L. R. 44 Mad. 831.
(2) L. R. (1925) 52 I. A. 245-50 : I. L. R. 52 Cal. 809.
(3) L. R. (1912) 40 I. A. 18 I. L. R. 40 Cal. 297.
(4) (1935) 40 Cal. W. N. 449.

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The suit is not barred as *res judicata* by the previous decisions. The parties here were not represented in the previous cases.

J. M. PRINGLE followed: I submit that the mosque was in existence as such till demolished in 1935. The description of its appearance in 1882 shows it was desecrated. There are findings in the earlier suits of non-user but there is no finding of exclusion. Persons who do not appear before the Tribunal though they can do so are not affected by the Gurdwara Act. The only persons affected are those who appear and those in possession. Section 30 of the Act shuts out a person who could have petitioned under the Act, but did not do so. It would not shut out a Muhammadan claiming merely a right to worship. The suit of 1855 was decided on the ground that the claim was *res judicata* by the judgments in the Settlement Courts. It was a decision against three persons. The mosque was not represented and the decisions is not binding on the parties here.

1940, May 2. The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—Before 1935 there had stood for many years to the south of what is now called the Naulakha Bazaar, in the city of Lahore, a structure having three domes and five arches, which had been built as a mosque (*masjid*) and which retained, notwithstanding considerable disrepair, sufficient of its original character to suggest, or even to proclaim, its original purpose. It had a projecting niche (*mehrab*) in the centre of the west wall such as is used in mosques as the place from which the imam leads the prayers. Its dedication is no longer in dispute, having been established as of the year 1134

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A. H. or 1722 A. D. by the production and proof of a deed of dedication executed by one Falak Beg Khan. By this deed, Sheikh Din Mohammad and his descendants were appointed mutawalis.

The deed speaks of a school, a well and an orchard as being among the appurtenances of the mosque and gives the total area of the dedicated property as three kanals and fifteen marlas; but it is not now necessary to ascertain with precision the limits of the original curtilage.

No less well established than the dedication is the fact that from about 1762 A. D. the building, together with the courtyard, well and adjacent land, has been in the occupation and possession of Sikhs. The occupation of Lahore by the " Bhangi Sardars " in 1762 was the commencement of Sikh power in this part of India. Sikh rule continued under Ranjit Singh, who in 1799 established himself by force of arms as the local ruler. It ended only in 1849, ten years after the death of Ranjit Singh, when the Punjab as a result of the second Sikh war, became part of British India by annexation. At some time during the Sikh domination, land adjacent to the mosque building (but to the north of what is now the Naulakha Bazaar) became the site of a Sikh shrine (*gurdwara*) and the tomb of a Sikh leader named Bhai Taru Singh situated thereon was held in reverence. The land, which in 1722 had been dedicated to the purposes of a mosque, came to be held and occupied by the managers and custodians of the Sikh institution and the mosque building was used by them. Until about 50 years ago, part of the building was used for the worship of the Granth Sahib or holy book of the Sikhs. Other parts have been used for

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secular purposes being let out to tenants, or used for storing chaff (*bhusa*) or holding rubbish. By a tradition which cannot be ignored (though their Lordships are thankful to be free of any duty to investigate its truth) the land adjacent to the building was regarded by the Sikhs as a place of martyrs (*shahid ganj*), it being commonly held among them that Bhai Taru Singh had on this spot suffered for his religion at the hands of Muslim rulers and that many others including women and children had been executed here. Thus communal feelings have long been in a state of tension as between Muslims and Sikhs with respect to this *masjid shahid ganj*. Its history after 1760 is summarised in the trial Judge's finding that "this mosque has not been used as a place of worship by Muslims since it came into Sikh possession and control"; in the Chief Justice's statement that "there has been a complete denial to the Muslims of all their rights"; and in the language of Bhide J. that "it is scarcely likely that the Muhammadans would have been allowed to have access to the building for any purpose whatever during this period (1760 to 1853)". These findings are not in any way blunted by the consideration that a pious mutawali might properly have let parts of the waqf property to tenants appropriating the rents to the purposes of the waqf. The possession of the Sikhs has been hostile not merely to the claim of other persons to the office of mutawali of his mosque, but hostile to the *waqf* itself and all interests thereunder. On the other hand it is true that the building has been frequently and indeed has been generally referred to as a mosque by those who have had its custody as well as by others and that it retained to the end the outward appearance of a mosque.

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In 1849, at the time of the British annexation, the mosque building and the property which had been dedicated therewith were in the possession of certain Sikhs mahants of the *gurdwara*. It is unnecessary to decide whether they held it under a revenue-free grant made to them by the Sikh authorities as it is certain that they held it and used it for their own purposes and for the purposes of the *gurdwara* as already described. The facts are made plain by the action taken to recover the property for the purposes of Islam soon after Sikh authority had given place to British. A criminal case brought in 1850 by one Nur Ahmad claiming to be mutawali and proceedings in the Settlement Department, brought by him in 1853, came to nothing as he had been long out of possession. A civil suit with a like object was brought and dismissed in 1853. On the 25th June, 1855, yet another suit by Nur Ahmad was brought in the Court of the Deputy Commissioner, Lahore, against the Sikhs in possession of the property : it was dismissed by that officer on the 14th November, 1855, by the Commissioner on the 9th April, 1856, and on further appeal by the Judicial Commissioner on 17th June, 1856.

In 1925 the Sikh Gurdwaras Act (Punjab Act VIII of 1925) was passed for the purpose of ascertaining what Sikh shrines were in existence and what property they owned; and of vesting the management of such shrines in certain committees (and other bodies). This step had become necessary to bring to an end disturbances which had been caused by disagreement between different schools or sects among the Sikhs. On 22nd December, 1927, by a Government notification the old mosque building and land adjacent thereto was included as belonging to the Sikh *gurdwara* " Shahid Ganj Bhai Taru Singh." Seventeen

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claims were made by various petitioners to have rights therein. One dated 8th March, 1928, was by Mahant Harnam Singh and others to the effect that the property belonged to them personally and not to the institution of which they were the head. Another dated 16th March, 1928, was by the Anjuman Islamia of the Punjab "on behalf of the Mohammedans" claiming that the land and property were dedicated for a mosque and did not belong to the *gurdwara*. Both sets of claimants failed before the Sikh Gurdwaras Tribunal which decided on the 20th January, 1930, that the mahants' possession had been held on account of the *gurdwara* and that the Anjuman's case failed by reason of adverse possession and previous decisions. No appeal was brought by the Anjuman from the latter decision but against the former an appeal brought by the mahants was dismissed by the High Court on 19th October, 1934. In the result the property and building were given into the custody of the defendants and on the night of 7th July, 1935, the building was suddenly demolished by or with the connivance of its Sikh custodians under the influence of communal ill-feeling. Riots and disorder ensued and much resentment was felt and expressed by the Muslims.

The plaint in the present suit was filed on 30th October, 1935, in the Court of the District Judge, Lahore, against the Shiromani Gurdwara Parbandhak Committee, and the Committee of Management for the notified Sikh gurdwaras at Lahore—the authorities who were in possession of the disputed property as being property belonging to the *gurdwara*.

It contained no claim for possession of the property or ejectment of the defendants or that the property be handed over to the hereditary mutawali.

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The relief claimed was a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship, an injunction restraining any improper use of the building and any interference with the plaintiffs' right of worship: and a mandatory injunction to reconstruct the building. The learned District Judge dismissed the suit by decree, dated 25th May, 1936, and an appeal to the High Court was dismissed on 26th January, 1938, by Young C. J. and Bhide J., Din Mohammad J. dissenting.

By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of the Muslims but only in so far as it has not been modified by legislation. Thus the Indian Limitation Act, 1908, applies though limitation is not an original principle of Mahomedan law. The length of time which had elapsed since the property claimed had been lost to Muslims and the repeated failure of the attempts previously made to recover it for their use and benefit, were manifest objections to the grant of the relief sought. To assist in surmounting these difficulties, the suit was brought by 18 plaintiffs of which the first was the mosque itself suing by a next friend—not the waqf or institution or charity in some abstract sense but the mosque in the sense of the site and building. The declaration sought was "that plaintiff No.1 was and is the site of a waqf mosque," the injunction sought was that the defendants "should not use plaintiff No.1 for any purpose which may be contrary to its sanctity", and the mandatory injunction asked for was "to reconstruct that portion of plaintiff No.1—i.e., the mosque which they demolished." The choice of this curious form of suit.

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was motived apparently by a notion that if the mosque could be made out to be a "juristic person" this would assist to establish that a mosque remains a mosque for ever, that limitation cannot be applied to it, that it is not property but an owner of property. A second feature of the suit as framed is that a number of the plaintiffs were minors or women. This was thought to be of some assistance to the plaintiffs in meeting objections taken under the Sikh Gurdwaras Act, 1925, to the competence of the suit, but it was also relied upon before the Board in argument as relevant to the general question of limitation.

A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman J. to the contrary [*Aziz Bano* v. *Muhammad Ibrahim Husain* (1)] was cited to him but he wrongly considered that section 49 of the Evidence Act was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of *pandits* on questions of Hindu law and the reference made thereto in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2). No great harm, as it happened, was done by the admission of this class of evidence as the witnesses made reference to authoritative texts in a short and sensible manner. But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions

(1) I. L. R. (1925) 47 All. 823, 835. (2) (1868) 12 Moo. I. A., 397, 436—39.

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upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. The Muslim law is not the common law of India: British India has no common law in the sense of law applicable *prima facie* to everyone unless it be in the statutory Codes, e.g., Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (*muftis*, *maulvis* or in the case of Hindu law *pandits*) had its day but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to:—

"It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted."

It has been made clear by learned counsel for the appellants that the plaintiffs do not now claim any relief extending beyond the actual site of the mosque building. The first question to be asked with reference to this immoveable property is the question: In

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whom was the title at the date when the sovereignty of this part of India passed to the British in 1849? It may have been open to the British on the ground of conquest or otherwise to annul rights of private property at the time of annexation as indeed they did in Oudh after 1857. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act or in any other Act authorising the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property [cf. *West Rand, etc., Ltd.* v. *The King* (1)]. Who then immediately prior to the British annexation was the local sovereign of Lahore? What law was applicable in that State to the present case? Who was recognised by the local sovereign or other authority as owner of the property now in dispute? These matters do not appear to their Lordships to have received sufficient attention in the present case. The plaintiffs would seem to have ignored them. It is idle to call upon the Courts to apply Mahommedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognised and enforced as such. If it be assumed, for example, that the property in dispute was by general law or by special decree or by revenue-free (*muafi*) grant vested in the Sikh *gurdwara* according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that

(1) L. R. (1905) 2 K. B. 391.

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Ranjit Singh took great interest in the *gurdwara* and continued endowments made to it by the Bhangi Sardars as was held by Hilton J. (20th January, 1930) presiding over the Sikh Gurdwaras Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh *gurdwara* under a *muafi* grant from the Sikh rulers. It was for the plaintiffs to establish the true position at the date of annexation. Since the Sikh mahants had held possession for a very long time under the Sikh state there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahommedan law as modified by the Indian Limitation Act, 1908.

The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Indian Limitation Act of 1908 applies to immoveables made waqf notwithstanding that the ownership in such property is said in accordance with the doctrine of the two disciples to be in God. Thus in *Abdur Rahim* v. *Narayan Das Aurora* (1), it was expressly stated by Lord Sumner delivering the judgment of the Board :—

" The property in respect of which a wakf is created by the settlor is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed ' God's acre ' and this is the basis of the settled rule that such

(1) L. R. (1922) 50 I. A. 84.

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property as is held in wakf is inalienable except for the purposes of the wakf."

Yet in that very case it was taken as plain that if article 134 of the Limitation Act did not apply to a waqf the claim to recover possession of waqf property was governed either by article 142 or article 144. The rule of Hanafi law that waqf property is taken to have ceased to be held in human ownership is applied to all such property even if the waqf be a *waqf-alal-aulad* or waqf for the benefit of descendants.

The result of the rule is not that the property cannot in any circumstances be alienated but that it can only be alienated for proper purposes and save as provided by the terms of the endowment with the leave of the Court. In some circumstances it can even be taken in execution. In the particular case of a mosque, like that of a graveyard, the waqf property is intended to be used in specie for a certain purpose—not to be let or cultivated so that the income may be applied to the purposes of the *waqf*. This and other facts make some case for a contention that such property cannot be alienated on any conditions or with any sanction, though their Lordships are by no means satisfied to affirm so wide a proposition. But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It is impossible to read into the modern Limitation Acts any exception for property made waqf for the purposes of a mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a

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site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the waqf, or that it is not so possessed so long as it is referred to as "mosque," or unless the building is rased to the ground or loses the appearance which reveals its original purpose.

The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. It is wholly inconsistent with many decisions whereby a worshipper or the mutawali has been permitted to maintain a suit to recover the land and buildings for the purposes of the waqf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the case of this very building. The learned District Judge in the course of his able and careful judgment noted that the defendants were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say:

"It is proved beyond doubt that mosques can and do hold property. There is ample authority for the proposition that a Hindu idol is a juristic person and it seems proper to hold that on the same principle a mosque as an institution should be considered as a juristic person. It was actually so held in *Jinda Ram* v. *Husain Bakhsh* (1), and later in *Maula Bakhsh* v. *Hafiz-ud-Din* (2)."

(1) 59 P. R. 1914 p. 200. (2) 1926 A. I. R. (Lah.) 372.

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That there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. The question whether a British Indian Court will recognise a mosque as having a *locus standi in judicio* is a question of procedure. In British India the Courts do not follow the Mahomedan law in matters of procedure [cf. *Jafri Begum* v. *Amir Muhammad Khan* (1), per Mahmood J.] any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. At the same time the procedure of the Courts in applying Hindu or Mahomedan law has to be appropriate to the laws which they apply. Thus the procedure in India takes account, necessarily, of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu law as essential thereto, e.g., that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the *sebait* (*Jagadindranath* v. *Hemanta Kumari* (2). Very considerable difficulties attend these doctrines—in particular as regards the distinction, if any, proper to be made between the deity and the image [cf. *Bhupati Nath* v. *Ram Lal* (3), Gopalchandra Sarkar Sastri's "Hindu Law," 7th ed., pp. 865 *et seq.*]. But there has never been any doubt that the property of a Hindu religious endowment—including a *thakurbari*—is subject to the law of limitation [*Damodar Das* v. *Lakhan Das* (4); *Sri Sri Iswari Bhubaneshwari Thakurani* v. *Brojo*

(1) I. L. R. (1885) 7 All. 822, 841-2 (F.B.).
(2) L. R. (1905) 31 I. A. 203.
(3) I. L. R. (1910) 37 Cal. 128, 153 (F.B.).
(4) L. R. (1910) 37 I. A. 147.

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Nath Dey (1)]. From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons. It is as true in law as in other spheres "*entia non sunt multiplicanda praeter necessitatem.*" The decisions recognising a mosque as a "juristic person" appear to be confined to the Punjab: *Shankar Das* v. *Said Ahmad* (2), *Jinda Ram* v. *Husain Bakhsh* (3), *Maula Bakhsh* v. *Hafiz-ud-din* (4). In none of these cases was a mosque party to the suit and in none except perhaps the last is the fictitious personality attributed to the mosque as a matter of decision. But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution—apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immoveable property.

It is not necessary in the present case to decide whether in any circumstances or for any purpose a Muslim institution can be regarded in law as a "juristic person." The recognition of an artificial person is not to be justified merely as a ready means of making enactments—well or ill expressed—work conveniently. It does not seem to be required merely to give an extended meaning to the word "person" as it appears in the Punjab Pre-emption Act, 1905, or in the definition of gift contained in section 122 of the Transfer of Property Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes without the

(1) L. R. (1937) 64 I. A. 203.
(2) 153 P. R. 1884.
(3) 59 P. R. 1914.
(4) 1926 A. I. R. (Lah.) 372.

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appointment of a trustee in the sense of the English law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of waqf, as having been made to the mutawali than to do so by inventing an artificial person in addition to the mutawali (and to God in whom the ownership of the mosque is placed by the theory of the law). Their Lordships do not understand that in this respect a mosque is thought to be in any unique position according to the authorities on Mahomedan law. "A gift may be made to a mosque or other institution" (Tyabji Principles of Muhammadan Law, 2nd ed., 1919, p. 401, cf. Abdur Rahim's Muhammadan Jurisprudence, p. 218). A gift can be made to a *madrasah* in like manner as to a *masjid*. The right of suit by the mutawali or other manager or by any person entitled to a benefit (whether individually or as a member of the public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a *caput mortuum*, and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such institutions as artificial persons in the British Indian Courts.

The property now in question having been possessed by Sikhs adversely to the waqf and to all

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interests thereunder for more than 12 years, the right of the mutawali to possession for the purposes of the waqf came to an end under article 144 of the Limitation Act and the title derived under the dedication from the settlor or wakif became extinct under section 28. The property was no longer, for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his creatures." The main contention on the part of the appellants is that the right of any Moslem to use a mosque for purposes of devotion is an individual right like the right to use a private road [*Jawahra* v. *Akbar Husain* (1)]; that the infant plaintiffs, though born a hundred years after the building had been possessed by Sikhs, had a right to resort to it for purposes of prayer; that they were not really obstructed in the exercise of their rights till 1935 when the building was demolished; and that in any case in view of their infancy the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. This argument must be rejected. The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the waqf property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the possession of the mutawali or of some other person for the purposes of the waqf. As a beneficiary of the religious endowment such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be

(1) I. L. R. (1885) 7 All. 178.

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entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the waqf and every interest thereunder the rights of all beneficiaries have gone: the land cannot be recovered by or for the mutawali and the terms of the endowment can no longer be enforced [cf. *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (1)]. The individual character of the right to go to a mosque for worship matters nothing when the land is no longer waqf and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication.

This seems to their Lordships a sufficient answer to the argument that the only article of the Limitation Act which affects the right of the plaintiffs (other than the first plaintiff) is article 120. Under that article any plaintiff who had been of age for more than six years before the date of the suit would be barred as he has clearly been excluded from resort to the building for purposes of prayer. But the true answer to these plaintiffs and to the minor plaintiffs is that the rights of the worshippers stand or fall with the waqf character of the property and do not continue apart from their right to have the property recovered for the waqf and applied to its purposes. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the waqf. Were the law otherwise the effect of limitation upon charitable endowments would be either negligible or absurd. The plaintiffs may, if they choose, refrain

(1) I. L. R. (1918) 41 Ma[illegible]

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from asking that the land be recovered for the waqf but they do not alter the character of their right by deserting the logic of their case.

It remains to say that in the opinion of their Lordships the present suit is concluded on the general principle of *res judicata*, by the decision in the suit of 1855 and also under section 37 of the Sikh Gurdwaras Act, 1925, by the decision of the Tribunal (20th January, 1930) rejecting the petition of the Anjuman Islamia. The mere circumstance that the plaintiffs have chosen not to seek recovery of the land in dispute but ask for relief in the forms of declaration and injunction does not avail to enable them to litigate again the claim made by Nur Ahmad as mutawali to recover the property for the purposes of the waqf. The ground of the decision of 1855 does not affect the question of *res judicata*.

Section 37 of the Act of 1925 is as follows:

"Except as provided in this Act no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this Part."

It is sufficiently plain that if the present suit were to succeed the effect of the decree would necessarily be inconsistent with the decision of the Tribunal rejecting the petition of the Anjuman Islamia. Unless therefore the case can be brought within the opening words of section 37—"except as provided in this Act"—that section is fatal to the claim. Their Lordships are of opinion that the words of exception have no reference to the provisions of clause (*ii*) of

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section 30 which states the circumstances under which a suit shall be tried notwithstanding that the claim was not put forward before the Tribunal. Section 37 assumes that a civil court has before it a competent suit in which one party or another would but for the section be entitled to a certain order or decree. and it provides that such order or decree shall not be made if the effect of it would be inconsistent with any decision of a Tribunal. The words of exception with which section 37 opens are doubtless accounted for by the provisions of section 34 authorising appeals to the High Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.

C. S. S.

Solicitors for the appellants: *Peake & Co.*

Solicitors for the respondents: *Charles Russell & Co.*

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MAHANT SHRI SRINIVASA RAMANUJ DAS

v.

SURAJNARAYAN DASS & ANR.

May 6, 1966

[A. K. SARKAR, C.J., M. HIDAYATULLAH, R. S. BACHAWAT, J. M. SHELAT AND RAGHUBAR DAYAL, JJ.]

Orissa Hindu Religious Endowments Act, 1939 (*Orissa* 4 *of* 1939), *—Math, Characteristics of—Distinction between public and private trust—Math, if governed by Act—Onus of proof of showing that Math is outside Act—Gazetteer—Statements in—If evidence.*

The Commissioner of Hindu Religious Endowments, Orissa, demanded contribution under s. 49 of the Hindu Religious Endowments Act and took steps to enforce certain other provisions of the Act against the appellants and certain properties. These properties, the appellants claimed, were not math as defined in the Act and the public had no free access to its premises and had no right of entry or worship of the deity installed therein. The Commissioner held that the properties were math as defined in the Act and that the properties constituted a 'religious endowment' to which the Act applied. Thereafter, the appellants instituted a suit and prayed for setting aside of the decision of the Commissioner and for a declaration that the Act did not apply to the properties in suit. The trial Court dismissed the suit, which on appeal was confirmed by the High Court. In appeal by special leave.

HELD: The appeal must be dismissed.

(1) An institution comes within the definition of 'Math' if it satisfies three conditions (i) that the institution be for the promotion of the Hindu religion; (ii) that it be presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples; and (iii) that the office of such person devolves in accordance with the directions of the founder of the institution or is regulated by usage. [441E]

There was ample evidence on the record to show that the property was presided over by the Mahant, that the Mahant exercised spiritual headship over the disciples, and that the succession to the office of the Mahant was regulated by the usage of the institution. There could be no question that such an institution must have been for the promotion of the Hindu religion. [441F]

Religious endowment includes the premises of the Math. If the premises of the property had been used both for secular purposes and for religious purposes, it according to the explanation to sub-s. (12) of s. 6, shall be deemed to be a religious endowment and its administration shall be governed by the provisions of the Act. This makes it clear that the premises of the math is not only deemed to be a religious endowment, but is deemed to be a Hindu Public religious endowment to which the Act applies, as the provisions of the Act govern its administration. It follows that an institution which comes within the definition of math under the Act, *ipso facto*, comes within the expression 'Hindu public religious endowment' and therefore become subject to the provisions of the Act. [441H-442B]

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The definition of 'temple' requires that the place would be a temple if it be used as a place of public religious worship. There is no requirement that an institution to be a math must be a public institution for the promotion of the Hindu religion. The use of the word 'public' was not necessary in connection with an institution for such promotion of the Hindu religion as any institution for such promotion of the Hindu religion must be of a public nature, the object being to promote Hindu religion, there would be no point in shutting the benefit of the institution to anyone among the Hindus. [442C-D]

The distinction between a public trust and a private trust is, broadly speaking, that in a public trust the beneficiaries of the trust are the people in general or some section of the people, while in the case of a private trust the beneficiaries are an ascertained body of persons. The beneficiaries of a math are the members of the fraternity to which the math belongs and the persons of the faith to which the spiritual head of the math belongs, and constitute, therefore, at least a section of the public. Maths, in general, consequently, are public maths. [442E-F]

[QUAERE: Whether there can be a private math or not?]

(2) The onus was initially on the appellant-plaintiff to show that the order of the Commissioner was wrong and this he could only show by establishing *prima facie* that the Math was not a math as defined in the Act and that the various properties were not endowed properties. [443H]

(3) The gazetteer could be consulted on matters of public history. [447B]

(4) The documentary evidence on the record did not support the case of the appellant, but showed that the properties were those of the math.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 205 of 1964.

Appeal by special leave from the judgment and decree dated November 30, 1961 of the Orissa High Court in First Appeal No. 63 of 1957.

A. K. Sen and *P. K. Chatterjee,* for the appellant.

Niren de, Addl. Solicitor-General, Dipak Datta Chaudhuri and *R. N. Sachthey,* for respondent No. 2.

The Judgment of the Court was delivered by

Raghubar Dayal, J. This appeal, by special leave, is against the judgment and decree of the Orissa High Court, confirming the judgment and decree of the Additional Subordinate Judge, Puri, dismissing the suit instituted by Mahant Gadadhar Ramanuj Das, represented after his death by Mahant Srinivas Ramanuj Das, for the setting aside of the decision of the Commissioner of Endowments dated July 20, 1946, under s. 64(1) of the Orissa Hindu Religious Endowments Act, 1939 (Act 4 of 1939), hereinafter called the Act, and for a declaration that the Act did not apply to the properties described in Schedules Ka, Kha and Ga of the plaint.

The allegations in the plaint are as follows. The premises on which the residential quarters of the plaintiff existed was said to

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be popularly known as (i) Srinivas Kote; (ii) Rajagopal Math; and (iii) Emar Math, according to the names of the different ancestors of the plaintiff, Srinivasachari, Rajagopalachari and Embarachari. It was alleged that these premises, though known as Emar Math, was not a 'math' as defined in the Act. The public had no free access to its premises and had no right of entry or worship of the deity installed therein. Embarachari and his ancestors were alleged to be grahasts. His successors to the Emar Math were celibate. Srinivasachari was the grand-father of Embarachari. It is alleged that he acquired a portion of the present site of the plaintiff's residential quarters and built his residence there and installed therein his family deity Sri Raghunathji for his own spiritual benefit and the spiritual benefit of his family members and that Embarachari acquired a large plot of land adjacent to Srinivas Math as an absolute gift and constructed buildings thereon. The buildings therefore became popularly known as Emar Math, although Embarachari was a married man and was living there with his wife and children with the private deity Sri Raghunathji.

The plaintiff alleged that the properties described in Schedule Ka of the plaint were his personal properties, those in Schedule Ka-1 as acquired through absolute gifts to the plaintiff or his ancestors and those in Ka-2 as gifted to or purchased by the plaintiff or his predecessors and that they were wrongly recorded in the settlement papers in the name of the plaintiff as marfatdar of Lord Jagannath. The properties in Schedule Kha are alleged to be Amrit Manohi properties of Lord Jagannath held by the plaintiff as marfatdar and to have been acquired either by purchase or 'krayadan' or by way of gift subject to the charge of some offering to Lord Jagannath. The properties in Schedule Ga were alleged to be owned and possessed by the plaintiff as marfatdar of various private deities. It was alleged that none of the properties in these schedules was however dedicated to the public and that the public had no interest in or right to any of the properties. The properties therefore did not constitute 'public religious endowments' within the meaning of the Act which, accordingly, could not apply to them.

The Commissioner of Hindu Religious Endowments, Orissa, hereinafter called the Commissioner, demanded contribution under s. 49 of the Act and took steps to enforce certain other provisions of the Act against the plaintiff and the properties in suit. This led the plaintiff to formally ask for a decision under s. 64(1) of the Act. The Commissioner decided against him on July 20, 1946 and held that the Emar Math was a 'math' as defined in the Act and that the properties constituted a 'religious endowment' to which the Act applied. Thereafter the plaintiff instituted this suit and prayed for the setting aside of the decision of the Commissioner and for a declaration that the Act did not apply to the properties in suit.

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A The Commissioner, defendant No. 2, contested the suit asserting that the properties in suit were public debottar properties and were public endowments to which the Act applied. It was further contended that the premises of Emar Math was a 'math' as defined in the Act and the public had a right to go there and had been actually going there from time immemorial.

B

The trial Court accepted the contentions of the defendant Commissioner and dismissed the suit. The High Court, on appeal by the plaintiff, agreed with the findings of the trial Court and accordingly dismissed the appeal.

Two main contentions have been raised before us. One is that
C the Emar Math in suit is not a public math and that therefore the Act does not apply to it. The other is that the properties in Schedule Ka were the personal property of the appellant-plaintiff and that the properties in schedules Kha and Ga were private debottar properties of the plaintiff. Before dealing with the contentions, we may refer to the object and the relevant provisions of the Act.

The Act was enacted for the better administration and gover-
D nance of certain Hindu Religious Endowments. Section 2, sub-s. (a), states that the Act applies, save as thereinafter provided, to all Hindu public religious endowments which, according to the Explanation to that sub-section, do not include Jain religious endowments. 'Math' is defined in sub-s. (7) of s. 6 as:

> " 'math' means an institution for the promotion of
> E the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headships over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple and also places of instruction
> F or places for the maintenance of vidyarthies or places for rendering charitable or religious services in general which are or may be appurtenant to such institution."

Sub-s. (10) of s. 6 defines the expression 'person having interest' to mean, in the case of a math, a disciple of the math or a person of the religious persuasion to which the math belongs. Sub-s. (12)
G of s. 6 defines 'religious endowment' or 'endowment' as meaning:

> "all property belonging to, or given or endowed for the support of maths or temples or for the performance of any service or charity connected therewith whether or not such maths or temples be in ruins or the worship in
> H connection with them is discontinued either temporarily or permanently and includes the premises of maths or temples."

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The explanation thereto reads:

"Where an endowment has been made or property given for the support of an institution which is partly of a religious and partly of a secular character or for the performance of any service or charity connected therewith, or where an endowment made or property given is appropriated partly to religious and partly to secular uses, such endowment or property or the income therefrom shall be deemed to be a religious endowment and its administration shall be governed by the provisions of this Act."

According to sub-s. (13) of s. 6, 'temple' is defined as follows:

"'temple' means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any section thereof, as a place of religious worship and also includes any cultural institution or mandab or library connected with such a place of public religious worship."

General superintendence of all religious endowments vested in the Commissioner under s. 11 of the Act. Clause (b) of sub-s. (1) of s. 12 requires the Commissioner to maintain a register for every math or temple and all title deeds and other documents relating thereto. Sub-s. (2) provides that the register shall be prepared, verified and signed by the trustee of the math or temple or by his authorised agent and submitted by him to the Commissioner within such period after the commencement of the Act as the Commissioner may fix. Sub-s. (3) authorises the Commissioner to make such enquiry as he may consider necessary and to direct that the register be approved with such alterations, omissions or additions as he thinks fit to order. Section 13 requires the annual verification of the entries in this register.

Section 46 reads:

"The trustee of a math or temple may, out of the funds of the endowments in his charge, after satisfying adequately the purposes of the endowments, incur expenditure on arrangements for securing the health, safety or convenience of disciples, pilgrims or worshippers resorting to such math or temple:

Provided that the Commissioner may, for reasons to be setforth in writing, restrict and place under such control as he may think fit the exercise by the trustee of his discretion under this section."

Section 49 provides that every math or temple and every specific endowment attached to a math or temple shall pay annually contributions at specified rates for meeting the expenses of the Commissioner when the annual income exceeds a specified amount.

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A Under s. 51(1), the amount of contributions payable by a math under s. 49 was to be assessed on and notified to the trustee of the math, temple or specified endowment concerned in the prescribed manner. The trustee can object to the assessment and has to pay such amount as be finally determined by the Commissioner on considering the objection.

B Section 64 reads:

> "(1) If any dispute arises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Commissioner.
>
> C (2) Any person affected by a decision under sub-section (1) may, within one year, institute a suit in the Court to modify or set aside such decisions; but subject to the result of such suit, the order of the Commissioner shall be final."

Before we deal with the contention about the Emar Math being not a public math, we may first consider what the Commis-
D sioner had to do under s. 64(1) of the Act. The Commissioner had to decide under that sub-section whether the Emar Math was a math as defined in the Act. He held that it was and we have to see whether he was right in so doing.

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An institution comes within such a definition if it satisfies three conditions: (i) that the institution be for the promotion of
E the Hindu religion; (ii) that it be presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples; and (iii) that the office of such person devolves in accordance with the directions of the founder of the institution or is regulated by usage.

There is ample evidence on the record to show that the Emar Math was presided over by the Mahant, that the Mahant exercised
F spiritual headship over the disciples, and that the succession to the office of the Mahant was regulated by the usage of the institution. There could be no question that such an institution must have been for the promotion of the Hindu religion. It was for such an object that one would have a body of disciples. It is in evidence that the Mahant used to preach and had a large number of disciples who were attracted by the high reputation the Mahant
G enjoyed. It is said that Embarachari was regarded with great respect in his times and that it was on account of such respect that the gift of the land evidenced by the Deed, Exhibit 110, executed sometime is 1767, was made in his favour.

It is not disputed for the appellant that the institution is a
H math. What is disputed is that it is not a public math as required by the Act. The premises of the Emar Math constituted a religious endowment, which includes the premises of maths or temples.

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Further, if the premises of the Emar Math had been used both for secular purposes and for religious purposes, it, according to the explanation to sub-s. (12) of s. 6, shall be deemed to be a religious endowment and its administration shall be governed by the provisions of the Act. This makes it clear that the premises of the Math is not only deemed to be a religious endowment, but is deemed to be a Hindu public religious endowment to which the Act applies, as the provisions of the Act govern its administration. It follows that an institution which comes within the definition of 'math' under the Act, *ipso facto* comes within the expression 'Hindu public religious endowment' and therefore becomes subject to the provisions of the Act.

In this connection, reference may be made to the definition of 'temple'. While the definition of 'temple' requires that the place would be a temple if it be used as a place of public religious worship, there is no requirement that an institution to be a math must be a public institution for the promotion of the Hindu religion. The use of the word 'public' was not necessary in connection with an institution for the promotion of the Hindu religion as any institution for such promotion of the Hindu religion must be of a public nature; the object being to promote Hindu religion, there would be no point in shutting the benefit of the institution to anyone among the Hindus. ...

The distinction between a public trust and a private trust is, broadly speaking, that in a public trust the beneficiaries of the trust are the people in general or some section of the people, while in the case of a private trust the beneficiaries are an ascertained body of persons. The beneficiaries of a math are the members of the fraternity to which the math belongs and the persons of the faith to which the spiritual head of the math belongs, and constitute therefore at least a section of the public. Maths, in general, consequently, are public maths. We say nothing as to whether there can be a private math or not. Mukherjea states at p. 390, in his 'Law of Endowment', 1st Edition:

> "By private math should be meant those institutions where the head or superior holds the property not on behalf of an indeterminate class of persons or a section of the public but for a determinate body of individuals, *viz.*, the family or descendants of the grantor."

In the present case, there is no evidence as to who actually founded the Math by granting the property to the spiritual preceptor. The earliest evidence on the record is of year 1767 when a piece of land was gifted to Emar Gosain on which a portion of the present Math stands. However, there is no evidence, whoever the founder be, that any particular family is the only body of persons who is interested in the Math. The spiritual family of the preceptor consisting of his disciples and the disciples in succession, cannot be deemed to be such a private family for whose benefit

A the Math is founded and on that account the Math be called a private Math. The body of disciples and the disciples' disciples etc., is a very unascertainable body. The Emar Math is therefore not such a private math.

Much has been said on either side with respect to the onus in connection with the Math being public or not. Onus loses its importance when the parties have led evidence sufficient to determine the matter in dispute. The High Court agreed with the trial Court that the onus was on the plaintiff-appellant to establish that the institution was the private property of the Mahant. It is said in para 10 of its judgment that the initial burden of showing that the Commissioner's decision was wrong was on the plaintiff and that apart from the appellant's position as plaintiff he had a heavy burden to establish affirmatively that the institution was the private property of the Mahant.

It is contended for the appellant that the initial onus lay on the defendant-respondent to establish that the Math was a public math. Reliance is placed on several cases of which reference may be made to *Parma Nand* v. *Nihal Chand*(1) in which the Privy Council approved of the view of the High Court that it was for the defendants to prove that the plaintiff who was admittedly in possession of the property held it on a trust created for a public purpose of a charitable and religious nature. The application was made to the District Judge by some representatives of the Hindu public alleging that the Baghichi Thakaran was a public endowment for religious and charitable purposes, and calling upon Mahant Narain Das to furnish details of the nature and purposes of the trust. Narain Das then instituted the suit which ultimately went to the Privy Council.

Section 5(3), the Charitable and Religious Trusts Act, 1920 (Act 14 of 1920) provides for the stay of proceedings before the Judge under s. 3 of that Act, in order that the person denying the public nature of the trust may institute a suit for a declaration that the property was not trust property. There was no decision of any binding nature by the Court or by any authority which was to be avoided by the plaintiff instituting a suit for a declaration that the property was not trust property. In the present case the suit was instituted in pursuance of s. 64(2) of the Act which provides that any person affected by a decision under its sub-s. (1) may, within one year, institute a suit in the Court to modify or set aside such decision and that, subject to the result of such a suit, the order of the Commissioner shall be final. The plaintiff-appellant instituted this suit for the setting aside of the order of the Commissioner under sub-s. (1) of s. 64 holding the institution to be a 'math' as defined in the Act and the property belonging to it endowed properties. This order of the Commissioner is final, subject to the result of the suit. The plaintiff has to get over it to avoid that decision. The onus is therefore initially on the plaintiff to show that the

(1) L.R. 65 I.A. 252.

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order of the Commissioner is wrong and this he can only show by establishing *prima facie* that the Math is not a math as defined in the Act and that the various properties were not endowed properties. A

Learned counsel for the parties have argued on the basis that the Act applies to public maths. It is urged for the appellant that it is not proved to be a public math, while the respondent contends to the contrary. Undoubtedly, the Math had been in existence for over two centuries. Oral evidence about the founding of the Math could not be possible after such a long period. The mahant of the Math has not come in the witness box. The Courts below have held the Math to be a public math on the basis of several considerations. These are that the Mahants had been celibate and therefore not likely to have personal ownership in the property including even the dakshinas or cash offered to them, by disciples or other devotees. Religious books, *viz.*, the Bhagavad Gita and the Ramayan, are recited daily in the temple of Raghunathji. There was also the image of Ramanuj, the founder of the cult. This image is carried in procession for five days around the compound of the main temple of Lord Jagannath at Puri. This could be to provide darshan to the devotees of the Vaishnav faith. Some ascetics called babajis reside at the math and are fed by the math authorities. The buildings of the math are many, much beyond the requirements of the Mahant and the few resident disciples. The Mahants of this Math have the privilege of rendering service to Lord Jagannath both in the temple and in the Gundicha Mandir. They also manage the Amrit Manchi properties the proceeds from which are utilised for offering bhog to Lord Jagannath and the *Maha Prasad* therefrom is distributed to the poor pilgrims and the Vaishnav visitors. B C D E

Apart from these considerations, certain documents relied upon by the High Court tend to favour the finding that Emar Math is a public math and that the various properties, though ostensibly acquired by the Mahants, were really acquired for the Math. The first document of importance in this respect is Exhibit 110 of 1767. It is a deed of gift by a private person in favour of Sadhu Emar Gosain, the Adhikari of Ramanuj Kote Math. P.W. 2 states that Ramanuj Kote belongs to Emar Math area. This description supports the conclusion that the Math, though under a different name, had been in existence from before the time of Emar Gosain. The plaint alleges that the premises in suit had been known by different names. The gift deed states that the donee will enjoy the property gifted in perpetuity. The idea of perpetuity is further emphasised when it is said in the gift deed: F G

> "Your Chelas, Sishyas and Anusishyas shall all enjoy this property for ever in perpetuity until the sun and moon last."

This stipulation shows that it was not a gift personally to Emar, that the gift was for the benefit of chelas, sishyas and anusishyas and that it was in favour of persons indeterminate in number. The H

A fact that the chelas are distinguished from sishyas and anusishyas shows that the chela is the nominee of the Guru for the purpose of succession and that though the chela would succeed to the Gaddi, he would hold the properties not for personal enjoyment but for the benefit of sishyas and their sishyas—indicating that the property was trust property. Further, the land donated by this B document admittedly is a portion of the site on which the Math stands. The gift of such land could be for no other object but for the purpose of the construction of the Math and therefore a gift to the Math, though it would normally be in the name of the Mahant, the head of the Math.

Another document of importance in this connection is the C Will, Exhibit 140, executed by Mahant Mohan Dass in 1857 in favour of his disciple who was the subsequent Mahant by the name Mahant Raghunandan Das. This Will, besides speaking of the careful training given to Raghunandan Das making him fit to succeed to the gaddi, states :

> "After me the said Raghunandan as my successor in the Mahantai Gaddi shall become the Mahant, Malik D and Gadanashin and shall continue to exercise ownership and possession in respect of all the properties as he is doing now and shall enjoy as the rightful owner and Malik of all the movable properties of and connected with this Math both within this part of the country and outside (Desh Bideshare) and shall continue to manage the rendering and supplying of the fixed Sheba Puja offerings and E Bhog etc. of Shri Jagannath Mohaprabhu in accordance with the traditional customs and shall give food and shelter, as he is doing now, to Bhaishnab guests and other persons arriving in the Math (Abhyagata) etc., and committing no laches in this and remaining in observance of his own religion, shall manage all affairs".

F The last expression with respect to giving of food and shelter to Vaishnay guests and other persons arriving in the Math etc. indicates that visitors, belonging to the Ramanuj Sampraday, used to visit the Math when on a pilgrimage to the Lord Jagannath Temple and the Mathadhish of Emar Math used to give shelter and food to them and the will enjoined the nominee to continue that practice. Such a practice shows that the beneficiaries of the Math properties were G again indeterminate in number. The gift being to the Math, though ostensibly in the name of the Mahant, the Mahant held the properties as a trustee for the indeterminate class of beneficiaries, *viz.*, sishyas, anusishyas and visitors. This stamps the Math with the public character. It is significant to note that there is not a word in this document to the effect that Mahant Mohan Das possessed any H private property and that such private property was to go to Raghunandan Das who was to succeed him on the gaddi or to somebody else. The only conclusion from such an omission can be that Mahant

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Mohan Das did not consider any property to be his own personal property. Whatever he possessed and over which he exercised ownership was considered to be the property of the Math or properties connected with the Math and that his successor was to exercise ownership and possession over all such properties.

We therefore hold that the Emar Math is a math as defined in the Act and that it is a public math.

The history of the Emar Math, according to the passage in the Puri Gazetteer, fits in with our finding. The High Court has relied on what has been stated in the Puri Gazetteer of O'Malley of 1908, at pp. 112-113. The relevant portion of the passage relied on is the following:

> "No account of Jagannath worship would be complete without some account of the maths in Puri. Maths are monastic houses originally founded with the object of feeding travellers, beggars, and ascetics, of giving religious instruction to chelas or disciples, and generally of encouraging a religious life. The heads of these religious houses who are called Mahants or Mathadharis are elected from among the chelas, and are assisted in the management of their properties by Adhikaris who may be described as their business managers. They are generally celibates but in certain maths married men may hold the office. Mahants are the gurus or spiritual guides of many people who present the maths with presents of money and endowments in land. Thus, the Sriramdas or Dakshinaparswa Math received rich endowments from the Mahrattas its abbot having been the guru of the Mahratta Governor; While the Mahant of Emar Math in the eighteenth century who had the reputation of being a very holy ascetic, similarly got large offerings from his followers. Both Saiva and Vaishnava Maths exist in Puri. The lands of the latter are known as Amruta Manchi (literally nectar food), because they were given with the intention that the proceeds thereof should be spent in offering bhoga before Jagannath and that the Mahaprasad thus obtained should be distributed among pilgrims, beggars and ascetics; they are distinct from the Amruta Manchi lands of the temple itself which are under the superintendence of the Raja. In 1848 Babu Brij Kishore Ghose roughly estimated the annual income of 28 maths from land alone at Rs. 1,45,400 and this income must have increased largely during the last sixty years.
>
> There are over 70 maths in Puri Town. The Chief Saiva maths are located in the sandy tract near Swargadwar *viz.*, Sankaracharya math with a fine library of old manuscripts and Sabkarananda math which has a branch at Bhubaneshwar. Most of the maths are naturally

Vaishnava. The richest of the latter are Emar, Sriramdasa and Raghavadasa the inmates of which are Ramats or followers of Ramananda."

It is urged for the appellant that what is stated in the Gazetteer cannot be treated as evidence. These statements in the Gazetteer are not relied on as evidence of title but as providing historical material and the practice followed by the Math and its head. The Gazetteer can be consulted on matters of public history.

The next question relates to the nature of the properties in suit.

The oral evidence about the foundation of the Math or about the various acquisitions of property by purchase or by gift is nil. Whatever a witness has deposed has not been on the basis of his personal knowledge. This is natural when the Math was founded about two hundred years ago and when most of the acquisitions had taken place long ago. The best person to speak, though not from personal knowledge, could have been the Mahant himself. He can base his knowledge on the documents about the history of the Math and the acquisition of the properties. Such documents must naturally be in the custody of the Mahant. The Mahant has not come in the witness box. All the documents have not been produced. In fact it is the plaintiff alone who produced a number of documents but he had picked and chosen from among the documents in his possession. Some documents which could have thrown some light on the question under determination have not been produced. It is true that the defendant-respondent also did not call upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking no inference adverse to the plaintiff can be drawn from his non-producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent's case.

The documents relied upon for the appellant relate to acquisition of properties by purchase or gift and are in the name of the Mahant of the Math. Such documents being in the name of the Mahant alone, do not necessarily lead to the conclusion that the properties were acquired or received in donation by the Mahant in his personal capacity for his personal use and possession. An inference that they were acquired by the Mahant for the Math is equally possible and in fact is to be preferred to what appears on the face of the documents. The onus of proof being on the appellant, it was possible for him to establish his case from the documents available to him. But he has chosen not to place at the disposal of the Court all the relevant documents. It is significant to note that not a single document has been produced by the plaintiff

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which specifically mentioned the purchase or the gift to be by or to the Math itself. It is difficult to believe that the Math acquired no property during the long period of its existence. The Mahant as the head of the institution acts for the Math and is its real representative. All the dealings for and on behalf of the Math must be conducted by the Mahant and it should be no wonder if the Mahant acting for the Math acts ostensibly in his own name. Though the documents relating to purchase of properties have been produced, no evidence was led to show that they were purchased from the personal assets of the Mahant. Presumably if there was such evidence, it would have been produced. The only possible inference which can be drawn is that they were purchased from the assets of the Math.

Reference may be made to *Sitaram Dass Banasi* v. *H.R.E. Board Madras*(1) and to *Raghbir Lala* v. *Mohammad Said*(2). In the former case, Varadachariar, J. said:

> "From the few sale deeds filed in the case, it no doubt appears that some of those properties were purchased in the name of the prior Mahant; but it being admitted that he was an ascetic and celibate and the head of the institution, the probabilities are that they were purchased with the funds of the institution."

and in the latter it was said:

> "No doubt if a question arises whether particular property acquired by a given individual was acquired on his own behalf or on behalf of some other person or institution with whom or with which he was connected the circumstance that the individual so acquiring property was a professed ascetic may have importance."

Reference may also be made in this connection to the Order, Exhibit 136, of the Maharaja of Puri, to Dewan Bhramarbar Ray. The order states:

> "The Maharaja hereby grants this Sananda taking Rs. 3,000 that he has granted the following 145 Batis and 15 Manas of land, that the income of this land will be utilised in Bhog of Lord Jagannath and distributed among the coming Baishnabas. The 19th day of Mass, Anka 2.
>
> 1. Rahang, Ph. Alisa—117 Batis and 15 Manas.
> 2. Out of Bania Kera—10 Batis.
> 3. Chabiskud, Ph. Tinikud—18 Batis."

Of the three properties mentioned in this order, the first one belongs to Schedule Ka-1, the second to Schedule Kha and the third to Schedule Ka-2, attached to the plaint. The property in Schedule Ka-1 is the property which is said to have been acquired by the plaintiff and his ancestors. The property in Schedule Ka-2 is the property said to be acquired by the plaintiff's

(1) I.L.R. 1937 Mad. 197: A.I.R. 1937 Mad. 186-187. (2) A.I.R. 1943 P.C. 79.

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A ancestors for personal services to Lord Jagannath while the properties in Schedule Kha are said to be acquired subject to a charge of offering Bhog to Lord Jagannath. The order makes no distinction in the nature of the objects for which the three properties are given. In fact it shows that the income from all the three properties was to be utilised in offering Bhog to Lord
B Jagannath, and for distributing the prasad among the Vaishnavas who would visit the place. There is nothing in this order that any of the properties was for the personal enjoyment and possession of the Mahant alone. It is not possible to hold that the properties covered by the same grant should fall in different categories as is the case, according to the schedules attached to the plaint.

C Apart from these general considerations, the documentary evidence on record does not support the case of the plaintiff with respect to the properties in schedule Ka-1 and Ka-2. It may also be mentioned at this stage that there is no document on record with respect to the properties in schedules Kha and Ga. We have already referred to document Exhibit 110, the gift deed with respect to the land which forms part of the site of the Math.
D Exhibit 112 refers to certain land given to the Adhikari of Emar Math for building a temple for the God. The document states that the drain for the gruel from the temple of Lord Jagannath used to pass over this land and that this drain had to be shifted. It is difficult to believe that the land which was being used in connection with a public temple would have been given for the purpose of personal enjoyment by the Mahant or for the purpose
E of constructing a private temple.

The land mentioned in Exhibit 115 and Exhibit 116 were acquired by the Mahant on payment of certain amounts. He was further required to pay certain amount towards the 'Kotha Bhoga' of Lord Jagannath. Exhibit 117 relates to a land purchased by the Mahant. He was required to pay certain amount towards
F Chamar Seba of Lord Jagannath.

Exhibit 118 mentions that certain land which the Mahant had purchased was being assigned to his Math in order that he might enjoy it for all times to come. This clearly brings out that the land purchased by the Mahant from some person was made over to the Math. He was exempted from payment of all sorts
G of extra taxes or other similar duties. Exemption from revenue and taxes appears to have been granted because it was understood that the lands were of the ownership of the Math and not the personal properties of the Mahant. Even this property which has been clearly assigned to the Math, according to this document is mentioned in Schedule Ka-1, indicating thereby that no
H particular care had been taken in preparing the schedule which just included the properties which had been acquired by sale deeds.

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Exhibit 119 sanctions certain purchases by Mahant Samujamatra and states that he will enjoy the same for all time to come on dedication of all sorts of requirements for Gundichaghar Chali (House of Lord Jagannath). No other demand towards Kotha should be made on him. This again clearly indicates that the property was dedicated for meeting the expenses of Gundichaghar Chali and was exempted from any other demand towards the Kotha presumably the Kotha Bhog of Sri Lord referred to in Exhibits 115 and 116. This property is included in Schedule Ka-2.

It appears that the various maths at Puri were founded by saints following different cults, but devoted to Lord Jagannath. They had to offer seva to Lord Jagannath in different forms, *e.g.*, offering Bhog and getting back Maha Prasad, Chamar Seva *i.e.*, fanning of the Lord etc. For Bhog or other services which required expenses, the saints were in need of funds and naturally the devotees of the saints would make gifts to them to enable them to perform these services. Gifts of property to the Mahants or exempting the Mahants to pay taxes etc. with respect to the lands purchased by them was therefore merely to provide them with funds necessary for rendering services to Lord Jagannath, on behalf of the Math and also to meeting the necessary expenses in running of the Maths which would include expenses on the maintenance of the buildings, feeding of the Mahant and the disciples and such other persons who came to reside at the Math and also for distributing food to the poor. The documents referred to above make this amply clear and thus show that the properties to which they relate do not belong to the Mahant personally but really belonged to the Math. It makes no difference to the nature of the properties whether they were purchased by the Mahants in their own names or in the names of the Math.

Some properties have been shown to be purchased by the chelas of the Mahants previous to their occupying the gaddi of the Mahant, that is to say, such properties were purchased when they were mere chelas and not mahants. It is therefore submitted for the appellants that these properties could not be held to be math properties now. It is true that the presumption that the properties that were obtained during the period when they were not Mahants cannot be presumed to be properties purchased or acquired for the Math. But the fact remains that when they themselves became Mahants such self-acquired properties did not appear to have been treated in any separate manner. Proceeds from such properties were mixed up with the proceeds of the other property. Letters, Exhibits C & D, by Mahant Gadadhar Das to the Commissioner speak of the entire mingling of the accounts of the private and Math properties. Some witnesses of the plaintiff stated that Gadadhar Das told them later that he had made wrong statement in those letters for ulterior purposes. Courts below did not rightly believe such statements. Further, it

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may be noted that it appears from the sale deed, Exhibit 77, executed in favour of Gadadhar Ramanuj Das, Chela of Mahant Raghunandan Ramanuj Das in 1909, that the founder owed a sum of Rs. 400/- to the Mahant Guru of Gadadhar and that this sum was adjusted towards the purchase price of the property conveyed under this deed. Mahant Mohan Das, by his will Exhibit 140, permitted his Chela Raghunandan, who was nominated to succeed him to get his own name gradually mutated in respect of the lands and zamindaris standing in the name of the Mahant. It follows therefore that the mere fact that certain properties were ostensibly purchased by the chelas does not necessarily mean that those properties were either acquired as their personal properties or that they continued to be their personal properties after they succeeded to the gaddi.

The plaintiff has failed to produce the expenditure accounts with respect to the income from the properties in suit. He has not produced the consolidated budget which is prepared. That could have indicated whether the income and expenditure over the property in suit was treated as of the Math or not. Accounts showing the sources of money from which the properties were acquired have not been produced. These omissions, together with statements in letters Exhibits C & D, are sufficient to support the findings of the Courts below that even these properties had been treated as Math properties.

We are therefore of opinion that the properties mentioned in Schedules Ka-1 and Ka-2, alleged to be the personal properties of the Mahant, are not his personal properties but are properties of the Math.

We may now consider the properties in schedule Kha said to be the Amrut Manohi properties of Lord Jagannath and held by the plaintiff as marfatdar. The plaintiff alleges that these properties were acquired either by purchase or 'krayadan' or by way of gift subject to a charge of some offering to Lord Jagannath which depended upon the individual judgment and discretion of the plaintiff, and that the public had no concern with the enjoyment or management of the usufruct thereof. The Gazetteer makes a reference to such properties and states:—

> "Both Saiva and Vaishnava Maths exist in Puri. The lands of the latter are known as Amruta Manohi (literally nectar food), because they were given with the intention that the proceeds thereof should be spent in offering bhoga before Jagannath and that the Mahaprasad thus obtained should be distributed among pilgrims, beggars and ascetics; they are distinct from the Amruta Manohi lands of the Temple itself which are under the superintendence of the Raja".

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This statement makes it clear that lands endowed to the temple of Lord Jagannath are distinct from the lands or property endowed to the Vaishnava Maths for the purpose of utilising the proceeds of those properties for offering bhoga before Lord Jagannath and the subsequent distribution of that Mahaprasad among pilgrims, beggars and ascetics, presumably visiting the Math, or approaching its authorities for a portion of the Maha Prasad. The mere fact that the proceeds of the properties were to be so used, would not justify the conclusion that these properties were not endowed to the Maths but were endowed to the temple of Lord Jagannath. Properties endowed to the temple of Lord Jagannath were, according to this statement, in the Gazetteer, not under the superintendence of any Math or Mahant but under the superintendence of the Raja of Puri himself.

As already stated, these Amrit Manohi properties are properties which are endowed to the Math by the devotees for a particular service, which is done to Lord Jagannath by the Mahant on behalf of the Math. The properties are therefore properties endowed to the Math and not merely gifted to the plaintiff or, as had been suggested, to Lord Jagannath.

The properties in Schedule Ga are said to be endowed to private deities whose sole marfatdar was the Mahant. The properties in this schedule are 200 in number and entries about them refer them to be of many a deity. These properties too appear to be endowed to the Math in the same way as Amrut Manohi properties had been endowed, that is to say, the devotees of the Mahant provided for the offering of Bhog or any other seva to the various deities by the Mahant as representing the Math. There is nothing unusual about it as a Hindu's devotion is not necessarily limited to one particular deity, to whichever persuasion of the Hindu religion he may belong. The Mahant of a Math, and of such a well-renowned Math as the Emar Math, is not expected otherwise to be the marfatdar of so many deities as a result of properties endowed by a number of persons. The very fact that the Mahant of Emar Nath took upon himself the marfatdari of so many deities indicates that his devotees could think of endowing properties to the Math for the purpose of doing seva of other deities as well.

The fact that the appellant has paid income-tax and municipal taxes with respect to the income from certain properties in suit is not sufficient to rebut the inference to be derived from the various other facts mentioned above.

We therefore hold that the properties in the Schedules to the plaint are the properties of the Math. The result is that the decree of the High Court is correct and the appeal is dismissed with costs.

Appeal dismissed.

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SUKHDEV SINGH

v.

MAHARAJA BAHADUR OF GIDHAUR

[SAIYID FAZL ALI, MUKHEERJEA and CHANDRASEKHARA AIYAR JJ.]

Ghatwali tenures—Nature and incidents—Government ghatwalis and Zemindary ghatwalis—Difference—Zemindar's right to sub-soil minerals—District Gazetteers—Evidentiary value.

Though there are several instances in which Government ghatwalis were included in the zemindary of other persons, yet where no clear evidence is forthcoming as to the true character of a ghatwali, the fact that the tenure is included within a zamindary and is covered by the jama assessed upon it should turn the scale in favour of the party who alleges that it is a tenure which is dependent upon the zemindary.

The mere fact that the ghatwali was shown to be under the Collector cannot alter the character of the ghatwali, *i.e.*, if it was a zemindary ghatwali, it could not become a Government ghatwali merely because it was stated to be under the Collector.

A zemindar is presumed to be the owner of underground rights in the tenancies created by him in the absence of evidence that he ever parted with them.

A statement in the District Gazetteer is not necessarily conclusive, but the Gazetteer is an official document of some value, as it is compiled by experienced officials with great care after obtaining the facts from official records.

(History and incidents of ghatwali tenures discussed).

CIVIL APPELLATE JURISDICTION. CIVIL Appeal No. 29 of 1950.

Appeal against the Judgment and Decree dated the 10th October, 1945, of the High Court of Judicature at Patna (Manohar Lal and Das JJ.) in Appeal No. 64 of 1942 arising out of decree dated the 28th February, 1942, of the Subordinate Judge at Monghyr in Suit No. 10 of 1941.

Amarendra Nath Sinha (*Samarendra Nath Mukherjee*, with him) for the appellants.

Lal Narain Sinha (*R. C. Prasad*, with him) for the respondent.

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1951. May 2. The judgment of the Court was delivered by

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Sukhdev Singh v. Maharaja Bahadur of Gidhaur

Fazl Ali J.

FAZL ALI J.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, affirming a judgment and decree of the Subordinate Judge of Monghyr in a title suit brought by the plaintiff-respondent.

The plaintiff, the Maharaja of Gidhaur, who has succeeded in both the courts below, is the proprietor of an impartible estate known as Gidhaur raj in the district of Monghyr. The ancestors of the defendants 1st party originally held a 4 annas share in a ghatwali tenure known as Mahal Dumri Nisf Katauna T. No. 325, and subsequently by private partition they were allotted mouza Dumri with its 47 tolas which are detailed in schedule I of the plaint. In execution of a mortgage decree obtained by one Chethru Rai against the ancestors of defendants 1st party, their interest, to which reference has been made, was purchased by the Maharaja of Gidhaur in the name of one of his employees, and the latter took delivery of possession of the property on the 19th April, 1904. On the 13th August, 1903, the ancestors of the defendants 1st party filed an application for setting aside the sale which was dismissed by the executing court and the appeal from the order of the executing court was dismissed by the High Court as well as by the Privy Council. After certain disputes in the criminal courts, the defendants second party alleging themselves to be the lessees of the defendants first party, obtained a mining license in 1937 from the sub-divisional officer of Jamui, and the District Magistrate apprehending a breach of the peace, started proceedings under section 144 of the Criminal Procedure Code, which ended in favour of the defendants first and second parties and against the plaintiff.

The plaintiff's case is that, emboldened by the order in the proceedings under section 144, the defendants started working mines in the tolas mentioned in schedule II of the plaint and extracted a considerable

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Sukhdev Singh v. *Maharaja Bahadur of Gidhaur.*

Fazl Ali J.

quantity of mica and hence he was compelled to institute the present suit. In this suit, after reciting the facts to which reference has been made he prayed for a declaration of the sub-soil rights with regard to the entire Mahal Dumri and for recovery of possession of the mortgage lands situated in the tolas specified in schedule II of the plaint. He also prayed for mesne profits and a permanent injunction restraining the defendants first and second parties from extracting mica or other underground minerals from the lands mentioned in schedule II of the plaint. The grounds on which these reliefs were claimed are summarized in paragraph 12 of the plaint in these words :—

"That the plaintiff submits that he being the 16 annas proprietor of Dumri Nisf Katauna has got an indefeasible right and title to all the underground minerals including mica situate within the said talukas. The plaintiff further submits that all the titles and interest in the said 4 annas mokrari shares of the ancestors of the defendant 1st party having been acquired by plaintiff's ancestor by auction purchase in 1903, the defendant 1st party have no sort of right and interests in the mica and other underground minerals nor the defendant 2nd party have derived any lawful right under leases alleged to have been granted in their favour by defendant 1st party, the plaintiff in law is entitled to get a declaration of his title and possession with respect to all the underground right including mica....."

The suit was contested by defendants Nos. 1 to 11 (defendants 1st party), but, as the trial judge has pointed out, the real defendant was defendant No. 1, father of the appellant. The case of this defendant was that the four annas interest in village Dumri was a ghatwali tenure granted to the ancestors of the defendants first party by Muhammadan rulers to guard the hill passes in the taluka, and the grant under which they held was affirmed subsequently by Captain Browne, a representative of the East India Company. The defendant No. 1 further contended that the mineral

and subsoil rights were vested in him as the holder of the ghatwali tenure, and that the plaintiff had acquired no right by his auction-purchase in 1903 inasmuch as the property in suit being Government ghatwali tenure was inalienable and consequently the auction-purchased was invalid. Lastly, it was contended that this defendant and his ancestors had been exercising rights of possession over the mines and minerals for more than 12 years prior to the suit in assertion of their ghatwali right and to the knowledge of the plaintiff and his ancestors and had thus acquired an indefeasible right by adverse possession to the mines and minerals in suit, especially those in the lands specified in schedule II of the plaint.

The Subordinate Judge decreed the suit, holding among other things that the disputed tenure was a zamindary ghatwali tenure, that it was not inalienable, that the plaintiff had been in possession of the property since he purchased it in 1903 until the order of the District Magistrate made in 1938, that the plaintiff as the proprietor of the Mahal was entitled to the mineral and subsoil rights and that under the mortgage-sale only the surface right had passed to the plaintiff. The findings of the Subordinate Judge were substantially upheld on appeal by the High Court, with this modification that, while agreeing with the Subordinate Judge that the subsoil rights remained with the proprietor, the High Court also held that even if the defendant No. 1 was assumed to have had the subsoil rights, those rights passed at the mortgage-sale of 1903 and therefore in any event the plaintiff was the real owner of the subsoil. On the plea of adverse possession raised in defence, the finding of the High Court was that there was no clear evidence that any mine was worked on behalf of the lessees of defendant No. 1 and that at the utmost the evidence adduced in the case showed that there had been some isolated acts of possession during recent years, probably since 1935 onwards, and therefore the plea could not be upheld.

The two main points urged on behalf of the appellant in this appeal are :—

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Fazl Ali J.

(1) that the finding of the courts below that the ghatwali tenure held by the defendants first party was a zamindary ghatwali and not a Government ghatwali, could not be sustained and that in fact it was a Government ghatwali and therefore the property was inalienable and no title passed to the plaintiff; and

(2) that in any event, the plaintiff's suit was barred by limitation under articles 142 and 144 of the Limitation Act.

The first point does not appear to us to be free from difficulty, and since its determination depends upon the proper construction of several old documents, we heard the parties at considerable length, notwithstanding the fact that the courts below have concurrently found that the tenure in question is not a government ghatwali. Before dealing with the merits of the controversy between the parties, it is necessary to understand what is meant by a "ghatwal" and what is a ghatwali tenure, and for the purpose of correctly apprehending what these expressions stand for, it is sufficient in our opinion to quote the following passage from the decision of the Patna High Court in *Rani Sonabati Kumari* v. *Raja Kirtyanand Singh*(1), in which the subject of ghatwali tenures has been very elaborately discussed :—

"Literally a ghatwal means a guard of the passes and the term 'ghatwali tenure' was applied by the Moghuls to lands assigned at a low rent or free of rent for guarding the mountain passes and protecting the villages near the hills from the depredations of lawless hill tribes. These ghatwali tenures are to be found for the most part on the western frontier of Bengal and particularly in the areas known as Kharagdiha, Gidhaur, Birbhum, Kharagpur, Bhagalpur, and the Santal Parganas. The ghatwals varied in rank and the incidents of their tenure varied in different places. In some cases they were owners of large estates, some of these estates being more or less of the nature of semi-military colonies.....In some cases the

(1) I.L.R. 14 Patna 70

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ghatwalis were created directly by the ruling power, while in other cases they were created by the landlords or zamindars for the purpose of protecting their zamindary and tenantry and to enable them to have a small force at their command and to discharge the obligations they owed to the ruling power. Sometimes the owners of large ghatwali estates subdivided and re-granted the lands to other tenants who besides paying small rents held their lands on condition of rendering certain quasi police and military services and providing a specified number of armed men to fulfil the requirements of the Government or of the zamindar as the case might be."

A Government ghatwali is thus a tenure created by the ruling power in favour of a person who is required to render ghatwali services to it, whereas a zamindary ghatwali is a tenure created by a zamindar for ghatwali services to be rendered to him. It is quite plain that the reason why the appellant is anxious to establish that the tenancy is a Government ghatwali is that a Government ghatwali has been uniformly held to be inalienable. On the other hand, a zamindary ghatwali may be alienated with the consent of the zamindar, and, where local custom permits, even without his consent. From the reports of cases relating to zamindary ghatwalis, it appears that by the passage of time the consent of the zamindar has ceased to be a matter of much significance, and is generally presumed when it is found that the alienation has been made without any objection from the zamindar. As to the extent of the power of alienation, the following observations of the Privy Council in *Kali Prasad* v. *Ananda Rai*(1) are pertinent :—

"When once it is established that the ghatwal had the power of alienation, as before stated, that power forms an integral portion of his right and interest in the ghatwali, and there is no evidence whatever to limit it to an alienation for his own life and no longer."

(1) 15 I.A. 18

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In order to determine the true character of a ghatwali tenure, it is usually necessary to refer to the grant by which the tenure was created. In the present case, the appellant relies upon exhibit C (1), which is a ghatwali sanad granted in 1776 to the ancestors of the appellant and which runs as follows:—

"Know ye the Chaudhuris, kanungoes, zamindars and mutasaddis of mauza Dumri Ghat (illegible) pargana Gidhaur, Sarkar Monghyr comprised in the province of Bihar.

The perquisites of ghatwari in all the rahdaris in mauza aforesaid, have now been granted to Kunji Singh, Jangal Singh, Ragho Singh and Manorath Singh, ghatwars of the said mauza, in accordance with what has been in vogue from old time, with effect from the commencement of 1184 fasli. It is desired that they should allow the said ghatwars to enjoy the perquisites of the ghatwari in all the rahdaris according to old customs. It will be the duty of the said ghatwars to be ever ready in discharging the duties of the post and guarding the ghats and chaukis of their elaqa by making rounds day and night. If murder, mischief, theft, highway robbery and sudden night attack be committed in their elaqa, they will be held liable therefor and will be dismissed from their post. Treat this as peremptory and act according to what is written.

Dated the 5 Ziqada of the 18th year of the August reign corresponding to 1184 Fasli.'

This sanad was granted by Captain Browne, who was deputed by the East India Company to restore order in a tract known as Jungle Terai, a vast waste and hilly country as its name signifies, lying to the south of Bhagalpur and west of Rajamahal Hills. This document was construed by a Bench of the Patna High Court in *Fulbati Kumari* v. *Maheshwari Prasad*(1), and as has been pointed out by Dawson Miller C.J. in that case,—

"It is not a grant of land but an authority to the persons named to collect as formerly ghatwari or

(1) A.I.R. 1923 Patna 453

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ghatwali fees or tolls from those using the roads and passes which the ghatwals undertook to protect."

When we compare this sanad with other ghatwali sanads granted by Captain Browne, some of which are found discussed in reported cases, the contrast becomes very marked. In some of the other documents—for example in the document which was the subject of the decision of the Privy Council in Narayan Singh v. *Niranjan Chakravarti*(1), and of the Patna High Court in *Rani Sonabati Kumari* v. *Raja Kirtyanand Singh*(2) the grant was in respect of a very extensive area of land and there were also words used to indicate that the services were to be rendered directly to the ruling power. The mere fact, therefore, that the sanad in this case was granted by Captain Browne cannot be held to be decisive of the nature of the tenure, because it seems to have been part of the duties assigned to him to confirm and recognise old titles. As was pointed out by Dawson Miller C.J., the sanad should be read along with the record of certain proceedings before the Dewani Adalat of Ramgarh, which show that a tenancy comprising 8 annas in mauza Dumri was granted by the zamindar of Gidhaur to 2 persons, one of whom was the ghatwal mentioned in Captain Browne's sanad, with the sanction of Captain Browne. In the present case, a document of 1798, which was the proceeding of the original court and which was before the learned judges who decided *Fulbati's* case(3) has not been produced, but we have before us a judgment dated the 18th March, 1799, of the appellate court in the same proceeding. This judgment recites that the case of the ghatwals was that they had been for 3 generations in possession of half of village Dumri, but in the year 1187 fasli (1780 A.D.) the zaminar of Gidhaur wanted to raise "revenue" or rent but they refused to accept a new patta or kabuliyat at an enhanced rent. Subsequently, the court ordered the zamindar to grant a patta, but the zamindar did not do so and forcibly dispossessed the ghatwals. They thereupon prayed that

(1) 51 I.A. 37

(2) I.L.R. 14 Patna 70

(3) A.I.R. 1923 Patna 453

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the zamindar may be ordered to grant them a patta and receive the kabuliyat at the old rent. The appellate court, to which the zamindar had appealed, upheld the decree of the first court ordering the patta to be granted. This document shows firstly that the ghatwali tenure in respect of half of Dumri had been in existence for 3 generations prior to 1789, *i.e.*, it must have come into existence long before Captain Browne's sanad, and secondly that it was held under the zamindar; otherwise, it was not necessary that the zamindar should grant a patta and the ghatwal should execute a kabuliyat in his favour.

We have also before us a document (exhibit 1) which is a report of one Khadim Muhammad Ataullah, an employee of the East India Company, incorporating certain statements made by the then zamindars of Gidhaur showing that they had been in possession of the zamindary for nearly 700 years and that "the milkiat zamindary, Chaudhri and Kanungoi of the pargana .....had all along been in their possession." This document shows that Gidhaur was an ancient zamindary and the zamindar also performed the functions of chaudhri and kanungoi. The last mentioned point is of some significance, because the sanad of Captain Browne was addressed to chaudhris, kanungos, etc.

In the case of *Fulbati Kumari*(1), to which reference has been made, there was an extract quoted from the Bengal District Gazetteer, volume XVII, at page 168, which runs as follows:—

"About 1774 the lawless state of this tract led the British to place it in charge of Captain James Browne, who settled the estates with the ghatwals with two exceptions. These two exceptions were Dumri and Mahesri which were settled directly with the proprietors, the story being that the ghatwal tenure holders fled at the approach of Captain Browne their reputation as dacoits and brigands being too strong for them to face a Government officer without fear of the consequences. In the case of Dumri however, the

(1) A.I.R. 1923 Patna 453

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ghatwals finding that in their absence a settlement had been made of their tenure, returned and obtained a sanad settling it with them under the Raja of Gidhaur. Of the estates settled with ghatwals only two or now held by their descendants, *viz.*, Tilwa and Kewal. The others have passed into the hands of the Maharaja of Gidhaur, Chetru Rai, Akleswar Prasad and others of Rohini."

The statement in the District Gazetteer is not necessarily conclusive, but the Gazetteer is an official document of some value, as it is compiled by experienced officials with great care after obtaining the facts from official records. As Dawson Miller C.J. has pointed out in *Fulbati's case*(1), there are a few inaccuracies in the latter part of the statement quoted above, but so far as the earlier part of it is concerned, it seems to derive considerable support from the documents to which reference has been made.

The counsel for the appellant greatly relied on the fact that Dumri ghatwali is mentioned in Captain Browne's "India Tracts" as one of the ghatwalis placed under the Collector of Jungle Terrai districts. It appears that this point was not raised before any of the courts below, nor was Captain Browne's treatise placed before them. There is thus considerable force in the objection raised on behalf of the respondent that he has not had sufficient opportunity to study the matter and place relevant materials before this court to enable it to determine what meaning and value should be attached to Captain Browne's statement. But apart from this objection, it seems to us on the evidence as it stands, that the inference sought to be drawn from Captain Browne's statement is not fully justified for the following reasons :—

1. The mere fact that the ghatwali was shown to be under the Collector cannot alter the character of the ghatwali, *i.e.*, if it was a zamindary ghatwali, it could not become a Government ghatwali merely because it was stated to be under the Collector.

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2. As Collector of Jungle Terrai districts, Captain Browne appears to have had control not only over the ghatwals but also over the zamindars within the area administered by him.

3. The observations made by Captain Browne with regard to the Jungle Terrai ghatwals and their relation to the zamindar hardly support the view urged on behalf of the appellant.

Referring to the Jungle Terrai ghatwalis, Captain Browne states in his book as follows :—

"All the Jungle Terry gautwalls were formerly subject to the several Rajahs, to whose territories their Gautwallies belonged; they paid a slight tribute in token of feodal obedience, and were bound to oppose all invasions (principally from the south) to attend their Rajahs when summoned, with all their followers in arms, and to be responsible for every violence and irregularity committed in their respective boundaries :— their followers are still bound by the same feodal ties to them, and have lands for feodal services; nothing can be conceived more absolute than the authority of these chiefs over their vassals; the fear of death even, when seized on in war, is not sufficient to force from them the discovery of any secret respecting their chief, his family, or property."

Again, Captain Browne's description of the zamindar of Gidhaur is to the following effect :—

"The Raja of Guidore was formerly of great extent, but the conquests made from it by the Rajah of Bierboom and Comgar Cawn, and the independency which these wars gave the Gautwalls an opportunity of assuming, have reduced the present Rajahs Gopal Singh, and Durrup Singh, to follow an ebb, that they can scarcely recover sufficient consequence to be of any political weight whatever."

On the whole, it appears that the ghatwals of Dumri were hardly men of such consequence as to break off from the zamindar and set themselves up as independent chiefs.

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There are two other items of evidence which seem to have an important bearing on the question. In the first place, the appellant's tenure was included within the Gidhaur zamindary in the Permanent Settlement, and secondly, it is shown in the Record of Rights as istemrari mokrari tenure under the zemindar of Gidhaur. In the case of *Raja Lelanund Singh Bahadoor* v. *The Bengal Government*(1) where the Government set up a claim to resume the ghatwali in the zamindary of Khuruckpore for the purpose of revenue assessment, the claim was negatived by the Privy Council, and one of the grounds upon which the decision was based was that the ghatwali lands were part of the zamindary and were included in the Permanent Settlement of the zamindar and were covered by the jama assessed on that zamindary. There can be no doubt that *prima facie* the fact that the tenure was included in the Permanent Settlement of the zamindar and under that Settlement the ghatwal had to pay rent to the zamindar raises a presumption that the ghatwali was in some way connected with the zamindar, but it must be recognized that the permanent settlement of the land "would not affect the nature of the tenancy upon which the lands were held, nor can it convert the services which were public into private services under the zamindar": [vide *Raja Nilmoni Singh* v. *Bakranath Singh*(2)]. There are several reported cases which furnish instances in which the properties of persons who were Government ghatwals were included in the zamindary of other persons, but where no clear evidence is forthcoming as to the true character of the ghatwali, the fact that the tenure is included within a zamindary and is covered by the jama assessed upon it should turn the scale in favour of the party who alleges that it is a tenure which is dependent upon the zamindary. In this case, the presumption arising under the Permanent Settlement is reinforced by the entry in the record of Rights which shows that the tenure in question is istemrari mokrari held under the Zamindar.

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(1) 6 Moore's I.A. 101 (2) 9 I. A. 104

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The learned counsel for the appellant relied upon exhibits N and N-1 and certain rent receipts granted by the zamindar to show the appellant's independent title, but, in our opinion, these documents do not help him much. Exhibit N is a notice issued to an ancestor of the appellant in 1859 by an official whose signature on the document is not legible. It refers to a report of the sub-inspector of thana Chakai stating that "the sautars (bad characters) are in their places of residence and no riots or disturbances are taking place", and directs the ghatwali to prepare a list of the sautars of his ilaqa and file it before the officer-in-charge of the thana. Exhibit N-1 is a similar notice, but it is incomplete and bears no indication as to who issued it. It recites a report of a police sub-inspector stating that owing to failure of crops there were burglaries and thefts and recommends that the zamindars of the ilaqa should be directed to "look after the occurrences and keep eyes over the bad characters and mischief makers so that occurrences may be stopped". These documents do not necessarily show that the appellant is a Government gatwal. It was not unusual in old days to issue notices like those referred to, to the zamindars of the ilaqa, as exhibit N-1 itself shows, and the mere fact that the person to whom the notice was issued was described as a ghatwal does not show that he was addressed in the capacity of a Government ghatwal and not as a zamindari ghatwal.

The next item of evidence upon which the appellant tried to rely consists of certain rent receipts and road cess receipts, but these also do not help him, seeing that they contain, among other things, a statement that the tenure with regard to which the receipts were granted, appertained to the proprietary zamindary of Gidhaur.

This brief review of the evidence is sufficient to show that the appellant has not been able by clear and conclusive evidence to rebut the presumption arising from the Record of Rights and the record of the Permanent Settlement, and he has failed to establish his claim that the tenure in question is Government ghatwali. It

may be incidentally mentioned that in the mortgage suit which preceded this litigation, there was no allegation by way of defence that the ghatwali was not alienable, and though the point was raised in the execution proceedings it was decided against the appellant by the court of first instance and was abandoned on appeal. In these circumstances, we see no reason to disturb the concurrent finding of the courts below which have dealt with the matter with great care.

Passing now to the second point raised in this appeal, we find that there are concurrent findings of both the courts below against the defendants on the plea of adverse possession. In arriving at this findings, the courts below have fully discussed the evidence and given cogent reasons in support of their conclusions. This court is usually reluctant to reinvestigate matters which have been fully investigated by the courts below and on which there are concurrent findings. In the present case, the appellant has failed to show to us any exceptional circumstances to induce us to depart from the sound and well established practice, and in this view the findings of the court below must be accepted.

It was however contended that in any event the plaintiff's suit is barred under article 142 of the Limitation Act inasmuch as it was incumbent on the plaintiff to prove that he had been in possession of the disputed lands, especially those mentioned in schedule II of the plaint, within 12 years of the suit, but he had failed to do so. In our opinion, this plea must be negatived. The trial judge in his judgment came to a very clear finding in these words :—

"The story of possession and dispossession as put forth in the plaint must be believed, because, as I have already said there is overwhelming evidence in this case to prove the possession of the plaintiff over the surface as well as the subsoil."

The finding of the Subordinate Judge does not appear to have been challenged before the High Court, and though no less than 16 reasons have been given in

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the statement of case filed in this court on behalf of the appellant, it has not been stated that there is no evidence to show that the plaintiff was in possession of the disputed land or the land mentioned in schedule II within 12 years of the suit.

Thus both the points urged in this appeal fail. There can be no doubt that the entire tenure has passed to the plaintiff by the sale, but, apart from this fact, it is well-settled that a zamindar is presumed to be the owner of the underground rights in the tenancies created by him in the absence of evidence that he ever parted with them: [See *Hari Narayan Singh* v. *Sriram Chakravarthi*(1) and *Durga Prasad Singh* v. *Braja Nath Bose*(2)].

The result is that this appeal fails, and it is dismissed with costs.

Appeal dismissed.

Agent for the appellant: *R. R. Biswas.*

Agent for the respondent: *R. C. Prasad.*

BISHUNDEO NARAIN AND ANOTHER

v.

SEOGENI RAI AND JAGERNATH

[SHRI HARILAL KANIA C. J., PATANJALI SASTRI, MEHAR CHAND MAHAJAN, S. R. DAS and VIVIAN BOSE JJ.]

Civil Procedure Code (Act V of 1908), O. 32, r. 7—Suit for partition to which minor is party—Compromise by guardian—Sanction of Court not obtained before entering into agreement—Validity of decree—Suit by minor to set aside decree—Mere unfairness of division, effect of.

Where a Court has sanctioned an agreement or compromise in a suit to which a minor is a party after satisfying itself that it is for the minor's benefit, the decree based on the agreement or compromise cannot be held to be invalid or not binding on the minor merely because the sanction of the Court was not obtained by the next friend or guardian before he began to negotiate for the agreement or compromise.

(1) 37 I.A. 136 (2) 39 I.A. 133

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confirmation. We are of the view that in the facts and circumstances appearing on the record it was not appropriate for the Division Bench to dismiss the claim of the workmen altogether. While it is a fact that the workmen had made tall claims which they had failed to substantiate, it was for the Tribunal and the High Court to appreciate the material on the record and decide as to which part of the claim was tenable. The finding of the Tribunal that 131 workmen had put in more than 240 days of work was arrived at on the basis of some evidence; it may be that better particulars and clear evidence should have been placed before the Tribunal. Quantum of evidence or appreciation thereof for recording findings of fact would not come within the purview of High Court's extraordinary jurisdiction under Article 226 of the Constitution. The finding of fact that 131 workmen out of the list appended to the reference had completed 240 days of work should, therefore, not have been disturbed by the Division Bench of the High Court.

9. The Tribunal had given the relief on the basis that the statutory requirement of Section 25-F of the Act had not been complied with. As the Division Bench found, and we find no justification to take a different view, the case of termination of employment had indeed not been made out. On that footing a direction for reinstatement with full back wages ought not to have been given. We are, therefore, inclined to mould the relief available to the workmen.

10. The claim of confirmation of 131 workmen as found by the Tribunal and upheld by the learned Single Judge of the High Court shall be restored. Relief of back wages in the facts and circumstances would, however, not be granted except to the extent it has been covered by two interim orders of this Court dated February 14, 1986 and May 5, 1988. Such payments as have been made shall not be recovered.

11. Parties are directed to bear their respective costs throughout.

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(BEFORE L.M. SHARMA AND K. RAMASWAMY, JJ.)

VIMLA BAI (DEAD) BY LRS. .. Appellant;

Versus

HIRALAL GUPTA AND OTHERS .. Respondents.

Civil Appeal No. 322 of 1973, decided on December 22, 1989

Hindu Law — Applicability of personal branch of law — Banaras School or Bombay School of Hindu Law of Mitakshara — Law of place of one's domicile normally applies — But where a person migrates from another place, rebuttable presumption of applicability of law of the original place of abode will arise — Migration — Meaning and proof of — Burden of proof on whom — General statements of historical facts about a class of persons entered in official records such as gazette — Though relevant but not conclusive in establishing the factum of private nature i.e. migration of a particular family — Private

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International Law — Domicile — Determination of — Words and Phrases — "Migration", meaning of

Evidence Act, 1872 — Sections 37 and 57(13) — Entries or statements in official records — Relevant but not conclusive for establishing rights of private parties (Paras 4 and 5)

Hindu Law — Succession — Mitakshara law (Bombay School) — 'Bandhu' — Female bandhu as heir entitled to succeed to the estate of last male holder through her mother's side within five degrees to the last male holder — Hence plaintiff female entitled to succeed to the estate of her father's sister's son as bandhu

One 'H' with his family was living in Ahmednagar District of Bombay Province. They were Dhangars (shepherd) by caste. 'H' had a son 'A' and a daughter 'B'. 'A' had a son 'R' and a daughter, the plaintiff. 'B' after her marriage with 'G' in the same district, adopted 'R'. All of them later migrated to Indore. 'R' died in 1918 and thereafter his childless widow 'S' succeeded to the suit house in Indore as limited owner. 'S' gifted the house by a registered deed to the first defendant in 1944 who in turn hypothecated the house to the fifth defendant/first respondent in 1948. 'S' died in 1949. The plaintiff filed a suit for possession and mesne profits of the house on grounds that the family was governed by the Bombay School of Hindu Law wherein female bandhu is an heir and thereby she was entitled to succeed to the estate of 'R' who was her natural brother but by operation of law of adoption had become her father's sister's son i.e. a bandhu; that 'S' as limited owner, had no power to dispose of the properties by way of gift and so the gift deed and the mortgage were void and not binding on her and that the respondents are in unlawful possession as trespassers. The trial court decreed the suit but the High Court reversed the decree. The present appeal by special leave was filed by the legal representatives of the plaintiff. Allowing the appeal with costs the Supreme Court

Held:

(1) In India a Hindu is governed by his personal branch of law which he carries with him wherever he goes. But the law of the province wherein he resides prima facie governs him and in this sense and to this extent only the law of domicile is of relevance or importance. But if it is shown that a person came from another province, the presumption will be that he is governed by the law or the special custom by which he would have been governed in his earlier home at the time of migration. (Para 6)

Migration is changing one's abode, quitting one's place of abode and settling permanently at another place. The burden of proving migration lies on the person setting up the plea of migration. An inference of migration can well be made from the known facts of the chief characteristics of the family, the language, observance of customs and rites though they are not sufficient to prove that they are governed by a particular school of law. The presumption can be displaced by showing that the immigrant had renounced the law of the place of his origin and adopted the law of the place to which he had migrated. The onus lies on the person alleging that the family had renounced the law of its origin and adopted that prevailing in the place to which he had migrated.

(Paras 4 and 6)

The statement in the official Gazette made in the course of the discharge of the official duties on private affairs or on historical facts in some cases is the

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best evidence of facts stated therein and is entitled to due consideration but should not be treated as conclusive in respect of matters requiring judicial adjudication. In an appropriate case where there is some evidence on record to prove the fact in issue but it is not sufficient to record a finding thereon, the statement of facts concerning management of private temples or historical facts of status of private persons etc. found in the official Gazette may be relied upon without further proof thereof as corroborative evidence. (Para 5)

Therefore, though the statement contained in Indore State Gazette regarding historical facts of Dhangars' social status and habitation of them may be relevant facts and in an appropriate case the court may presume it to be genuine without any further proof of its contents but it is not conclusive. Where there is absolutely no evidence on record in proof of the migration of the family of the plaintiff or their ancestors from Mathura area, the historical factum of some Dhangars having migrated from U.P. and settled down in Aurangabad District or in the Central Province by itself cannot be accepted as sufficient evidence to prove migration of the plaintiff family. Further no evidence was placed on record connecting Holkars of Indore with Dhangars of Bombay Province. Thus the migration of the plaintiff and her family from Mathura to Ahmednagar District in Bombay Presidency has not been proved. Admittedly, they migrated from Ahmednagar to Indore and carried with them to Indore their personal law, namely, Hindu Law of the Mitakshara applicable to Bombay Province and not Banaras School of Hindu Law. (Paras 5 and 6)

Keshao Rao Bapurao v. *Sadasheorao Dajiba*, AIR 1938 Nag 163: 1938 NLJ 24; *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*, LR (1873-74) 1 IA 209, 238: 3 Suther 17; *Martand Rao* v. *Malhar Rao*, AIR 1928 PC 10: LR (1927-28) 55 IA 45; *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*, AIR 1919 PC 62: LR (1919) 46 IA 204; *Balwant Rao* v. *Baji Rao*, AIR 1921 PC 59: 25 CWN 243; *Udebhan Rajaram* v. *Vikram Ganu*, AIR 1957 MP 175: 1957 MPLJ 572, *approved*

Narayan Bhagwantrao Gosavi Balajiwale v. *Gopal Vinayak Gosavi*, AIR 1960 SC 100: (1960) 1 SCR 773; *Poohari Fakir Sadavarthy of Bondilipuram* v. *Commr., H.R. & C.E.*, AIR 1963 SC 510: 1962 Supp 2 SCR 276; *Mahant Shri Srinivasa Ramanuj Das* v. *Surajnarayan Dass*, AIR 1967 SC 256: 1966 Supp SCR 436; *Hindu Law* by Raghavachariar, 8th edn, 1987, edited by Prof. S. Venkataraman; Phipson on *Evidence*, 13th edn. at p. 510, para 25.07; Thurston on *Caste and Tribes of Southern India* in Vol. III, p. 167, *relied on*

(2) The enumeration of bandhus in various schools of Hindu Law of the rules of succession to the estate of the last male Hindu as agnates or cognates or collaterals, are only illustrative and not exhaustive. The Hindu Law of succession of Mitakshara School prevailing in Bombay Presidency recognises that a female is an heir as a bandhu to succeed to the estate of the last male holder through her mother's side within five degrees to the last male holder. The plaintiff being the only nearest bandhu of 'R' within five degrees through her mother, is entitled to succeed to his estate as an heir. (Para 10)

Bhagirathibai v. *Kahnujirav*, ILR 11 Bom 285 (FB); *Girdhari Lall Roy* v. *Bengal Government*, (1867-79) 12 MIA 448: 1 BLR 44; *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar*, LR (1895-96) 23 IA 83: ILR 19 Mad 405: 6 MLJ 113, *approved*

Mayne's *Hindu Law*, 12th edn., paras 504, 543, 544, pp. 753-6, 757, 761; Raghavachariar's *Hindu Law* at p. 412, para 458; *Mitakshara and Dayabhaga* by Colebrooke, 1883 edn., p. 99, *relied on*

R-M/9851/C

The Judgment of the Court was delivered by—

K. RAMASWAMY, J.—This appeal by special leave by the legal representatives of the plaintiff, Bhikubai, arises from decision in First Appeal No. 90 of 1962 of the High Court of Madhya Pradesh, Indore

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Bench, dated July 18, 1982 reversing the decree of the trial court in O.S. No. 29 of 1951 filed for possession and mesne profits of two houses, Nos. 88 and 89 situated at Nandlalpura, Indore City, mentioned in the plaint schedule. In this appeal, we are only concerned with house No. 88 as the parties have settled their dispute regarding the other house. The admitted facts are that one Hariba Bhagwat of Mouza Pisore village had a son by name Appaji and a daughter Bajabai. Appaji in turn had a son by name Rakhmaji and a daughter Bhikubai (the plaintiff). Bajabai was married to Ganpatrao Page of Madhavagoan village. As they were issue-less they adopted Rakhmaji. Both the villages are situated in Ahmed-nagar District of Bombay Province. They are Dhangars (shepherd) by caste. All of them migrated to Indore. Rakhmaji died in 1918 and Sonubai his childless widow succeeded to the two houses and other properties as limited owner. She gifted house No. 88 to Shankar Lanke, a brahmin, first defendant by a registered gift deed dated October 31, 1944 under Ex. D1-5. Shankar Lanke in turn hypothecated house No. 88 to Hiralal, fifth defendant/first respondent on September 21, 1948 under Ex. 5-D3. Sonubai died on March 11, 1949. Rakhmaji was the natural brother of Bhikubai, but by operation of law namely adoption, he became her father's sister's son, i.e. a bandhu. The case of the plaintiff was that the family is governed by the Bombay School of Hindu Law wherein female bandhu is an heir and thereby she was entitled to succeed to the estate of Rakhmaji. Sonubai, as limited owner, had no power to dispose of the properties by way of gift and so the gift deed and the mortgage are void and do not bind her. The respondents are in unlawful possession as trespassers. The suit was resisted by the first defendant, the donee, on diverse grounds. The material defence relevant for the disposal of this appeal is that the persons concerned are governed by the Banaras School of Hindu Law under which a female bandhu is not an heir. Hiralal's case was that the mortgage was for consideration and that he had no objection to hand over the possession of the property provided the consideration of Rs 12,000 borrowed by Shankar Lanke was paid to him.

2. The trial court framed as many as 14 issues with sub-issues on each count. It found on issue No. 6-*a*, which is material for the purpose of this case, that the parties are governed by the Bombay School, and not the Banaras School, of Hindu Law; the plaintiff is the heir of Rakhmaji as his mother's brother's daughter, and though the consideration was paid under the mortgage obtained by Hiralal, it was not taken after due inquiry about existence of legal necessity and in good faith. The gift deed was declared void and does not bind the plaintiff. The plaintiff was held entitled to possession and mesne profits. The claim for refund of the mortgaged money was rejected. Accordingly, the suit was decreed. Hiralal and another filed the appeal. Shankar Lanke did not file any appeal. It was contended before the High Court that the plaintiff's family

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belonging to Dhangar caste were migrants from U.P. (Mathura) to Aurangabad from where they had further migrated to Central Province (now Madhya Pradesh). They are governed by the Banaras School of Hindu Law. There is no proof that they abandoned the personal law, namely, Banaras School of Hindu Law, and adopted Bombay School of Hindu Law. This contention found favour with the High Court, which relied upon the statement made in Indore State Gazette of 1931 at page 20, wherein it was claimed to have been recorded that Holkars belonged to the Dhangar caste and it would appear that they were originally residents of the countryside around Mathura and they migrated to Aurangabad District and thereafter Phaltan Pargana. At page 90, it was mentioned about Dhangars in general and that in Indore Shepherd caste was the ruling family. Many of the Dhangars were Shivaji's trusted Maoles used for guerilla warfare. In domestic life as also in language, dress and food they closely resemble the Marathas, though in the caste scale their position is lower. Their deity is Khandoba. The High Court also found that the parties, namely, Rakhmaji's father and Ganpatrao Page were residents of Ahmednagar District. Their family God is Malhar Jijori, which is situated in the District of Poona. They migrated from Maharashtra to Indore. This finding is based on the evidence of, not only the plaintiff (PW 4), but also the admission made by defendant 1 and his witness, DW 8. Placing reliance solely on the recital in the Indore State Gazette, it was concluded that the parties had migrated from Mathura and thereby they are governed by the Banaras School of Hindu Law, under which the female bandhu is not an heir to succeed to the estate of the last male holder. Alternatively, it also found that even applying the Bombay School of Hindu Law (Mitakshara), the plaintiff had not established that she was an heir to Rakhmaji. Accordingly, the appeal was allowed.

3. At the outset, it is made clear that neither Hiralal, nor Shankar Lanke pleaded that the plaintiff or her ancestors had migrated from Mathura and settled down in Ahmednagar District. The specific plea of the plaintiff in paragraph 5 of the plaint that they were original residents of Ahmednagar District was not disputed. Hiralal did not also plead that the Banaras School of Hindu Law would apply to the plaintiff's family. Shankar Lanke vaguely pleaded this but adduced no evidence in proof thereof. Both the courts have concurrently found that the plaintiff, Rakhmaji, and Ganpatrao Page are Dhangars by caste; their family God is Khandoba of Jijori; their manners and customs were also of Maharashtrians, vide DW 8 Kusumrao; and the High Court also further found that, "Undoubtedly true that the customs, manners, marriages and the way they worship the God are all the same as that of Maharashtrians or of the Marathas." But the customs, dress, language and manners may not by themselves show that person migrating from Mathura has given up the law of origin, though they are relevant facts. It must also be

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proved that in a particular case they have given up their law of origin, i.e. the Banaras School of Hindu Law, and adopted the law of domicile, i.e. the Bombay School of Hindu Law. Accordingly, it was held that the parties are governed by the Banaras School of Hindu Law.

4. Migration is changing one's abode, quitting one's place of abode and settling permanently at another place. The burden of proving migration lies on the person setting up the plea of migration. As seen the respondents neither pleaded nor proved that the plaintiff's family migrated from Mathura to Ahmednagar in Bombay Presidency. When the plaintiff was examined as a witness no attempt was made to elicit from her that they or their ancestors were migrants from Mathura and settled down in Ahmednagar. On the other hand the specific plea of the plaintiff in her plaint that they were the original residents of Ahmednagar District remained undisputed. In *Hindu Law* by Raghavachariar, 8th Edition, 1987 edited by Prof. S. Venkataraman who was himself an authority on Hindu law, in paragraph 32 it is stated that a family's original place of abode can be inferred from the chief characteristics of the family. In *Keshao Rao Bapurao* v. *Sadasheorao Dajiba*[1], Vivian Bose, J., as he then was, held that wherever a family is found clinging to its individuality and retaining its identity as Maharashtrian, it must be presumed until the contrary is shown that it hailed from the race or group of people known as Maharashtrians and carried the law of Maharashtra with them. Thus, it is clear that migration cannot be presumed but it must be established by adduction of evidence. The question then arises is whether the recital in Indore State Gazette relied on, at the appellate stage, can form the sole base to establish that the plaintiff's family were the migrants from Mathura in U.P. Section 37 of the Evidence Act, 1872 postulates that any statement made in a government gazette of a public nature is a relevant fact. Section 57(13) declares that on all matters of public history, the court may resort for its aid to appropriate books or documents of reference, and Section 81 draws a presumption as to genuineness of gazettes coming from proper custody. Phipson on *Evidence*, the Common Law Library (Thirteenth Edition) at page 510 paragraph 25.07 stated that the government gazettes ... are admissible (and sometimes conclusive) evidence of the public, but not of the private matters contained therein. In *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*[2], the Judicial Committee, while considering the reliability of a report sent by the District Collector to the Commissioner about the management of a temple, held that when the reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under statutory authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also insofar as they are

1 AIR 1938 Nag 163: 1938 NLJ 24
2 LR (1873-74) 1 IA 238: 3 Suther 17

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relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the government founded upon them. Same view was reiterated in *Martand Rao* v. *Malhar Rao*[3] on the question of reliability of official reports relating to succession to a zamindari, and held that "their Lordships consider it necessary at the outset to point out that, though such official reports are valuable and in many cases the best evidence of facts stated therein, opinions therein expressed *should not be treated as conclusive in respect of matters requiring judicial determination*, however, eminent the authors of such reports may be". In *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal*[4] it was held that while their Lordships do not doubt that such a report (Inam register) would not dis place 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. This view was followed by this Court in *Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi*[5]. Same is the view expressed in *Poohari Fakir Sadavarthy of Bondilipuram* v. *Commissioner, Hindu Religious & Charitable Endowments*[6] and held that Inam register is of great evidentiary value but the entries cannot be accepted on the face value without giving due consideration to other evidence on record. In *Mahant Shri Srinivasa Ramanuj Das* v. *Surajnarayan Dass*[7] relied on by Shri Lalit, learned senior counsel for the respondents, it was held that the statements in the Gazetteer can be consulted on matters of public history. This is also the case relating to entries in Inam register. Inam fair registers are maintained while exercising the statutory power and the entries were made in the relevant columns during the course of discharging official duties and so they are entitled to weight and great consideration, while assessing the evidence. Therefore, this Court did not lay any rule contrary to what has been laid by the Judicial Committee or by this Court in the decisions referred to hereinbefore.

5. The statement of fact contained in the official Gazette made in the course of the discharge of the official duties on private affairs or on historical facts in some cases is best evidence of facts stated therein and is entitled to due consideration but should not be treated as conclusive in respect of matters requiring judicial adjudication. In an appropriate case where there is some evidence on record to prove the fact in issue but it is not sufficient to record a finding thereon, the statement of facts concerning management of private temples or historical facts of status of private persons etc. found in the official Gazette may be relied upon without further proof thereof as corroborative evidence. Therefore, though the statement of facts contained in Indore State Gazette regarding historical

3 LR (1927-28) 55 IA 45, 48: AIR 1928 PC 10
4 LR (1919) 46 IA 204: AIR 1919 PC 62
5 (1960) 1 SCR 773, 788: AIR 1960 SC 100
6 1962 Supp 2 SCR 276: AIR 1963 SC 510
7 1966 Supp SCR 436, 447: AIR 1967 SC 256

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facts of Dhangars' social status and habitation of them may be relevant fact and in an appropriate case the court may presume to be genuine without any further proof of its contents but it is not conclusive. Where there is absolutely no evidence on record in proof of the migration of the family of the plaintiff or their ancestors from Mathura area, the historical factum of some Dhangars having migrated from U.P. and settled down in Aurangabad District or in the Central Province by itself cannot be accepted as sufficient evidence to prove migration of the plaintiff family. Further no evidence was placed on record connecting Holkars of Indore with Dhangars of Bombay Province. Shri Lalit, learned counsel, admits that the statement of facts of Dhangars contained in Indore State Gazette is not conclusive evidence but he says that it may be taken into account as evidence connecting the family of the plaintiff. In the absence of any evidence proving migration of the family of the plaintiff or their ancestors from Mathura to Ahmednagar, the historical factum of the migration of Dhangars from U.P. State mentioned in Indore State Gazette is of little assistance to the respondents so as to hold that they carried with them to Indore the Banaras School of Hindu Law prevailing in Uttar Pradesh. Even as regards the Dhangars as migrants, Thurston on *Caste and Tribes of Southern India* in Vol. III p. 167 stated that the statement of the Census Report of 1901 establishes that Marathi caste of Shepherd are Dhangars and their home speech is Marathi and they are the residents of Bombay Presidency. It would, thus, show that even in 1901, Dhangars were held to be original Marathis of Bombay Presidency. We, therefore, hold that the case before us that Bhikubai, the plaintiff, and her family had migrated from Mathura to Ahmednagar District in Bombay Presidency has not been proved and admittedly, they migrated from Ahmednagar to Indore.

6. In India a Hindu is governed by his personal branch of law which he carries with him wherever he goes. But the law of the province wherein he resides prima facie governs him and in this sense and to this extent only the law of domicile is of relevance or importance. But if it is shown that a person came from another province, the presumption will be that he is governed by the law or the special custom by which he would have been governed in his earlier home at the time of migration. An inference of migration can well be made from the known facts of the chief characteristics of the family, the language, observance of customs and rites though they are not sufficient to prove that they are governed by a particular school of law. The presumption can be displaced by showing that the immigrant had renounced the law of the place of his origin and adopted the law of the place to which he had migrated. The onus lies on the person alleging that the family had renounced the law of its origin and adopted that prevailing in the place to which he had migrated *vide Hindu Law* by Raghavachariar, 8th Edition, para 32 at pages 30 and 31. The same view was expressed in Mulla's *Hindu Law*, edited by Justice

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S.T. Desai, 15th Edition, in paras 13-A and 14. In *Hindu Law* by S.V. Gupte (Vol. 1, 3rd Edition, p. 50) Article 10 it is stated that in case of migration of a Hindu from one part of India to another, it is presumed that he and his descendants continue to be governed by the law of the school to which he belonged before migration. Such presumptions are rebuttable. In ***Balwant Rao*** **v.** ***Baji Rao***[8], Lord Dunedin speaking for the Board held that it is absolutely settled that the law of succession in any given case is to be determined according to the personal law of the individual whose succession is in question. In that case it was found that Bapuji's ancestors at one time lived in Bombay Province and his migration at the place of death was obscured. Therefore, it was held that the original law that prevailed in Bombay Province at the time of migration governs the succession to a Maharashtra Brahmin and Bombay School of Mitakshara Law would apply and the daughter would take her father's property as an absolute owner and her heirs alone would be entitled to succeed to her estate. This was reiterated by Bose, J. in *Keshao Rao case*[1] in considering the question of migration by a Maharashtra Brahmin residing in Central Provinces and was held to be governed by the Bombay School of Mitakshara Hindu Law when migration is not proved in the sense that the exact origin of the family cannot be traced. Same view was followed in *Udebhan Rajaram* v. *Vikram Ganu*[9]. Accordingly, we hold that the plaintiff and her family carried with them to Indore their personal law, namely, Hindu Law of the Mitakshara applicable to Bombay Province and not Banaras School of Hindu Law.

7. The question then is whether the plaintiff is an heir to Rakhmaji, the last male holder of the estate left by Sonubai, his widow. In *Bhagirathibai* v. *Kahnujirav*[10], the Full Bench held that under the Hindu Law as prevailing in Bombay Presidency, a daughter inheriting from a mother or a father takes as an absolute estate, which passes on her death to her own heirs, and not those of the preceding owner. Thereby Hindu female is recognised under the Bombay School of Hindu Law to be an heir to last male holder of the estate and takes the property as an absolute owner. The immediate question, therefore, is whether the plaintiff is an heir as bandhu. In Mayne's *Hindu Law*, 12th edition, revised by Justice Alladi Kuppuswami, Chief Justice (Retd.) of Andhra Pradesh High Court, in paragraph 504 at pp. 735 and 736 stated the meaning of the word 'bandhu' thus: The term 'bandhu' or 'bandhava' meant relations in general and included both agnates and cognates though it was sometimes confined to agnates in some of the Smriti texts relating to succession and gotra kinship, as for instance in the Vishnusmriti and in some of the verses in Manusmriti. The Mitakashara explains that the term 'bandhavas' in the above text of Manu means

8 AIR 1921 PC 59: 25 CWN 243
9 AIR 1957 MP 175: 1957 MPLJ 572
10 ILR 11 Bom 285 (FB)

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Atma Bandhus, Pitrubandhus and *Matrubandhus*, vide Mit. on Yajn III, 24 (Setlur edn. 1169) Naraharayya's translation 56.

8. In paragraph 543, at page 761, dealing with the third division of heirs, namely, 'bandhus' and of their enumeration in paragraph 544 it was stated that the enumeration is only illustrative, which read thus:

> Para 543: "*Bandhus*.— The third division of heirs consists of bandhus (Table B). They are the sapindas related through a female, being within five degrees from and inclusive of common ancestor, in the line or lines in which a female or females intervene (paras 121-26). In the portion of his work relating to succession, Vijnanesvara styles them as sapindas of a different gotra. The term 'bandhu' has therefore acquired in the system of the Mitakashara a distinctive and technical meaning and signifies bhinnagotra sapindas. They are the three classes : (1) atmabandhus or one's own bandhus, (2) pitrubandhus or the father's bandhus, and (3) matrubandhus or the mother's bandhus. The relevant passage in the Mitakshara is as follows: "Cognates are of three kinds: related to the person himself, to his father, or to his mother, as is declared by the following text. The sons of his own father's sister, the sons of his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred. Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance; on failure of them, his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended.
>
> Para 544 : *Enumeration only illustrative*.— Evidently, the enumeration of the above nine bandhus was not intended to be exhaustive, but only illustrative. When defining sapinda, Vijnanesvara says, "So also is the nephew a sapinda relation of this maternal aunts and uncles and the rest, because particles of the same body (the maternal grandfather) have entered into his and theirs; likewise does he stand in sapinda relationship with paternal uncles and aunts and the rest. In the light of this, his definition of bandhus or bhinnagotra sapindas makes it clear that maternal aunts and uncles and their descendants as well as paternal aunts and their descendants are bandhus and that his enumeration is purely illustrative. Visvarupa and Mitra Misra in his Viramitrodaya recognised this by including the maternal uncle and the like in the term 'bandhu' purely by way of illustration. Referring to the maternal uncle's sons, the Viramitrodaya says that it would be extremely improper that their sons are heirs but they themselves though nearer, are not heirs. After some fluctuation of opinion, it was finally settled that the enumeration of bandhus in the Mitakshara is not exhaustive but illustrative only."

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9. In paragraph 536, at p. 757, it is stated that in Bombay, the daughters of descendants, ascendants and collaterals *within five degrees inherit as bandhus in the order of propinquity*, such as the son's daughter, the daughter's daughter, the brother's daughter, the father's sister and so on. In Raghavachariar's *Hindu Law* at p. 412 in para 458, it is stated that the daughters of descendants, ascendants and collaterals up to fifth degree are bandhus and the test of nearness of blood is to be applied in ascertaining their order of succession. In *Mitakshara and Dayabhaga* by Colebrooke, 1883 Edition, at p. 99, it is stated in Section VI on the succession of cognate kindred, bandhu that on failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother. At p. 100, it is further stated that here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance: on failure of them his father's cognate kindred: or, if there be none, his mother's cogante kindred. This must be understood to be the order of succession here intended.

10. In *Girdhari Lall Roy* v. *Bengal Government*[11], the question arose whether the maternal uncle of the last male holder is a bandhu entitled to succession of the estate of the deceased. While considering the question exhaustively of the texts of Hindu Law on this topic including Section VI of Colebrooke's referred to above of the order of succession by bandhus, it was held by the Judicial Committee that if for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitakashara, they would feel great difficulty in inferring, from the omission of "the maternal uncle" and "the father's maternal uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindu in preference to the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. *For the text does not purport to be an exhaustive enumeration of all bandhus who are capable of inheriting, nor is it cited as such,* or for that purpose, by the author of the Mitakshara, as is used simply *as a proof or illustration of* his proposition, that there are three kinds of classes of bandhus, and all that he states further upon it is, the order in which the three classes take, viz., that the bandhus of the deceased himself must be exhausted before any of his father's bandhus can take, and so on. Accordingly, it was held that the maternal uncle is capable of inheriting the estate. This view was followed in *Muthuswami Mudaliyar* v. *Sunamedu Muthukumaraswami Mudaliyar*[12]. Accordingly, we hold that the enumeration of bandhus in various schools of Hindu Law of the rule of succession to the estate of the last male Hindu as agnates or cognates or collaterals, are only illustrative and not exhaustive. The Hindu Law of succession of Mitakshara School prevailing in Bombay Presidency recognises that a female is

11 (1867-79) 12 MIA 448: 1 BLR 44
12 LR (1895-96) 23 IA 83: ILR 19 Mad 405: 6 MLJ 113

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an heir as a bandhu to succeed to the estate of the last male holder through her mother's side within five degrees to the last male holder. The plaintiff being the only nearest bandhu of Rakhmaji within five degrees through her mother, is entitled to succeed to his estate as an heir. Accordingly, we hold that the plaintiff is entitled to the possession of the plaintiff schedule house No. 88 with mesne profits from the respondents.

11. The contention of Shri Lalit that the mortgagee respondent is entitled, in equity, to a decree for refund of the mortgage money which was admittedly found to have been paid, cannot be accepted as the same was not paid to the plaintiff. So far as the mortgagee's claim against the mortgagor is concerned, he may pursue any remedy available to him under law.

12. Accordingly, the appeal is allowed, the decree of the High Court is set aside and that of the trial court is restored to the extent of house No. 88, with proportionate costs throughout.

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(BEFORE K. JAGANNATHA SHETTY AND T.K. THOMMEN, JJ.)

MUNICIPAL CORPORATION, JABALPUR .. Appellant;

Versus

KRISHI UPAJ MANDI SAMITI AND ANOTHER .. Respondents.

Civil Appeal No. 480 of 1986†, decided on January 25, 1990

Municipalities — M.P. Krishi Upaj Mandi Adhiniyam, 1973 — Section 415 — Assessment of tax or demand of any fee by Corporation from a local authority under the provisions of the Act or refusal of the Corporation to consider the objections against such assessment or recovery fall within the expression "anything done or intended to be done under the Act" — But Corporation not obliged to move the government when the local authority refused to pay tax or fees levied and demanded — Difference between Section 415 of the 1973 Act and Section 334 of M.P. Municipalities Act, 1961 indicated (Paras 8 and 13)

Municipal Council, Gadarwara v. *Jawahar Krishi Upaj Mandi Samiti, Gadarwara*, W.P. No. 994 of 1981, decided on May 5, 1983, *distinguished*

R-M/9859/C

Advocates who appeared in this case:
D.N. Mukherjee and Ranjan Mukherjee, Advocates, for the Appellant;
S.S. Khanduja, Yashpal Dhingra and Baldev Kishan, Advocates, for the Respondents.

The Judgment of the Court was delivered by

K. JAGANNATHA SHETTY, J.— This appeal by leave from a judgment of the M.P. High Court concerns the scope of Section 415 of the M.P. Municipal Corporation Act, 1956 ('the Act' for short).

2. The circumstances can be shortly stated:

† From the Judgment and Order dated July 10, 1985 of the Madhya Pradesh High Court in Misc. Petition No. 1235 of 1984

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immediately on demand is a contravention under Section 20 read with Section 29 of the Act which is a forest offence. Therefore, the High Court was not right in holding that it is not in transit and that, therefore, the offences under Rule 3 read with Sections 20 and 29 of the Act have not been made out.

6. Accordingly, we hold that the loading of 28 logs of red sanderswood and storage of 118 red sanderswood on the road margin for loading into the lorry, but for the interception, would be forest produce in transit within the meaning of Rule 2(3) of the Rules. Admittedly, no permit was issued by the competent authority for transit of the red sanderswood seized from the lorry owner and the persons were found in possession at the time of loading. Thereby the offence under Rule 3 read with Sections 20 and 29 of the Act was rightly found by the court below. Accordingly, minimum sentence has been awarded. The appeal is accordingly allowed. The acquittal by the Single Judge is set aside and the conviction and sentence recorded by the trial court as confirmed by the appellate court are upheld. The confiscation of the lorry also is upheld, if not already confiscated by any order of the competent authority under Section 44 of the Act.

1995 Supp (1) Supreme Court Cases 485

(BEFORE J.S. VERMA AND K. RAMASWAMY, JJ.)

BALA SHANKAR MAHA SHANKER BHATTJEE AND OTHERS .. Appellants;

Versus

CHARITY COMMISSIONER, GUJARAT STATE .. Respondent.

Civil Appeal No. 175 of 1973†, decided on August 17, 1994

A. Hindu Law — Religious and charitable endowments — Temple — Public or private — Test to determine — Temple of Kalika Mataji situated on top of Pavagadh Hill near the town of Champaner in Halol Taluka of Panchmahal District, Gujarat — Idol — Nature of dedication — Inferable from conduct or facts and circumstances — Factors to be considered — Burden of proof — How discharged — Temple of ancient origin — Gazette and historical evidence can be relied on — Worship by general public as of right for long, offerings made by public, grants given by Rulers, location of the temple are circumstances in favour of the temple being a public trust — Fact that temple and its properties treated by the Will as private properties inconsequential as at that time concept of public and private trust was not in vogue — Internal regulations such as 'no entry without permission' or no puja inside the temple would not change the public character of the temple — On facts and circumstances held, the temple of Kalika Mataji a public trust — Bombay Public Trusts Act, 1950, Ss. 2(13) & (17) and 18

B. Hindu Law — Religious & charitable endowments — Temple — Private and public — Distinction between

C. Evidence Act, 1872 — Ss. 35, 81 and 45 — Gazette — Gazette of Bombay Presidency, Vol. III (published in 1879) — Admissible in evidence — Statement contained therein can be treated as evidence under S. 45

† From the Judgment and Decree dated 25/29-8-1972 of the Gujarat High Court in F.A. No. 417 of 1964

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D. Evidence Act, 1872 — S. 101 — Burden of proof — Meaning — Question of onus when arises

Held:

In private trust the beneficial interest is vested absolutely in one or more individuals who are, or within a given time, may be definitely ascertained. On the other hand public trust has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement of a private trust. In a public debuttar or endowment, the dedication is for the use or benefit of the public. But in a private endowment when property is set apart for the worship of the family idol, the public are not interested. There is a broad difference when one comes to construe a dedication, between conduct which shows that the owner of the property is giving individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission that is to say, as of right. A place in order to be a temple, must be a place for public religious worship used as such place and must be either dedicated to the community at large or any section thereof as a place of public religious worship. A useful test, for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. (Paras 8 and 19)

An idol is a juristic person capable of holding property. The property endowed to it vests in it but the idol has no beneficial interest in the endowment. The beneficiaries are the worshippers. Dedication may be made orally or can be inferred from the conduct or from a given set of facts and circumstances. There need not be a document to evidence dedication to the public. Dedication to the public may be proved by evidence or circumstances obtainable in given facts and circumstances. In given set of facts, it is not possible to prove actual dedication which may be inferred on the proved facts that place of public religious worship has been used as of right by the general public or a section thereof as such place without let or hindrance. Though the management of a temple by the members of the family for a long time is a factor in favour of the view that the temple is a private temple, it is not conclusive. It requires to be considered in the light of other facts or circumstances. In a given case management by the members of the family may give rise to an inference that the temple is impressed with the character of a private temple and assumes importance in the absence of an express dedication through a document. The consciousness of the manager of the temple or the devotees as to the public character of the temple; gift of properties by the public or grant by the Ruler or Government; and long use by the public as of right to worship in the temple are relevant facts drawing a presumption strongly in favour of the view that the temple is a public temple. The true character of the temple may be decided by taking into consideration diverse circumstances. Internal management of the temple is a mode of orderly discipline. That the devotees are allowed to enter into the temple to worship at particular time or after some duration or after the headman leaves the temple are not conclusive. The nature of the temple and its location are also relevant facts. The right of the public to worship in the temple is a matter of inference. If the general public have always made use of the temple for the public worship and devotion in the same way as they do in other temples, it is a strong circumstance in favour of the conclusiveness of public temple. The origin of the temple, when lost in antiquity, it is difficult to prove dedication to public worship. It must be inferred only from the proved facts and circumstances of a given case. No set of general principles could be laid. (Paras 20 and 21)

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Deoki Nandan v. *Murlidhar*, 1956 SCR 756 : AIR 1957 SC 133; *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan*, (1964) 1 SCR 561 : AIR 1963 SC 1638; *Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi*, (1960) 1 SCR 773 : AIR 1960 SC 100; *Mahant Ram Saroop Dasji* v. *S.P. Sahi, Special Officer-in-Charge of the Hindu Religious Trusts*, 1959 Supp (2) SCR 583 : AIR 1959 SC 951; *Goswami Shri Mahalaxmi Vahuji* v. *Ranchhoddas Kalidas*, (1969) 2 SCC 853 : AIR 1970 SC 2025; *State of Bihar* v. *Charusila Dasi*, AIR 1959 SC 1002 : 1959 Supp (2) SCR 601; *Bihar State Board Religious Trust* v. *Mahant Sri Biseshwar Das*, (1971) 1 SCC 574 : AIR 1971 SC 2057; *T.D. Gopalan* v. *Commissioner of Hindu Religious and Charitable Endowments*, (1972) 2 SCC 329 : (1973) 1 SCR 584; *Dhaneshwarbuwa Guru Purshottambuwa, owner of Shri Vithal Rukhamai Sansthan* v. *Charity Commissioner, State of Bombay*, (1976) 2 SCC 417 : (1976) 3 SCR 518; *T.V. Mahalinga Iyer* v. *State of Madras*, (1981) 1 SCC 445 : AIR 1980 SC 2036; *Radhakanta Deb* v. *Commissioner of Hindu Religious Endowments*, (1981) 2 SCC 226; *Hari Bhanu Maharaj of Baroda* v. *Charity Commissioner*, (1986) 4 SCC 162; *Jammi Raja Rao* v. *Sri Anjaneyaswami Temple Valu*, (1992) 3 SCC 14; *Kapoor Chand* v. *Ganesh Dutt*, 1993 Supp (4) SCC 432, *relied on*

Burden of proof would mean that a party has to prove an allegation before he is entitled to a judgment in his favour. The one or the other of the contending parties has to introduce evidence on a contested issue. The question of onus is material only where the party on which it is placed would eventually lose if he failed to discharge the same. Where, however, parties joined the issue, led evidence, such evidence can be weighed in order to determine the issue. The question of burden becomes academic. (Para 19)

The Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under Section 35 read with Section 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Section 45 and the court may in conjunction with other evidence and circumstance take into consideration in adjudging the dispute in question, though may not be treated as conclusive evidence. (Para 22)

The Gazette and the historical evidence of the temple would show that the village is the pilgrimage centre. Situation of the temple on the top of the hill away from the village and worshipped by the people of Hindu community at large congregated in thousands without any let or hindrance and as of right, devotees giving their offerings in large sums in discharge of their vows, do establish that it is a public temple. The treatment meted out to the temple by the Will as private property is not conclusive for, at that time the concept of public trust and public temple was not very much in vogue. On the other hand the fixed cash grants given by the Rulers — Scindias and the successor British emperors and the large endowment of lands given to Kalika Mataji temple by the devotees do indicate that the temple was treated as public temple. The appropriation of the income and the inter se disputes in that behalf are self-serving evidence without any probative value. Admittedly, at no point of time, the character of the temple was an issue in any civil proceedings. All the lands gifted to the deity stand in the name of the deities, in particular, large extent of agricultural lands belong to Kalika Mataji. The entries in Revenue records corroborated it. It is true that there is no proof of dedication to the public. It was lost in antiquity and no documentary evidence in that behalf is available. Therefore, from the treatment meted out to the temple and aforesaid evidence, an irresistible inference would be drawn that the temple was dedicated to the Hindu public or a section thereof and the public treat the temple as public temple and worship thereat as of right. It is true that there is evidence on

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record to show that there was a board with inscription thereon that "no entry without permission" and that only Darshan was being had and inside Pooja was not permitted. But that is only internal regulation arranged for the orderly Darshan and that is not a circumstance to go against the conclusion that it is a public temple. Enjoyment of the properties and non-interference by the public in the management are not sufficient to conclude that the temple is a private temple. It is found by the District Court and the High Court that the appellants are hereditary priests and when the public found that they are in the management of the properties, they obviously felt it not expedient to interfere with the management of the temples. The High Court considered the evidence placed on record and has drawn the necessary conclusions and inferences from the proved facts that Kalika Mataji temple is a public temple. It is a finding of fact. As regards the oral evidence the High Court rightly appreciated the evidence and it being a question of fact, there is no error in the assessment of the evidence by the High Court. (*See* also Para 5)

(Paras 22 and 5)

Therefore, it must be held that Kalika Mataji temple is a public trust within the meaning of Section 2(13); and public temple under Section 2(17) of the Act.

(Para 23)

Appeal dismissed with costs quantified as Rs 20,000 R-M/ATG/13436/S

Advocates who appeared in this case :

Yogeshwar Prasad, Senior Advocate (Ms S. Bagga, Advocate, with him) for the Appellants;

M.L. Verma, Senior Advocate (Devendra Singh, Advocate, with him) for the Intervenor;

R.P. Bhatt, Senior Advocate (M.N. Shroff, Tanuja Sheel, Reema Bhandari and Anip Sachthey, Advocates, with him) for the Respondent.

The Judgment of the Court was delivered by

K. RAMASWAMY, J.— This appeal, by leave under Article 133, granted by the High Court, arises from the Division Bench judgment of the Gujarat High Court in First Appeal No. 417 of 1964 dated 25/29-8-1972 reversing the decision of the District Judge Panchmahal in OMCA No. 19 of 1961. Near the town of Champaner in Halol Taluka of Panchmahal District, there is a hill called Pavagadh Hill. On its top Kalika Mataji, Bhadrakali Mataji, Annapurna Mataji and Budhia Darwajani Budhia Mataji temples are situated. Another temple by name Ranchhodji along with the Haveli is also situated in the main village which are the subject-matters of these proceedings. The High Court held that Kalika Mataji temple is a public trust and a public temple within the meaning of Section 2(13) read with Section 2(17) of the Bombay Public Trusts Act, 1950, (for short 'the Act') and set aside the contra-declaration of the District Judge. The Assistant Charity Commissioner was directed to conduct *de novo* inquiry in regard to other temples, finding that the joint enquiry held by the Assistant Charity Commissioner has led to "prejudicial and lopsided results".

2. The facts for our decision are as under.

3. The appellants' predecessors were called upon and under protest made an application under Section 18 of the Act for registration of the temples as Public Trust. By order dated 6-6-1958, after conducting an enquiry, the Assistant Charity Commissioner held the five temples and Haveli as public trust properties. On appeal the Deputy Charity Commissioner in his order dated

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20-10-1959, remitted for fresh inquiry. Thereafter the Assistant Charity Commissioner after inquiry, by his order dated 24-8-1969, reiterated that the temples and Haveli will be public trust properties and accordingly ordered their registration under the Act. On appeal, the Charity Commissioner in his order dated 22-5-1961 confirmed the same and dismissed the appeal. On further appeal under Section 72, at the instance of the appellants, the District Judge declared that all the five temples and Haveli are private properties and directed deletion of their registration under the Act. As stated earlier, the High Court reversed and upheld the registration of Kalika Mataji temple as a public trust property and remitted for fresh inquiry in respect of other four temples and Haveli.

4. Shri Yogeshwar Prasad, the learned Senior Counsel contended that the District Judge had elaborately considered the entire evidence from the factual matrix to conclude that Kalika Mataji temple and other temples are private temples and that, therefore, they are not public trust properties for being registered under Section 18 of the Act. He had taken us through the entire evidence, judgments of the District Court and the High Court. He contends that the High Court had not correctly applied the legal tests laid by this Court in adjudging Kalika Mataji to be public temple which was refuted by Shri Bhatt, Senior Counsel appearing for the respondents and Shri Verma for the intervener who has been permitted to argue the matter by specific order in that behalf. We have gone through the judgment of the High Court and that of the District Court, scanned the entire evidence on records and given our anxious consideration to their respective contentions.

5. The question emerges whether the Kalika Mataji temple is a public trust. The High Court after exhaustively subjecting the entire material evidence to close scrutiny concluded thus:

(1) It (Kalika Mataji temple) is very ancient temple more than thousand years old.

(2) Its origin is lost in antiquity. It is not possible to rely upon the evidence of witness Chandramukhram and witness Pavinbhai that about a thousand years ago their ancestor Devshanker had the vision of Mataji at that place and that he had constructed that temple for his own worship. They cannot have knowledge of events which took place a thousand years ago. We are, therefore, of the opinion that so far as the origin of the temple is concerned it is lost in antiquity. The temple is situated on a hill where there is no permanent human habitation.

(3) It is situated about a mile away from Champaner which is the nearest village.

(4) Pilgrims in thousands visit every year this temple for Darshan, for performing their individual rituals and for discharging themselves from the vows (Badhas) which they take for due fulfilment of their desires. They do so on account of their faith in Mataji.

(5) The visitors visit the temple without let or hindrance. Therefore, no evidence of anyone having been obstructed in his visit to temple for Darshan. There is evidence on record regarding offerings from the

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visitors to Mataji not only in small coins but also in big things, as we shall shortly show.

(6) The temple has been shown in Government records as belonging to Mataji and the respondents have been described as its Vahivatdars and Pujaris.

(8) There is cash allowance paid from the State Treasury to maintain it. It has been paid to the deity. The respondents are only its recipients in their capacities as the Pujaris or Acharyas of the temple.

(8) The evidence of witness Chandramukhram shows that separate accounts of the income of the temple have been maintained.

(9) Sanad No. 19 to which we have referred in the foregoing paragraphs of this judgment, shows that Scindias in their capacity as sovereign Rulers had interest in that temple and that they had passed on their obligation in respect of the temple to the British Government by the treaty concluded between them and the British Government in 1860.

(10) The properties attached to the temple of Kalika Mataji have been shown in all Government records in the name of Mataji and not in the names of the respondents. Obviously this factor leads to the inference that the immovable properties standing in the name of Mataji were gifted or donated to the deity.

(11) The evidence further discloses that the deity has three sources of income (*a*) cash allowance from the State Treasury, (*b*) offerings by the devotees and visitors and (*c*) income from immovable properties given over to and in the name of Mataji.

In view of all these factors we have no doubt in our mind that temple of Kalika Mataji is 'temple' within the meaning of Section 2(17) of the Bombay Public Trusts Act, 1950 and is therefore, a public trust as defined in Section 2(13) of the said Act. We record this conclusion on the strength of the fact that taking into account the nature of public user of the temple and other attendant factors the members of the Hindu community have been using it as of right. In a given case public user as of right may not amount to implied dedication. It depends upon the facts of each case. But so far as the facts of the present case are concerned, no doubt it is left in our mind that on an analysis of the evidence discussed by us above not only the user by members of the Hindu community of the said temple has been as of right but that it amounts to implied dedication for the benefit of the Hindu community.

6. The main question that needs decision is whether Kalika Mataji temple is a temple within the meaning of Section 2(17) and a public trust under Section 2(13) of the Act. Temple has been defined in Section 2(17) of the Act, which reads thus:

> " 'temple' means a place by whatever designation known and used as place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as place of public religious worship."

and public trust has been defined in Section 2(13) thereof which reads as under:

> " 'Public trust' means an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, a dharmada or any other religious or charitable endowment and a

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society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860."

7. A bare conjoint reading of the two definitions would show that the definition of public trust is an inclusive one bringing within its ambit, an express or constructive trust for which a public religious or charitable purpose or for both which includes a temple, a math, a wakf, a dharmada or any other religious or charitable endowment and a society formed either for religious or charitable purpose or for both and a registered society under the Societies Registration Act. A public place by whatever designation is temple when it is used as a place of public religious worship. It must be dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof, as a place of public religious worship.

8. *Black's Law Dictionary*, 6th Edn., at p. 1512 defines "public trust" to mean:

> "One constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description; public trusts and charitable trusts may be considered in general as synonymous expressions."

At p. 1510 "charitable trust" has been defined as:

> "Trusts designed for the benefit of a class or the public generally. They are essentially different from private trusts in that the beneficiaries are uncertain. In general, such must be created for charitable, educational, religious or scientific purposes."

In P. Ramanatha Aiyar's *The Law Lexicon*, Reprint Edn. 1987, at p. 1298 under "Trust" "public and private trust" has been defined as:

> "In the case of a temple an idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous, one would expect and ought to insist upon clear evidence of permission given or licence given and permission withheld because it is equally true that a private individual may construct, out of his private purse a private temple and idol retaining the control and management in his own hands and that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication and by conduct."

There is a broad difference when one comes to construe a dedication, between conduct which shows that the owner of the property is giving individuals and conduct which shows that he intends certain members of a class whom he desires to benefit to act indiscriminately without permission that is to say, as of right. A useful test, for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. In private trust the beneficial interest is vested absolutely in one or more individuals who are, or within a given time, may be definitely ascertained. On the other hand public trust has for its object the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement of a private trust.

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9. *Deoki Nandan* v. *Murlidhar*[1] is a leading judgment of this Court by a Bench of four Judges. In that case the facts found were that one Sheo Ghulam, a pious childless Hindu, constructed Thakurdwara of Shri Radhakrishnaji in Balasia Village of District Sitapur. He was in management of the temple till his death. He executed a 'will' bequeathing all his properties to the temple and made provisions for its proper management. The question arose whether the temple was dedicated to the public and whether the temple was a public or private temple. This Court laid down that the issue whether the religious endowment is a public or a private one is a mixed question of law and facts, the decision of which must be taken on the application of the legal concepts of public and private endowment to the facts found and it is open to consideration of this Court. The distinction between a private or a public endowment is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. An idol is a juristic person capable of holding properties. The properties endowed for the temple vest in it, but the idol has no beneficial interest in the endowment. The true beneficiaries are its worshippers. On facts it was found that the temple was a public temple. In *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan*[2] the Constitution Bench of this Court held, on construction of evidence, that Nathdwara temple of Udaipur is a public temple with the management of the property belonging to the temple vested in the trustee. In *Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi*[3] a Bench of three Judges held that the long user by the public as of right and grant of land and cash by the Rulers, taken along with other relevant facts were consistent only with the public nature of the endowment. It was held that Sri Balaji Venkatesh at Nasik and its Sansthan constituted charitable and religious trust within the meaning of the Charitable and Religious Trusts Act, 1920. In that context this Court also considered the question of burden of proof and held that it would mean one of two things, namely, (1) that a party has to prove an allegation before it is entitled to a judgment in its favour; and (2) that the one or the other of the two contending parties has to introduce evidence on a contested issue. The question of onus is material only where the party on which it is placed would eventually lose if it failed to discharge the same. Where issues are, however, joined, evidence is led and such evidence can be weighed in order to determine the issues, the question of burden becomes academic.

10. In *Mahant Ram Saroop Dasji* v. *S.P. Sahi, Special Officer-in-Charge of the Hindu Religious Trusts*[4] another Constitution Bench reiterated the distinction between the public and private trust. In the former the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it, answering a particular description. In the latter, the beneficiaries are definite and ascertained individuals or who within a time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or

1 1956 SCR 756 : AIR 1957 SC 133
2 (1964) 1 SCR 561 : AIR 1963 SC 1638
3 (1960) 1 SCR 773 : AIR 1960 SC 100
4 1959 Supp (2) SCR 583 : AIR 1959 SC 951

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is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust. It was held that Sri Thakur Laxmi Narainji was a public trust within the meaning of Section 2(*e*) of the Bihar Hindu Religious Trusts Act, 1950. In *Goswami Shri Mahalaxmi Vahuji* v. *Ranchhoddas Kalidas*[5], relied on by the appellant, this Court construing whether a temple is a public or a private temple laid down the following tests: (SCC p. 861, para 15)

"(1) Is the temple built in such imposing manner that it may prima facie appear to be a public temple?

(2) Are the members of the public entitled to worship in that temple as of right?

(3) Are the temple expenses met from the contributions made by the public?

(4) Whether the Sevas and Utsavas conducted in the temple are those usually conducted in public temples?

(5) Have the management as well as the devotees been treating that temple as a public temple?

On the facts of that case, it was held that Haveli at Nadiad was a public temple. In that context this Court emphasised that the origin of the temple, the manner in which its affairs are managed, the nature and extent of gifts received by it, rights exercised by the devotees in regard to worship, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple are relevant factors which would go to establish whether that the temple is a public or a private one. The true character of a particular temple is to be decided on the basis of diverse circumstances.

11. In *Goswami Shri Mahalaxmi Vahuji* v. *Ranchhoddas Kalidas*[5] while considering whether Shree Gokulnathji temple at Nadiad was a public trust, this Court had held that the temple belongs to Vallabha Sampradayees and the custom that the public are asked to enter the temple only after Goswami has finished worship is no circumstance to show that temple is private one. The power to manage temple includes the power to maintain discipline within its precincts. It was held that Shree Gokulnathji temple was a public trust. In *State of Bihar* v. *Charusila Dasi*[6] another Constitution Bench found that Ishwar Shreegopal was installed as a family deity by Smt Charusila Dasi. A trust deed was settled by her. Subsequent execution of the trust deed and the terms thereof were considered by this Court and held to be a public endowment. In *Bihar State Board Religious Trusts* v. *Mahant Sri Biseshwar Das*[7] relied on by the appellant, while reiterating the distinction between public or private endowment, one of the tests laid was that user by public as of right would be a strong circumstance to give stand to the inference that it was dedicated to the public and the public users were as of right. With regard to the management of the properties and enjoyment thereof this Court pointed out to find whether the property was given to the Math or to the head of the Math for personal benefit

5 (1969) 2 SCC 853 : AIR 1970 SC 2025
6 AIR 1959 SC 1002 : 1959 Supp (2) SCR 601
7 (1971) 1 SCC 574 : AIR 1971 SC 2057

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which has to be decided either from the terms of the grant or from the circumstance of the case. On the terms of the deed of the gift it was held that the properties were stamped as trust properties for public purpose.

12. In *T.D. Gopalan* v. *Commissioner of Hindu Religious and Charitable Endowments*[8], relied on by the appellants, the facts were that the Mandapam was constructed on their own land. The Garbha Griha in front of the Mandapam, stone idols called Dwarabalakas on either side and implements necessary for offering puja in the Mandapam existed. The Commissioner declared it to be a public temple but in the suit the trial court declared it to be a private temple. On appeal, the High Court reversed the decree of the trial court and held that the temple was a public temple on the ground that members of the public had been worshipping at the shrine without let or hindrance, and that the temple was being run by contributions and by benefactions obtained from members of the public. This Court considered the nature of the temple, place of worship without attaching importance of the origin of the temple, the management thereof by the members of the family and absence of any endowed property etc. declared it to be private temple and confirmed the decree of the trial court. While considering those facts, this Court held that the origin of the temple, the manner in which its affairs were managed, the nature and extent of the gifts received by it, the rights exercised by devotees in regard to worship therein, the consciousness of the manager or devotees themselves as to the public character of the temple are facts which go to establish whether a temple is public or private. The absence of Dwajasthamba or Nagara bell or Hundial in the temple were considered to be factors to declare the temple to be a private temple. In *Dhaneshwarbuwa Guru Purshottambuwa, owner of Shri Vithal Rukhamai Sansthan* v. *Charity Commissioner, State of Bombay*[9], while reiterating the well-settled distinction between private trust and public trust, this Court emphasised that the deity installed in the temple was intended by the founder to be continually worshipped by an indeterminate multitude of the Hindu public without any hindrance or restriction in the matter of worship by the public extending over a long period. Receipt of the royal grant, gifts of the land by members of the public, absence of any evidence in the long history of the Sansthan to warrant that it had any appearance of, or that it was ever treated as, a private property are some of the features to lead to an inescapable conclusion that Shri Vithal Rukhamai Sansthan was to be public trust within the meaning of Section 2(13) of the Act.

13. In *T.V. Mahalinga Iyer* v. *State of Madras*[10], it was held that crucial question is as to whether the public worship in the temple as of right. Ordinarily there may not be direct evidence regarding the exercise of such right by the general public and an inference has to be drawn from a wealth of circumstances. The dedication to the public need not be by a deed and may be spelt out of the circumstances present. The right of the public to worship is also a matter of inference. The initial presumption with regard to temples in South India is that

8 (1972) 2 SCC 329 : (1973) 1 SCR 584
9 (1976) 2 SCC 417 : (1976) 3 SCR 518
10 (1981) 1 SCC 445 : AIR 1980 SC 2036

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they are the public temples, rebuttable by clinching testimony. The temple, in question, in that case, was held to be a public temple.

14. In *Radhakanta Deb* v. *Commissioner of Hindu Religious Endowments*[11], this Court was to consider whether Radhakanta Deb in Orissa State is a public or private trust. This Court held that each case has to be decided with reference to the facts proved therein and it is difficult to lay down any test or tests which can be of universal application. Where the origin of the endowment is lost in antiquity or shrouded in mystery, there being no document or reliable entries to prove its origin, the task of the Court becomes difficult and it has to rely merely on the circumstantial evidence regarding the nature of the user of the temple. It was also further held that allowing the public to worship by itself would not make an endowment public unless it is proved that the members of the public had a right to worship in the temple. On the facts, in that case, it was held that the temple, in question, was a public temple.

15. In *Hari Bhanu Maharaj of Baroda* v. *Charity Commissioner*[12], the trump card of the appellant renders little assistance to them. Laxman Maharaj Math built in 1835 A.D. was considered whether to be public or private trust. In view of the size of the building, existence of Samadhi on Mandir in a small extent of land, location of the Mandir, using a portion of it for residents, were held to be important factors. In view of the unimpeachable evidence of use of the Mandir for long period and the absence of Maths and tomb under the Samadhi was considered to be a private temple.

16. In *Jammi Raja Rao* v. *Sri Anjaneyaswami Temple Valu*[13] the question whether Sri Anjaneyaswami temple at V'puram in Andhra Pradesh is a private or a public temple. The appellant's father claimed it to be private temple and that he was a hereditary trustee. The trial court and the High Court held the temple to be a public temple. This Court dismissed the appeal confirming the decree of the High Court and civil court and held that the entries in the Inam Fair Register and the oral evidence establish the temple to be a public temple. Proof of user by the public without interference would be cogent that its dedication was in favour of the public. The finding that the temple is public temple is a finding of fact. It is not open to further scrutiny by this Court unless it suffers from errors of law.

17. In *Kapoor Chand* v. *Ganesh Dutt*[14] this Court held that dedication of private property for religious and charitable purpose may be proved by oral evidence or may be inferred from the conduct of the parties. In a suit to set aside alienation of the temple property by its manager, this Court held that the High Court committed error of law in not drawing proper inference from the proved evidence or admissions. An inference of dedication of a property to the deity was drawn from the conduct of the parties.

18. From the aforesaid discussion the following principles of law would merge.

11 (1981) 2 SCC 226
12 (1986) 4 SCC 162
13 (1992) 3 SCC 14
14 1993 Supp (4) SCC 432

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19. A place in order to be a temple, must be a place for public religious worship used as such place and must be either dedicated to the community at large or any section thereof as a place of public religious worship. The distinction between a private temple and public temple is now well settled. In the case of former the beneficiaries are specific individuals; in the latter they are indeterminate or fluctuating general public or a class thereof. Burden of proof would mean that a party has to prove an allegation before he is entitled to a judgment in his favour. The one or the other of the contending parties has to introduce evidence on a contested issue. The question of onus is material only where the party on which it is placed would eventually lose if he failed to discharge the same. Where, however, parties joined the issue, led evidence, such evidence can be weighed in order to determine the issue. The question of burden becomes academic.

20. An idol is a juristic person capable of holding property. The property endowed to it vests in it but the idol has no beneficial interest in the endowment. The beneficiaries are the worshippers. Dedication may be made orally or can be inferred from the conduct or from a given set of facts and circumstances. There need not be a document to evidence dedication to the public. The consciousness of the manager of the temple or the devotees as to the public character of the temple; gift of properties by the public or grant by the ruler or Government; and long use by the public as of right to worship in the temple are relevant facts drawing a presumption strongly in favour of the view that the temple is a public temple. The true character of the temple may be decided by taking into consideration diverse circumstances. Though the management of a temple by the members of the family for a long time, is a factor in favour of the view that the temple is a private temple, it is not conclusive. It requires to be considered in the light of other facts or circumstances. Internal management of the temple is a mode of orderly discipline or the devotees are allowed to enter into the temple to worship at particular time or after some duration or after the headman leaves the temple are not conclusive. The nature of the temple and its location are also relevant facts. The right of the public to worship in the temple is a matter of inference.

21. Dedication to the public may be proved by evidence or circumstances obtainable in given facts and circumstances. In given set of facts, it is not possible to prove actual dedication which may be inferred on the proved facts that place of public religious worship has been used as of right by the general public or a section thereof as such place without let or hindrance. In a public debuttar or endowment, the dedication is for the use or benefit of the public. But in a private endowment when property is set apart for the worship of the family idol, the public are not interested. The mere fact that the management has been in the hands of the members of the family itself is not a circumstance to conclude that the temple is a private trust. In a given case management by the members of the family may give rise to an inference that the temple is impressed with the character of a private temple and assumes importance in the absence of an express dedication through a document. As stated earlier, consciousness of the manager or the devotees in the user by the public must be as of right. If the general public have always made use of the temple for the public worship and devotion in the same way as they do in other temples, it is a

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strong circumstance in favour of the conclusiveness of public temple. The origin of the temple, when lost in antiquity, it is difficult to prove dedication to public worship. It must be inferred only from the proved facts and circumstances of a given case. No set of general principles could be laid.

22. The contention of Shri Yogeshwar Prasad that the Assistant Charity Commissioner has failed to prove that Kalika Mataji temple is a public trust; contrarily the evidence on records, namely the 'Will' of Bai Diwali, widow of N. Girjashankar, establishes that the temple and its properties were always treated as private properties. It would get fortified and gets corroborated by decrees in Civil Suit No. 439 of 1985, one of the legatees sought to annul the Will in Exs. 10, 59 and the decree in that behalf. The Civil Suit No. 353 of 1993, Ex. 24 and the Civil Suit No. 439 of 1885, Ex. 26 and the Civil Suits Nos. 904 and 910 of 1903, Ex. 52 and Ex. 54, Civil Suit No. 912 of 1903, Ex. 55 would establish that the appellant's family had always treated the temple and the lands attached to temple as private properties. It has also been further contended that the entry into the temple was subject to permission and the devotees were not allowed to have Pooja, but have Darshan only. These circumstances have duly been taken into consideration by the District Judge while the High Court had not considered them in proper perspective. We find no force in the contention. It is seen that the Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under Section 35 read with Section 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Section 45 and the court may in conjunction with other evidence and circumstance take into consideration in adjudging the dispute in question, though may not be treated as conclusive evidence. The recitals in the Gazette do establish that Kalika Mataji is on the top of the hill, Mahakali temple and Bachra Mataji on the right and left to the Kalika Mataji. During Mughal rule another Syed Sadar Peer was also installed there, but Kalika Mataji was the chief temple. Hollies and Bills are the main worshippers. On full moon of *Chaitra* (April) and Dussehra (in the month of October), large number of Hindus of all classes gather there and worship Kalika Mataji, Mahakali etc. After the downfall of Mughal Empire, Marathas took over and His Highness Scindia attached great importance to the temple. One of the devotees in 1700 offered silver doors. The British annexed the territory pursuant to the treaty between Her Majesty's Government of India and His Highness Scindia on 12-12-1860. A condition was imposed in the treaty for continued payment of fixed cash grants to all the temples from the Treasury and the British emperors accepted the condition. Regular cash grants of fixed sums were given to all the temples by Scindias and British rulers, as evidenced by Exs. 27, 28, 29 and 30. The historical statement of noted historian, stated by the High Court, by name M.S. Commissionaria in his Vol. 1 of 1938 Edition corroborates the Gazette on the material particulars which would establish that the temple was constructed on the top of the hill around 14th century and the people congregate in thousands and worship, as of right, Kalika Mataji and other deities. R.N. Jogelkar's *Alienation Manual* brought out in 1921, in the Chapter 5

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'Devasthana' also corroborates the historical evidence. It is true that Bai Diwali in her Will, Ex. 22 treated the temple and the properties to be private property and bequeathed to her brother and the litigation ensued in that behalf. At that time, as rightly pointed out by the High Court, the concept of public trust and public temple was not very much in vogue. Therefore, the treatment meted out to these properties at that time is not conclusive. On the other hand the fixed cash grants given by the Rulers — Scindias and the successor British emperors and the large endowment of lands given to Kalika Mataji temple by the devotees do indicate that the temple was treated as public temple. The appropriation of the income and the inter se disputes in that behalf are self-serving evidence without any probative value. Admittedly, at no point of time, the character of the temple was an issue in any civil proceedings. All the lands gifted to the deity stand in the name of the deities, in particular, large extent of agricultural lands belong to Kalika Mataji. The entries in Revenue records corroborated it. The Gazette and the historical evidence of the temple would show that the village is the pilgrimage centre. Situation of the temple on the top of the hill away from the village and worshipped by the people of Hindu community at large congregated in thousands without any let or hindrance and as of right, devotees giving their offerings in large sums in discharge of their vows, do establish that it is a public temple. It is true that there is no proof of dedication to the public. It is seen that it was lost in antiquity and no documentary evidence in that behalf is available. Therefore, from the treatment meted out to the temple and aforesaid evidence, in our considered view, an irresistible inference would be drawn that the temple was dedicated to the Hindu public or a section thereof and the public treat the temple as public temple and worship thereat as of right. It is true that there is evidence on record to show that there was a board with inscription thereon that "no entry without permission" and that only Darshan was being had and inside Pooja was not permitted. But that is only internal regulation arranged for the orderly Darshan and that is not a circumstance to go against the conclusion that it is a public temple. Enjoyment of the properties and non-interference by the public in the management are not sufficient to conclude that the temple is a private temple. It is found by the District Court and the High Court that the appellants are hereditary priests and when the public found that they are in the management of the properties, they obviously felt it not expedient to interfere with the management of the temples. It is seen that the High Court considered the evidence placed on record and has drawn the necessary conclusions and inferences from the proved facts that Kalika Mataji temple is a public temple. It is a finding of fact. As regards the oral evidence the High Court rightly appreciated the evidence and it being a question of fact, we find no error in the assessment of the evidence by the High Court.

23. Thus, we are of the considered view that Kalika Mataji temple is a public trust within the meaning of Section 2(13); and public temple under Section 2(17) of the Act and the High Court rightly relegated the enquiry in respect of other temples and we feel it not expedient to record any finding in that behalf. The appeal is accordingly dismissed with costs quantified as Rs 20,000.

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1874 SCC OnLine PC 8 : (1873-74) 1 IA 209

Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai

Reported in Indian Appeals

Indian Appeals being Cases in the Privy Council in Appeal from The East Indies

JUDICIAL COMMITTEE:—THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, AND THE RIGHT HON. SIR ROBERT P. COLLIER.

RAJAH MUTTU RAMALINGA SETUPATI, Zemindar of Ramnad, the adopted Son of the late Zemindar RAMASWAMI SETU-PATI, and Survivor of RANEE SETU-PATI PARVATAVARDANI NAUCHEAR, late Zemindar of Ramnad, Co-Plaintiff, deceased ... Appellant;

and

PERIANAYAGUM PILLAI, Guardian of RAMANADA PANDARAM, a Minor, Heir to AMBALAVANA PILLAI late Defendant, deceased ... Respondent

On Appeal from the High Court of Judicature at Madras.

Decided on Jan. 16, 17, 23, 24, 28, 29 and March 18, 1874

The important principle to be observed by the Courts in dealing with the constitution and rules of religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of litigation and to be guided by them. The custom and practice in such matters is to be proved by testimony.

A zemindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom.

An acknowledgment, taken in troubled times from the guardian of an infant mohunt, of a Zemindar's customary right to control and remove the mohunt, is entitled to little, if any, weight as evidence of the custom.

The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government; and Reg. VII. of 1817, of the *Madras Presidency*, merely defined the manner in which that power was thenceforth to be exercised.

Reports made by collectors, acting under Reg. VII. of 1817, of the *Madras Presidency*, are not to be regarded as having judicial authority where they express opinions on the private rights of parties; but being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded on them.

THE zemindars of *Ramnad*, in the district of *Madras*, represent one of the principal benefactors of the richly-endowed pagoda of

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Rameswarem, and the zemindar for the time being enjoys the title of Setupati, or Lord of the Causeway by

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which pilgrims approach the temple. He also claims the title of Dharmakarta (which he interprets as meaning trustee or superintendent of the affairs of the pagoda), and the right to appoint and to grant investiture to the pandaram, or chief priest of the temple.

In the year 1857 the zemindar, the late *Ranee Setupati Parvatavardani Nauchear*, filed her plaint in the Civil Court of *Madura* against the pandaram, *Ambalavana Pillai*, stating the gifts and claims of the family in respect of the pagoda, and alleging that the Defendant had not been duly appointed; that he had not managed the affairs of the pagoda under the superintendence of the zemindar, notwithstanding that in 1837 the person who was then the pandaram had entered into a special convention to do so. The plaint also charged the pandaram with misapplication of funds, and prayed that he might be removed from the management and might pay over a balance of Rs. 18,000 to the Plaintiff.

The Defendant by his answer insisted that the pagoda owed the chief part of its wealth to other sources than the endowments derived from the zemindar; that the pandaram and not the zemindar was the dharmakarta, and that he had a right to appoint his own successor; that the instrument of 1837 set up by the Plaintiff was fabricated, and, at all events, invalid. He pleaded also the *Statute of Limitations*.

(It may be here mentioned that while the suit was pending the Plaintiff adopted a son, the Appellant, who was associated with her as co-Plaintiff, and also survived her. The original Defendant died, and was succeeded by the Respondent.)

The parties went into evidence, and certain depositions or statements made in 1815 or 1816 (the admissibility of which was disputed) were tendered to prove that several appointments and removals of pandarams had been made previous to 1793 by *Muttu Ramalinga*, the zemindar of the day, a rajah in whose time the country was in a disturbed state, and who was finally deposed by the British Government. It was clearly established that in 1793 he appointed a boy of the sacerdotal family of *Tillianayagam Pillai* to be pandaram, and took from the boy, through his guardian, a karamamah, or engagement, in the following terms: —

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"To M.R. Ry. Karttakkal Avergal.

"Karamamah executed by *Ramanadan, son* of *Tillianayagam Pillai*, on the 25th Ady, in the year Pramadicha (11th August, 1793).

"As you have been pleased to appoint me for the management of the affairs of the pagoda at *Rameswarem*, I will cause puja to be duly performed in the pagoda six times a day without delay, and get the monthly, annual, and other festivals affairs duly performed as usual; I shall have the fixed wages of the servants and workmen of the pagoda paid to them without any difference, and make every one of the servants to attend to his duty regularly. If any one is absent I shall mark down his name in the absent book, and make a stoppage in his wages, and credit the same to the pagoda. I shall keep peace with the ryots in the villages attached to the pagoda, so as to effect proper cultivation, and use all the means I could to enhance the amount of profit. If any one in the pagoda, or any of the ryots in the villages, shall be found guilty, or if any case be brought by them, I shall stand impartial in deciding the case, and levy fine from the person found guilty, and carry the money to the credit of the pagoda.

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"I shall deal in peace with those who are friendly with *Samastanam* (*Zemindary*), and stand against those who are adversaries. In case of my dealing friendly with the enemies of the zemindary you may remove me and appoint another person in my room. I shall pay into the palace half of the profits realised in hundies on account of the puja of the goddess *Raja Rajeswara Ammann*. As a person belonging to the zemindary, I shall take every care to see the affairs of the pagoda performed efficiently. If I act improperly in these affairs I shall submit myself to the orders of the zemindar.

"Thus do I execute this karamamah of my free will.

(Signed)

"Ramanadan,"

This karamamah was witnessed by *Arunachalam* and *Yeganayagam*, officers of the pagoda.

About the same time the zemindar issued a written order to all the officers of the pagoda, enjoining them to obey the new pandaram.

In 1803 the government revenue in respect of the zemindary

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was permanently settled with the zemindar. The settlement did not comprise any of the villages belonging to the pagoda.

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In the year 1815, the pandaram, who was appointed in 1793, died, and one *Venkatachellum* claimed to succeed him, whereupon the zemindar, alleging that *Venkatachellum* had been unduly appointed by certain persons who had misappropriated and intended to misappropriate the property of the pagoda, applied to the collector to issue directions that the said *Venkatachellum* should not be acknowledged as pandaram, and that the property of the deceased pandaram should be placed in charge of the Circar (Government).

The collector issued an order, restraining *Venkatachellum* from acting as pandaram "until further orders," but on the 23rd of July, 1816, after further investigation, he issued another order, directing that *Venkatachellum* should be acknowledged as pandaram of the pagoda, with all the usual honours and offerings. It appears however, that he was not allowed exclusive control over the property and finances of the pagoda, but that he was ordered to conduct its affairs jointly with the Circar servants, and subject to the control of the sub-collector. At this time the pagoda was under attachment by the collector, with the sanction of the Board of Revenue, and the zemindary was also under attachment, because the succession to it was disputed; but it was matter of contest in the cause at what dates they had severally been attached, or whether they had been attached together.

In the year 1828, the litigation respecting the succession to the zemindary terminated by the judgment of His Majesty in Council, dated the 28th of April, 1828, in favour of *Ramaswami Setupati*, who thereupon became Zemindar of *Ramnad.*

In the year 1829, the attachment was accordingly removed, and the zemindary and its appendages formally handed over to *Ramaswami Setupati*, in the following manner:—

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On the 30th of April, 1829, the collector informed the zemindar, *Ramaswami Setupati*, that he had issued a circular order to all the amildars of the thirteen talooks of the zemindary, the tahsildars of the pagoda and choultry, and the other servants, directing them to act up to the zemindar's orders from the 1st of May.

The zemindar was accordingly put in possession of the zemindary,

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together with all the pagodas (including the pagoda in question), and gave his formal receipt for the same, on the 14th of May, 1829, in the following terms:

"As *Henry* Morris, Esq., the sub-collector of *Madura*, has put in my possession the Zemindary of *Ramnad*, and all the pagodas, choultries, &c., as also the accounts of the zemindary, and all the utensils, cloths, cattles, dhonies, &c., of the pagodas and choultries, this is to be held as the whole receipt for the same."

Venkatachellum presented a petition to the collector, Mr.*Vivash*, praying that the pagoda and its appurtenances might be placed in his possession as pandaram according to usage, whereupon the zemindar set up a claim to the dharmakartaship or management of the pagoda, denying the claim of the pandaram.

The pandaram also petitioned the authorities at *Madras* on the subject, by whom the matter was referred to Mr. *Vivash* to report upon; and his report, dated the 20th of September, 1832, was as follows:—

"To the President and Members of the Board of Revenue, *Fort St. George.*

"Gentlemen,—

"1. With reference to the enclosed correspondence, I have the honour to report on the claim of [the pandaram of] *Rameswarem*, to the management of the *Rameswarem Devastanum*, and the villages and revenues with which that establishment is endowed.

"2. The devastanum and chuttrums of *Rameswarem* were assumed by Mr. *Peter*, with the sanction of your Board, in consequence of mismanagement by the pandaram, and entrusted to the superintendence of the head tahsildar of *Ramnad*, and subsequently to the control of the sub-collector, who continued to manage the devastanum affairs until the *Ramnad* zemindary was made over to *Ramaswami Setupati*, the zemindar, in the year 1829. The *Rameswarem Devastanum* was entrusted to the zemindar's management at the same time, as a temporary measure, in consequence of the sub-collector having been appointed to another part of the district, and the zemindar was the only responsible person to whom I could with propriety and safety entrust the

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management pending the determination of your Board as to provisions for the future devastanum management.

"3. The late pandaram, of whose conduct Mr. *Peter* complained, died in the year, 1815, and the present claimant appears by an order of Mr. *Peter* to the head tahsildar, to have been nominated as his successor, although he was not allowed, as his predecessor, exclusive control, he was ordered jointly with the Circar servants, to conduct the devastanum affairs. He now claims exclusive management.

"4. The *Ramnad* zemindar, or, rather the manager in the zemindar's behalf, urges his right to management of

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the devastanum affairs on the ground that the late pandaram executed a deed to the former kurthakul, agreeing to abide by his control; it appears to me to be unnecessary to dwell upon this claim, as the *Rameswarem Devastanum* has never been managed by the zemindar since the date of the permanent sunnud, and before that period it is universally admitted that the pandaram in succession, conducted exclusively the devastanum affairs. In Mr. *Parish's* time, attention was paid to the representation of *Mungalaswiree Nauchiar* [1], relative to the misconduct of the pandaram, but this officer does not appear to have been placed by Mr. *Parish* in any way under the control of the zemindar. On general grounds, however, I think that the supervision of the zemindar is advisable to check abuses noted by Mr. *Lushington* and Mr. *Peter.*

"5. I think, therefore, that the pandaram might, without objection, be placed in immediate management of the devastanum of *Rameswarem* and its revenues, that the expenditure and the sibbundy be arranged agreeably to a list, fixed with reference to the usual disbursements, and that the zemindar be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses; and that periodical accounts of receipts and disbursements may be rendered to the huzur, for the purpose of preparing which, a huzur goomastah may be employed at *Rameswarem.*

"6. Concurring with my predecessor, that control over the devastanum expenditure and the devastanum affairs, is necessary

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to preserve its revenues from spoliation, and to enforce a due performance of the necessary and usual ceremonies; as the country of *Ramnad* is under the management of the zemindar's family, I would recommend that the zemindar be nominated to this duty, because they are people of integrity and responsibility, and would, I have no doubt, discharge the duty of supervision with advantage to the interest of the devastanum and their own credit.

"7. The revenues of the *Rameswarem Devastanum* are derived from 70 7/16 villages, the average revenue from which amounts to Rs. 46,463 3*a.* 0*p.*, the proposed annual expenditure is Rs. 38,678, which will leave Rs. 7,785 2*a.* 3*p.* for the zemindar's quit-rent and occasional failure. . . ."

By an order of the Governor in Council, dated the 23rd day of October, 1832, the measure proposed in paragraph 5 of this report was approved and directed to be carried into effect, and, accordingly by an order dated the 14th of November, 1832, it was ordered that the said pandaram (*Venkatachellum*) should be placed in full and exclusive possession of the pagoda and the villages and property attached thereto.

The zemindar, however (or the manager of the zemindary), delayed obeying the last-mentioned order, but made an attempt to obtain some share in the management of the pagoda, and addressed an arzi or petition to the then collector (Mr. *Sullivan*), for this purpose. That officer, however, on the 28th of November, 1832, issued an order, which was as follows:—

"To the Guardian of *Ramnad.*

"I have received and perused the Arzi No. 14, addressed by you on the 23rd instant, to the effect that the pagoda of *Rameswarem* and the villages attached to it, should not be put in the possession of the pandaram, and that your man and the pandaram's man should jointly hold the management. Having examined the

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documents, &c., connected with the above matter for several days, I wrote to the Board the circumstances under which the said pandaram held the said pagoda and the villages attached thereto, for a long time prior to the attachment by the Circar. In accordance with the orders issued in this matter by the Government and the Board, you were ordered to allow the pandaram to hold the said

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pagoda, &c. You should do so immediately. The delay is unfair. You wrote that your servants also should be employed together. This will create a great disturbance. Therefore the custom must be followed up. Nothing can be done contrary to the custom. However, if the said pandaram misbehave for the future, it will be then taken into consideration. If you do not give him possession immediately, the Circar officers shall be sent to put him in possession.

(Signed)

"*R.J. Sullivan*, Acting Collector.

"28th November, 1832."

Accordingly the pandaram was, in the year 1832, placed in exclusive possession of the pagoda and its endowments.

About the same time (on the 26th of September, 1832) the guardian and the manager of the zemindary presented another petition to the Governor in Council, on which, when referred to the collector of *Madura*, the indorsement of the collector was as follows:—

"The governments of ancient times certainly endowed the *Rameswarem Devastanum* with rent-free villages, &c., from which the establishment derives its support; all our records however, shew, that the establishment was superintended by the pandaram, and it is acknowledged by the stanigals of the place that the pandaram has so superintended since the Nabob's government. In my letter to the Board, dated the 20th of September, 1832, I have proposed that the zemindar might supervise the pandaram's management of the devastanum with advantage, so far as to see that no neglect is allowed; but it would by no means be beneficial to the devastanum estate to allow him to have control over the funds. The revenues of the devastanum should be paid into the Circar treasury, from which also the monthly disbursements should be issued: in this case the surplus which remains could be expended as occasion requires for the benefit of the *Rameswarem Devastanum*.

"The Manager of *Ramnad* seems to be of opinion that he has a right to superintend in consequence of endowments made by his ancestors. This ground of claim, however, cannot justly be urged, because two-thirds of the revenues are derived from *Maneyam* villages in the *Tinnevelly, Tanjore*, and *Shevagunga* districts, and

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all the *Ramnad* devastanum villages are excluded from the permanent settlement.

"*Madura*, 24th January, 1833."

Soon after the appointment of Mr. *Wroughton* as principal collector of *Madura*, the matters in dispute between the zemindar and the pandaram were again brought under consideration, and on the 7th of January, 1834, he

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sent a report of considerable length to the Board of Revenue, in which are contained the following paragraphs: —

"12. With regard to the right of the zemindars to appoint pandarams, the present manager possesses no other document except the kararnamah stated to have been executed by the late pandaram, when he was five years of age, to the former zemindar, *Muttu Ramalinga Setupati*, in the year Pramatheetcha, 1793. The several others alluded to were issued in the time of the Setupati, within four successive years, in which he dismisses the pandarams and appoints other persons to the management of the pagoda. It does not appear that the manager possesses any documents or accounts, to prove that any other Setupati had, before or after *Muttu Ramalinga Setupati*, exercised such an authority. The kararnamah said to have been given by the late pandaram when he was five years old is not binding according to law. Moreover, the oppressive conduct of *Muttu Ramalinga Setupati* is well known to Government, which terminated with his confinement at *Madras* and the assumption of the zemindary. Exercising such tyranny, it was easy for him to have obtained any kind of documents from a poor pandaram who was in his power. Such documents are only to be admitted with extreme doubt, if at all.

"13. It appears generally from the documents and witnesses produced on both sides that it has been the established custom that the dying pandaram nominates one of his disciples, and that the election is reported for the zemindar's sanction and approbation, who thereupon issues orders to the stalathars of the pagoda to shew him the usual respect, and to obey his orders. At the time the present pandaram was nominated, the zemindary was in dispute, and held under the attachment by the collector, so that the orders which would have under other circumstances emanated

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from the zemindar were passed by the collector. The orders were dated 23rd July, 1816, to the late head tahsildar."

The minutes of the proceedings of the Board of Revenue, upon the report of the 7th of January, 1834, being submitted to them, is dated the 30th of July, 1835. After referring to the report and to certain correspondence, the minute proceeds as follows:—

"Upon attentive consideration of the circumstances stated in Mr. *Wroughton's* report, dated the 7th of January, 1834, the Board are of opinion that there exists no ground for questioning the validity of the appointment of *Setu Ramanada*, pandaram, to the office which he holds in the *Rameswaram Devastanum*, nor any objection on the score of character to his being allowed to retain possession of that appointment.

"The rules proposed in the letter above alluded to appear to the Board to be judicious, and they resolve to authorize their adoption for the future management of the affairs of the pagoda.

"With reference to the suggestion contained in the same letter, the Board leave it to the present principal collector to make such arrangements as may appear to him most likely to conduce to the proper superintendence and the due appropriation of the surplus funds of the pagoda."

The rules referred to in the above extract are the arrangements recommended in the 5th paragraph of the report of Mr. *Vivash*, dated the 20th of September, 1832 [2].

The following rules were, on the 24th of August, 1835, issued by the collector, under the authority of the

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Revenue Board:—

"The Revenue Board having fully considered the dispute which existed between the Zemindar of *Ramnad* and *Ramanada*, Pandaram, for a longtime, regarding the appointment of the latter to the management of *Rameswarem Pagoda*, and of the right of the management of the said pagoda, expressed that there was not the least objection to the appointment made at present of *Ramanada*, Pandaram, to the post of pandaram, and that neither is there any suspicion in his character to continue him in the said post, and admitting the rules hereunder inserted for the management of the

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pagoda, recorded their opinion on the 30th of July, 1835; the said opinion is forwarded to this office.

"RULES.

"1. The management of pagoda expenses is stated to be the proper duty of a pandaram. Moreover, the appointment, as well as the removal in the establishment, should be made by the pandaram himself; but all such acts shall be subject to appeal, first to the zemindar, and afterwards to the collector.

"2. Money collected on every account should be deposited in the pagoda treasury itself.

"3. A samprathi, or a person of the zemindar for supervision, should be appointed on a monthly salary of Rs. 20, and his pay should be paid out of the pagoda funds; the said *employe* should make an entry of all the receipts and disbursements, he should send a monthly return thereof to the zemindar, under the signature of the pandaram, he should inspect the state of the treasury, which is in the possession of the pandaram, every month, and he should report to the zemindar; an order has been issued to this effect. The said samprathi should not think himself to be an equal *employe* with the pandaram, he should behave himself towards the manager of the pagoda, the pandaram, with as much deference and submission as he would do towards his own master.

"4. The returns which the zemindar may receive as stated above should, at the close of the year, be sent to the collector's office along with the other annual returns of other pagodas that are in the management of *Ramnad* Zemindary.

"5. The special violation of the rules to be observed in the pagoda and the villages attached thereto, as well as the differences should be reported to the zemindar by the first manager pandaram, and the zemindar, if it appears necessary to do so, will institute an inquiry into any subject, and report the same to the collector as usual. As for the efficient management of the pagoda, and for the application of the balance produce for any proper occasion, the principal collector is authorized by the Board to issue any rules which he may deem fit.

"(Signed) *J. Blackburne*, Principal Collector."

The disputes between the zemindar and the pandaram continuing,

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the collector placed the pagoda under attachment, and by an order dated the 17th of September, 1836, he stated that he should retain the same until both the disputants sent in a razinamah to the effect that they had made an amicable settlement; the ground as stated being the trouble given by both parties, and their failure to act up to the Board's order of the 24th of August, 1835.

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The pandaram then addressed an arzi, or letter, to the collector, which was as follows:—

An arzi addressed by *Setu Ramanada*, Pandaram, "Vicharnykurther" [3] of *Rameswarem Devastanum*, to the Principal Collector of *Madura*.

"With reference to your order directing attachment of the said *Rameswarem Devastanum*, &c., until an arzi shall be addressed in compromise of the dispute existing between me and the zemindar of the said district, we have entered into a razee [4] to the effect that I shall abide by the directions of the said zemindar in regard to the aforesaid devastanum pagoda villages and sibbundies and other affairs, dispose of all the receipts and disbursements in conjunction with the samprathi appointed by the said zemindar, and send to the zemindar accounts of receipts and disbursements, with my signature therein. That in addressing arzis to the zemindar I shall state 'addressed by *Setu Ramanada*, Pandaram of *Rameswarem Devastanum*, to the presence of *Setupati Rajah Avergal*, and that the zemindar will, in his communications to my address', state, 'addressed to *Setu Ramanada*, Pandaram of *Rameswarem Devastanum*.' As the zemindar has forwarded an arzi to your presence, praying for making over to me the said devastanum, &c., from attachment, I beg you will be pleased to make over the said devastanum, &c., to me as per mamool.

"(Signed. In Tamil) *Saithoo Ramanada*,

"Pandaram, Vichamykurther."

"*Thoamytoory*, 9th April, 1837."

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In consequence of this arrangement, the pandaram was at once reinstated in the pagoda. The differences between him and the zemindar appear to have revived about 1852; but *Venkatachellum*

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continued in his office of pandaram until he died, towards the end of 1854, having appointed his younger brother's son, *Chockalingam Pillai*, to succeed him. *Chockalingam Pillai* died in the month of February, 1857, and, in like manner, appointed *Chithambura Pillai* as his successor.

Chithambura Pillai appointed *Ambalavana Pillai* (the original Defendant in the suit), as his successor; and upon his death the said *Ambalavana Pillai*, as pandaram, entered into possession of the said pagoda, and continued in possession till his death.

The zemindar refused to recognise these appointments, and a pandaram selected from the family of *Tillianayagam Pillai* about February, 1856, was appointed and confirmed in August, 1856, by the zemindar, under the name of *Setu Ramanada*, his real name being *Mathaiya Pillai*. Eventually the *Ranee*, the zemindar, instituted the suit in which the appeal was brought.

After a protracted ligitation in the Zillah Court and the Sudder Adawlut, the case came before the High Court of *Madras*, on the 22nd of July, 1865. It appeared to that tribunal that the issues were not properly framed for the decision of the suit, and that the matters in dispute could be settled only by the determination of the main question in the cause, that of title: "Is the zemindar the real trustee of the pagoda, and the Defendant a wrongdoer, or is the zemindar seeking, without legal title, to possess himself of a valuable property to which, as Defendants allege, he has no title?" On this issue, with the assent of counsel, the High Court heard the

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pagoda of *Rameswarem* and some other pagodas were appurtenant to the zemindary, and were attached along with it, and all that was thenceforth done by the collector in reference to the pagoda was done by him as representing the zemindar.

The petition of *Ramanada*, in 1815, to the collector stating his appointment was merely presented to the collector, instead of the zemindar, owing to the attachment, and shews that the pandaram was used to apply for approval and sanction. The appointment of a pandaram could not he valid if made after the death of his predecessor.

The order made in 1816, for suspending the installation of the pandaram was made by the collector, as representative of the zemindar while the zemindary was under attachment, and the order authorizing the installation was also made in right of the zemindary.

Reg. VII of 1817 conferred important powers on the revenue authorities, but previously the Board of Revenue and the collector had no judicial power in such matters: Reg. I., 1803; Reg. II., 1803, s. 15; Reg. II., 1806; Reg. XXV. of 1802; Reg. XXVIII. of 1802; *Madras* Sudder Decisions, 1856, pp. 165-6.

From 1817 to 1828 the collector was in possession, not as a servant of the Government, but as representing the zemindar alone as superintendent.

The acts of the collectors before the passing of the Regulation of 1817 could only have been done by them by virtue of the same right. This view is in accordance with the fact that in April, 1829, after the right to the zemindar had been adjudicated upon by the Privy Council, and the attachment was put an end to, the collector ordered the pagoda to be delivered over with the zemindary to the Setupathi, and he assumed the control and management of the pagoda.

In 1829 the zemindar was put in possession, not by mistake—the receipt signed by the zemindar was sent to him by the collector for that purpose.

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The Judges of the High Court attached too much weight to the report of the collectors, which they described as quasi-judicial proceedings, but itis to be observed that paragraph 13 of Mr. *Wroughton's* order states that the election of the new pandaram is reported for the zemindar's sanction and approbation, who thereupon issues orders to the stalathars of the pagoda to shew him the usual respect and to obey his orders. And he also has a right to superintend the management and expenditure, which it is admitted by the collector ought not to remain without some supervision.

The fact that the pagoda villages were not settled for along with the zemindary has no bearing on the case; for the zemindar does not claim a right of property in the villages or in the pagoda.

We ask to remove the pandaram, because he was not legally appointed, the permission of the zemindar as dharmakarta not having been obtained.

The archives of the pagoda are in the power of the Defendant and would have supplied evidence, if any existed, to shew the appointment of a successor by the pandarams. From the death of the zemindar, in 1829,

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until 1832, the pandaram was not in management, and all the acts done were the acts of the Court of Wards as representing the minor zemindar. The pandaram was only in joint management with the officers of the government, the pagoda being under attachment.

Mr. *Leith*, Q.C., and Mr. *J.B. Norton* (with whom was Mr. F.C. *J.* Millar), for the Respondents:—

The title of Setupati, or Lord or Protector of the Causeway by which pilgrims approach the temple, does not prove any right of interference in the appointment of the priests or the management of the pagoda. The villages derived from the zemindars of *Ramnad* were only thirteen out of seventy held by the pagoda, and could give the zemindars no claim to the title of founders. The ancient inscriptions shew that the zemindars of *Ramnad* were not the founders of the pagoda. The zemindary of *Ramnad* was permanently settled in 1803, but none of the pagoda villages were included in the settlement. It is usual for religious personages like the pandaram to have the power to appoint their successors. *Norton's* Leading Cases, p. 592. The zemindars of *Ramnad*

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are of a low caste—the Marwar caste—and are eaters of animal food,—the pandarams are of the pure Shiva caste. Therefore it is contrary to all precedent and religious usage and propriety that the zemindar should personally invest the pandaram with the cashayem or red cloth, the beads and the ear-rings, the symbols of the sacred office. *Vencatachellum* must have been regarded by the zemindar *Ramaswami Setupati* as duly appointed, otherwise the latter would not have allowed him to perform the ceremony of tying the parivattom, or cloth of honour, round his head on the day of his instalment. The depositions which form the only basis for the statement that the zemindar appointed and removed certain pandarams before 1793, were merely taken by the servants of the zemindar, who had no authority to take them; they were not taken on oath, nor in the presence of the pandaram. It was only under certain specified circumstances that the kararnamah of 1793 admitted any liability to restrain or removal by the zemindar. Neither the infant pandaram, nor any other pandaram, had any power to bind his successors by a document such as the karamamah of 1793 [5], and there is no evidence that it was ever acted on, or that the zemindar exercised any control during the life of the pandaram.

The real cause of the attachment of the pagoda was the mismanagement of the pandaram, and it was not attached along with the zemindary, but subsequently. The collector expressly reported to Government that he had delivered the pagoda to the zemindar only as a temporary measure, and the pandaram did not acquiesce in it even as such, and eventually, when it had been ordered to be restored and the zemindar delayed to do so, the collector addressed to him a pre-emptory order. The zemindar never was in possession except during the period from 1829 to 1832,when he was put in possession for the reason stated. There have been several appointments since 1815, but the zemindar never appointed any one who has had possession.

In 1816 the collector merely recognised the new pandaram as being satisfied that he had been nominated by the dying pandaram.

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There is no evidence that the pagoda was attached from 1830 to 1846, at the time when the zemindary was under attachment because its owners, the daughters of the last zemindar, were minors; the pandaram, indeed, appears to have been more than once dispossessed and reinstated in the interval. The charge of malversation is not made the subject of any specific statement, nor established by any proof.

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Mr. *Mackeson*, Q.C., in reply.

Their Lordships took time to consider their judgment, which was now delivered by

The Right Hon. Sir Montague E. Smith:—

The question raised in this appeal relates to the right of the zemindars of the large and important zemindary of *Ramnad* in the *Madura* district, either to appoint, or to confirm the election of, the pandaram or head of the celebrated and richly endowed pagoda of *Rameswarem*.

The possessions of this temple are estimated by the Appellant to be of the value of £200,000.

The plaint of the Ranee zemindar (now represented by the Appellant, the present zemindar), filed so long ago as the year 1857, sought to oust the original Defendant, *Ambalavana Pillai*, from the office of pandaram which he *de facto* held.

It alleged that the zemindar was the dharmakarta or trustee of the pagoda, and had the right to conduct the management of it. It directly also asserted her right to appoint the pandarams, and concluded with a prayer for a decree to the effect that the zemindar should conduct the management of the pagoda, and that the Defendant pandaram should be removed from the management, and pay over the money in his hands to the zemindar.

The Plaintiff also charged the pandaram with misappropriation of the property, and the prayer for his removal was based on this charge, and also, though vaguely, on the ground of his not having been appointed to, or confirmed in, the office by the zemindar.

The charges of misappropriation were not sustained by the evidence and have been abandoned; so also has the claim of the zemindar to be placed in the direct management of the pagoda,

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and to have its funds placed in his hands. And the single question argued at their Lordships' Bar, and to which issue the cause was brought by consent in the High Court is, whether the zemindar has established the right to appoint or to confirm the election of the pandarams of this great pagoda, and was entitled to a decree for the removal of the Defendant from the office of pandaram because he was not so appointed or confirmed.

The early history of the pagoda is obscured by time, and its foundation cannot be shewn. But it is evidently an ancient temple of great renown, which has long attracted pilgrims from all parts of *India*. It is situate on an island in the extreme south of *India*, connected with the lands of the zemindary by a causeway. The Rajahs of *Ramnad* were the guardians of this causeway, and had thence acquired the title of *Setupati*, or *Lord' of the Causeway*.

It is asserted on the part of the pandaram that the pagoda of *Rameswarem* was an indepent endowment, in which the Rajahs Setupati had no rights of patronage, or control, other than the general authority they assumed as the rightful or *de facto* rulers of the district, to prevent abuses in the management of its affairs, and to see that its laws and usages were properly observed.

The first records in the evidence are some inscriptions on stones found in the walls of the pagoda. The

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earliest inscription is on a mandapam, and states that the mandapam was erected by *Munerama Nathan* "as a place to halt for the god *Ramesar*, who was attached to this pagoda, founded by *Mall* or *Vishnu.*" Its date is in the Salivahana era 1520, which corresponds with the Christian year 1588. It is evident from this and other inscriptions that the pagoda was an ancient temple at this time.

Subsequently, in the year of the Salivahana era 1607, the Rajah of *Ramnad* made a gift of five villages, and in 1609 another gift of eight villages to the pagoda. These grants, as the dates shew, formed no part of the original endowment of the pagoda, and no condition is found in them creating or reserving any rights of patronage or interference in the affairs of the temple. There is evidence of similar gifts of villages from other Rajahs, among them the Rajah of *Sivagunga*, shewing that the pagoda had been endowed by other donors than the *Lord of Ramnad.* Indeed, of the seventy villages belonging to the pagoda, thirteen only are proved

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to have been given to it by that Rajah. The right, therefore, now claimed by the zemindar of *Ramnad* is not shewn to have an origin in the foundation or subsequent endowment of the pagoda.

It may be observed, before further considering the evidence, that the case on both sides is singularly deficient in materials to elucidate the constitution of the community or brotherhood attached to this pagoda, the duties of the pandarams, and whether they are selected from a particular family or class. The claims of the zemindars also have been put forward in the most uncertain way. They at one time asserted a right to be chief managers, and directly to appoint the pandarams as sub-managers, but that claim was not strongly urged by Mr. *Mackeson* at their Lordships' Bar. He mainly contended, in his elaborate argument, for the right to have the pandarams presented to the zemindars for confirmation when nominated or elected by others. It is obvious, however, that there is a great distinction between a right to appoint and one to confirm; and if the latter only is insisted on, it still might be expected that some definite information would be given as to the manner of electing the candidate to be presented for confirmation. The absence of such evidence may perhaps be accounted for by the fact that the claim it was at first attempted to sustain was the right of direct appointment.

It is not, however, unimportant to observe that it appears to be the common practice in the *Madras* Presidency for pandarams to appoint their successors. (See Mr. *Norton's* Leading Cases, pp. 592-3.)

But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them.

That principle was laid down by this Committee in an appeal involving the succession to the office of mohunt of a richly endowed mutt in *Rajgunge* in these terms:—"It is to be observed that the only law as to these mohunts and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony." (See 11 *Moore*, Ind. Ap. Ca. 428.)

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In this case the burden of proving that the right he claims is supported by the usage lies upon the zemindar, and the question to be decided is, whether he has sustained it.

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It was contended on his behalf that the zemindar of *Ramnad* is dharmakarta of the pagoda, and that it must be inferred from this title he had the power he claims. But the right to bear this title, and the functions belonging to its holder, are among the disputed questions involved in the general controversy between the parties. The title "Dharmakarta" may have a definite signification, but their Lordships observe, in the proceedings of this record, it is used in different senses, sometimes to denote a trustee who appoints the pandaram, or head manager, and sometimes the manager himself. In the long contention which took place between the zemindar and the pandaram in the collectorate, as to the titles by which each was to address the other, the collectors refused to allow either to assume this title. Their Lordships, upon the imperfect information disclosed by the record, will therefore abstain from using this appellation, and will not attempt to define what the title as regards this pagoda indicates, or to whom it belongs; but will proceed to consider the substantial issue they have to determine, viz., whether the zemindar has established the right, under whatever name, to make or confirm the appointment of pandarams.

It has been already stated that he has failed to shew that such a right is derived either from the original foundation or any subsequent endowments of the pagoda by his predecessors.

The Counsel for the zemindar strongly relied on statements found in certain depositions as affording proof of the direct appointment and removal of pandarams by the Rajahs of *Ramnad* prior to the Christian year 1793; and if these statements were admissible and trustworthy, they would afford strong support to the zemindar's case. The depositions were taken in 1815, on the death of Pandaram *Ramanada*, who had held the office from 1793. On his death *Venkatachellum* claimed to be his successor, alleging that he had been appointed by his predecessor according to custom. Objections were made to Mr. *Peter*, the Collector of *Madura*, against his appointment, upon the ground that he had not been nominated by the dying pandaram, but had been put

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forward after his death by certain persons attached to the pagoda. The Collector required the head tahsildar to make inquiries as to the fact and time of *Venkatachellum's* appointment, and several depositions, the authenticity of which is not questioned, were taken by him, bearing on this matter. The statements in question appear to have been made at this time, but there is no satisfactory evidence to shew they were obtained by any competent or independent authority. It is suggested that they were taken by the tahsildar, but there is no proof of this, and the tahsildar's report is not forthcoming. On the other hand, the form of the documents leads to the inference that they were not so taken. They are addressed "to the Company's Circar," signed by the deponents, and attested by two native witnesses, from which it may be inferred that they were written statements obtained on behalf of the zemindar, and sent to the tahsildar to be forwarded to the collector. Their Lordships think that such statements ought not to be received as proof of an important right, and that they were properly rejected as inadmissible by the High Court.

The first appointment of which there is trustworthy evidence occurred in 1793. In that year *Muttu Ramalinga*, then Setupati of *Ramnad*, appointed *Ramanada* to be pandaram.

Mr. *Nelson' s* "Manual of the *Madwa* Country," compiled by order of the *Madras* Government describes the disturbed state of *Ramnad*, and the rest of *Madura* at this time, and for some years previously. A British force had been employed against the Setupati to enforce the rights of the Nabob of the *Carnatic*, and the district had afterwards passed under the direct authority of the British Government. This appointment of *Ramanada*

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was near the period of the transition of the sovereign power from the Nabob to the British Government. It appears from the authority above cited that, in 1792, *Muttu Ramalinga* shewed symptoms of rebellion against that Government, and in 1795, he was deposed, and his sister, the Ranee, installed in the possession of the Raj. It was with this Ranee the permanent settlement was made in 1803 [6].

The pandaram appointed by *Muttu Ramalinga* in 1793, was only five years old, and he took from this child a kararnamah, which is much relied on by the Appellant.

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It commences thus:—"As you have been pleased to apppoint me for the management of the affairs of the pagoda at *Rameswarem*, I will cause puja to be duly performed in the pagoda," &c.

The instrument also contains the following passages:—

"In case of my dealing friendly with the enemies of the zemindary you may remove me, and appoint another person in my room. . . . . If I act improperly in these affairs, I shall submit myself to the orders of the zemindar."

This appointment, and the kararnamah which followed it, would, under ordinary conditions, be entitled to great weight, but when the disturbed state of the district and the age of the pandaram are regarded, the transaction loses much, if not all, of its force as evidence of the right claimed.

Ramanada filled the office of pandram until his death in 1815. After this date much valuable evidence is afforded by the proceedings of the collectors.

The permanent settlement, as already stated, was made with the Ranee in 1803: but this settlement did not include the villages belonging to the pagoda, which had long been held free from tribute. Some years before 1815, both the zemindary and the pagoda had been under attachment. It was contended that the pagoda had been attached as part of the zemindary; but, although the orders of attachment are not set out, enough appears on the record to negative this suggestion. It was not until after the zemindary had been attached in consequence of a disputed succession, that the pagoda was placed under attachment on account of the alleged mismanagement of the pandaram.

Such was the state of things in 1815, when *Venkatachellum* claimed to be pandaram on the nomination of his predecessor. Two documents appear on the record, both dated 19th July, 1815, and addressed to the collector; one from the dying pandaram *Ramanada*, stating that he had appointed *Setu Ramanada* (*Venkatachellum*), whom he describes as "a relation of mine by blood, and a descendant of our family," to be his successor; and another from *Venkatachellum* announcing his appointment, praying for instructions for his guidance, and that the attachment of the pagoda might be removed.

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The Ranee Setupati disputed this appointment. In a letter of the 3rd August, 1815, she prays the collector to prevent his being invested with the purivattom cloth, and the other emblems of office. An inquiry was thereupon directed to ascertain whether *Venkatachellum* had been appointed by the dying pandaram; and before receiving any report from the tahsildar, the collector, on the 9th August, directed that officer to inhibit

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the installation of *Venkatachellum* as pandaram "until further orders."

This temporary injunction was, however, removed by the same collector by an order of the 27th of July 1816, directing the tahsildar that *Venkatachallum* should be installed as pandaram with all usual ceremonies according to custom, and he was installed accordingly.

It was contended for the Appellant that the order suspending the installation was made by the collector as the representative of the zemindar, whilst the zemindary was under attachment, and that the order authorizing it was a new appointment of *Venkatachellum* in the same right.

Their Lordships are unable to concur in this view of the acts of the collector. They think the proper construction to be placed on his action in the matter is, that the orders first suspending, and then directing the installation, were made by him as a public officer on the part of the Government, and not in virtue of any right derived from the zemindar. It also appears to them that the last order did not profess to be, and was not, an original appointment, but was an act of the collector to give effect to the title derived from the nomination of the former pandaram. They are consequently of opinion that *Venkatachellum's* title to the office must be considered to rest upon the nomination of his predecessor, and not upon any appointment or confirmatory act proceeding from the zemindar.

It will be convenient to consider what powers the Board of Revenue and the collectors possessed, or *de facto* exercised in relation to religious houses.

The proceedings upon the accession of *Venkatachellum*, above described, took place before Regulation VII. of 1810 was passed. But it is evident that before that regulation the British Government, by virtue of its sovereign power, asserted, as the former Rulers of the country had done, the right to visit endowments of

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this kind and to prevent and redress abuses in their management.

There can be little doubt that this superintending authority was exercised by the old rulers. Mr. *Nelson* in the *Madura* Manual says: "The principal pagodas, with their enormous establishments, their officiating priests, &c., were managed by a dharmakarta, or trustee and manager for life, who, as stated above, was usually a monk and guru." He had said just before—"The manager of the great pagoda at *Madura* seems to have been always a pandaram or saiva monk." Mr. *Nelson* evidently designates the manager, and not the person appointing him, as dharmakarta, who might be a monk or pandaram, in which case he would probably be known by the latter title. He then describes the duties of the manager:—

"He collected and disbursed the revenues derived from the lands granted to the pagoda by the King and others, and from fees and offerings; appointed the officiating Brahmans and servants," &c.

He then says:—"The dharmakartas held but little communication one with another, and recognised no earthly superiors except the King himself. Each was independent of all control, and acted altogether as he pleased. This freedom led naturally to gross abuses, and the King was compelled occasionally to interfere in the management of some of the churches." (Part III. chap. 7, p. 162.)

The King here spoken of was the ruler of *Madura*; but there is little doubt that the Setupatis of *Ramnad*, although the vassals of the Pandya of *Madura*, exercised sovereign power within their own territories. Mr.

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Nelson says:—"There is, therefore, a considerable amount of evidence which goes to support the claim to high antiquity put forward by the *Ramnad* royal family. And, seeing that *Rameswarem* has been resorted to annually by large bodies of pilgrims, and that this would have been simply impossible unless some strong-handed prince or princes were ruling over the country in the neighbourhood, I think it may be pretty safely concluded that the principality of *Ramnad* had been in existence for many centuries before *Sadeika Sevan* (who seems to have lived in the sixteenth century) was made Setupati." (Manual, p. 111.)

It appears, therefore, to be highly probable that the Setupatis in the days of their power exercised control over the pagoda, not,

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however, in virtue of any proprietary right of patronage, but as the rightful or *de facto* rulers of the district. The powers they enjoyed as Sovereigns, whatever they may have been, have now passed to the British Government, and the present zemindars can have no rights with respect to the pagoda other than those of a private and proprietary nature, which they can establish by evidence to belong to them.

That the new rulers, at an early date, exercised a controlling supervision and authority over the temples very clearly appears from a letter written in 1803, by the Board of Revenue to Mr. *Hurdis*, the Collector of *Madura*, of which the following extracts are printed in the Manual (Part IV., chap. 5, p. 130):—

"The subject of devastanum lands is of great importance to the happiness of the people, and the attention paid to the interests of the pagodas by the immediate officers of the Government has been attended with the most beneficial consequences to the people in different parts of the peninsula."

After saying that the Governor-General had directed that the collector should proclaim the restoration of the lands resumed from the pagodas by the late Government, the letter proceeds thus:—

"The administration of these lands forms a distinct question. The extensive abuses found to prevail with respect to these lands, with which the pagodas of *Dindigal* were endowed, render it expedient that the lands as affairs of the pagodas of *Madura* be conducted in the same manner as those of *Dindigal, under the immediate care of the collector.*"

It is abundantly clear from this letter that long before Regulation VII. 1817, the British Government not only assumed the power to superintend the management of the property and affairs of the pagodas throughout the Peninsula, but exercised its authority through the agency of the collectors.

The preamble of the Regulation of 1817, after stating that large endowments had been granted by former Governments as well as by the British Government and individuals for the support of temples, and that the produce of such endowments were, in many instances, misappropriated, declares it to be "the duty of the

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Government to provide that all such endowments be applied according to the real intent and will of the grantor." It then enacts that the general superintendence of all endowments should be vested in the Board of Revenue, and prescribe the duties to be performed by them to prevent misappropriation of the funds. It also authorizes the Board to appoint local agents, and declares that the collector of the district shall be *ex officio* one of such agents. (Sects. 7 and 8.)

The Counsel for the Appellant, whilst admitting that the proceedings of the collectors subsequent to this

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Regulation might be equivocal with regard to the character in which they acted, strongly insisted that the acts of those officers prior to it could only have proceeded from, and must therefore be referred to, the rights of the zemindar vested in them under the attachment. This contention is, however, entirely disposed of, when it is established that at an early date the power of superintendence was intrusted by the Government to the Board of Revenue, and the collectors. The Regulation, in fact, merely defined the manner in which that power was thenceforth to be exercised.

The general authority of the collectors as agents of the Government being thus shewn, the ground is cleared for considering the question which was so much discussed on the argument, whether the collectors in the various proceedings found in the record were acting under such general authority, or, as the Appellant asserts, in virtue of the rights of the zemindar.

From 1815 until 1828, during the whole of which time both the zemindary and the pagoda were under attachment, there is no doubt that the pagoda was managed by the pandaram under the control of the collectors, even in minute details, but the Counsel for the Appellant did not establish to their Lordships satisfaction the inference he sought to draw from this evidence, that the collector's interference arose from his representing the zemindar's interest. On the contrary, considering that the pagoda had been attached for the alleged misconduct of the pandaram, and having regard to the powers of superintendence entrusted to the collectors as agents of the Government, both before and under the Regulation of 1817, they think that their interference ought to be referred to the exercise of these powers. This view is supported

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by the reports of the collectors made during a subsequent attachment to be presently adverted to.

The long litigation respecting the succession to the zemindary ended in 1828, when a Judgment of His Majesty in Council established the title of *Ramaswami Setupati* to the zemindary of *Ramnad*. The attachment which had so long existed was thereupon removed. It appears from an order of the collector, dated the 21st of April, 1829, addressed to *Ramaswami Setupati*, that on this removal the pagoda was ordered to be delivered over with the zemindary to the Setupati, and for some time he appears to have assumed to control the management of it, as the collectors had done. The Appellant's Counsel urged that this delivery of possession to the zemindar, besides being in itself strong evidence in his favour, threw light on the proceedings of the collectors throughout the time of the attachment. If the orders relied on had not been corrected, they might have been rightly so regarded; but they were, after full inquiry, superseded by subsequent orders hereafter referred to.

On the 21st of April, 1830, *Ramaswami Setupati* died, having devised the zemindary to his two daughters. Both being minors, the management of the estate became vested in the Board of Revenue, acting as the Court of Wards, and so remained until 1846, when, on the death of the minors, the zemindary was restored to their mother, *Rani Setupati*, who was the original Plaintiff in the present suit.

Whilst the estate was under the care of the Court of Wards, a manager was appointed on behalf of the minor zemindars. Disputes appear to have arisen between this manager and the pandaram, in consequence of the latter being kept out of possession of the pagoda, and the manager assuming the control of it.

The then collector, Mr. *Vivash*, being appealed to by both, investigated their complaints, and on the 20th of September, 1832, made a report to the Board of Revenue, which is well worthy of attention.

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In that report, paragraph 2, Mr. *Vivash* says:—[See *ante*, p.213.]

This statement confirms the view their Lordships derived from the evidence, that, under the attachment, the collectors acted as

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the agents of the Government in superintending the pagoda. It also shews that when, on the discharge of the attachment in 1839, the pagoda was entrusted by Mr. *Vivash* to the zemindar's care, it was not so done because of any right belonging to him as zemindar, as the Appellant alleges, but as "a temporary measure" in the absence of the sub-collector: the zemindar, being a responsible person selected by the collector, to have the care of it until the Board had decided upon the future management.

This view is confirmed by the statements of fact contained in other parts of the report. Paragraph 3 states that the pandaram appointed in 1815 was not allowed, as his predecessor, exclusive control, but "was ordered jointly with the Circar servants to conduct the devastanum affairs."

Again, paragraph 4, says:—"The *Ramnad* zemindar, or rather the manager on the (minor) zemindar's behalf, urges his right to the management. . . . . It appears to me unnecessary to dwell upon this claim, as the *Rameswarem* devastanum has never been managed by the zemindar since the date of the permanent sunnud; and before that period it is universally admitted that the pandarams in succession conducted exclusively the devastanum affairs."

It maybe allowed that this latter statement ought not to be relied on as proof of the fact said to be admitted, but what the collector says of the practice since the permanent sunnud would be derived from official records and experience.

Mr. *Vivash* further reports that, in his opinion, the supervision of the zemindars would be useful to check abuses, and his recommendations are contained in paragraphs Nos. 5 and 6:—[See *ante*, p. 214.]

It appears that this report was laid before the Governor in Council, and a letter was thereupon written, and transmitted through the Board of Revenue to the collector, approving of his proposed measures, and directing them to be carried into effect.

The collector afterwards sent an order to the manager of the zemindary, under the Court of Wards, directing him to put the pandaram in possession of the pagoda. The manager having hesitated to obey it, the collector issued the following peremptory order:—[See *ante*, p. 215.]

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Nothing can be more decisive than this action of the collector on the question of the character in which he was acting. So far from relying on the right of the zemindar, he acted in direct opposition to the claims of his guardian.

The pandaram (*Venkatachellum*) having thus been restored to full possession of the pagoda, the manager for the zemindar again put forward his claim to the management, and on this occasion he impeached the validity of the title under which the pandaram had held the office since 1815, asserting the zemindar's right to appoint the pandarams as well as to manage the pagoda.

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This new dispute was referred to the then collector, Mr. *Wroughton.* His report upon it is dated the 7th of January, 1834. It appears that the examined the depositions sent to the collectorate in 1815, and other documents, and he records the facts which, in his opinion, are adverse to the claims made on the part of the zemindar. He also reported in favour of the title of the pandaram *Venkatachellum* to the office.

The Board of Revenue upon this report made a minute on the 30th of July, 1835, that there existed no ground for questioning the validity of the appointment of the pandarain.

One of the objections urged by Mr. *Mackeson* to the judgment of the High Court was that the Judges had given too much weight to the reports of the collectors, which they described as "quasi judicial proceedings." It is to be observed, however, that it is the duty of the collectors, under sect. 10 of the Regulation of 1817, to ascertain and report to the Board the names of the present trustees, managers, and superintendents of the temples, and by whom and under what authority they have been appointed or elected, and whether in conformity to the special provisions of the original endowment by the founder, or under any general rules. They are also, under sect. 11, to report all vacancies, with full information to enable the Board to judge of the pretensions of claimants, and whether the succession has been by descent, or by election, and if so, by whom. The report, therefore, of Mr. *Wroughton* was entirely within his province, and the line of his duty.

Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or

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force. But being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded upon them.

Whilst protesting against the weight given by the High Court to Mr. *Wroughton's* report, Mr. *Mackeson* invoked the authority of the collector's opinion contained in the last paragraph of it, in aid of his contention that the appointment was invalid without the zemindar's confirmation.

The paragraph is as follows:—[See *ante*, p. 217.]

The opinion of Mr. *Wroughton* is clearly against the claim of the zemindars to nominate to the office, and it may be doubtful whether he intends to support their pretension to a right of confirmation in the sense of a power entitling the zemindar to reject the person elected, and to treat the pandaram who enters upon the office without his confirmation as an usurper.

But however that may be, their Lordships have already said that the opinions of the collectors are not to be treated as having judicial authority. They also think that if the opinion of Mr. *Wroughton* really is to the effect contended for, it is not well founded. They have already commented on the effect of the orders passed by the collector in 1816.

It is very probable that the pandarams, on their election, were presented to the Setupati, not for the confirmation of their title, but to obtain from him, as the great chieftain of the district, a recognition of it, and to secure his protection and support.

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In consequence of the recommendation contained in the reports of the collectors (1832 and 1834) rules were drawn up for the superintendence of the pagoda. They were to the effect that the pandaram was to be the manager, but an officer of the zemindar was to superintend the management, reporting to the zemindar who was to send in the reports to the collector. It was expressly declared that this officer should treat the pandaram with great respect.

This state of things again led to frequent disputes. Mr *Blackburne*, the collector, writes to the Board that he had received no

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less than forty-two recriminatory complaints in eleven months from the manager of the zemindary and the pandaram. In consequence the pagoda was again placed under attachment; and the collector, on the 17th of September, 1836, addressed orders to the pandaram and the manager, stating that, as they gave vain trouble, and did not act up to the Board's orders, the management would be kept under attachment on behalf of the Circar until they came to an amicable settlement.

In April, 1837, the disputants came to a formal compromise, and the pandaram promised to submit to the superintendence of the manager, and do certain things in conjunction with him. The razeenamah drawn up on this occasion was strongly relied upon by the Appellant's counsel. Taken by itself, this agreement would certainly appear to recognise the manager as superintendent in right of the zemindar; but, having regard to the recommendations in Mr. *Vivash's* report, paragraph 5, that the zemindar should be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses, their Lordships think that the acknowledgment must be referred to the power entrusted to the zemindar as the nominee of the Government. Even if it had been shewn that some power of superintendence resided in the owners of the zemindary, it would not at all follow that the right to interfere in the appointment of pandarams belonged to them.

Pandaram *Venkatachellum* continued in office until his death in November, 1854, having filled it since 1815.

Before his death he appointed as his successor, *Chockalingam Pillai*, who continued in office until his death, in February, 1857. He appointed *Chidambara Pillai* to succeed him, who died shortly afterwards, having first nominated *Ambalavana Pillai*, the original Defendant in this suit, to be his successor.

It results from a review of the whole mass of evidence in this case that there is no instance of the appointment of a pandaram by the zemindars satisfactorily proved, except that of the child by *Muttu Ramalinga*, in 1793, nor of any pandaram having been kept out of his office, or ejected from it, because the zemindar had not confirmed his appointment.

In the absence of proof of the actual exercise of either of the rights claimed, the rest of the evidence, for the reasons already

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given, is in their Lordships' opinion wholly insufficient to maintain them. They are therefore of opinion that the Appellant has failed to establish his pretension to oust the pandaram from his office, because he was not appointed to, or confirmed in it by him or his predecessors.

In the result they will humbly advise her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

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Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Respondents: *Jones, Blaxland, & Son.*

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[1] *Ranee Mungalaswiree Nauchiar*, who, as zemindar, complained to the collector in 1809.

[2] Supra, p. 214.

[3] A superintendent or manager. Wils. Gloss. 547.

[4] Agreement by way of compromise.

[5] Madras Sudder Rep. 1858, p. 33; 19 Suth. W.R. p. 216; *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy*, 17 Suth. W.R. 444; 1 Beng. L R. 86; Norton L.C. 592.

[6] See Part IV, p. 154,

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ALIYATHAMMUDA BEETHATHEBIYYAPPURA POOKOYA & ANR. *Appellants*

VS

PATTAKAL CHERIYAKOYA & ORS. *Respondents*

CORAM: MOHAN M. SHANTANAGOUDAR AND AJAY RASTOGI, JJ.

WAKFS — WAQF ACT, 1995 — SECTION 3(i), 69(2) & 83(9) — WAKF ACT, 1954 — SECTION 60 & 64 — CPC — ORDER 1 RULE 8; ORDER XXIII RULE 3B — EVIDENCE ACT, 1872 — SECTION 35, 45 & 81 — Term 'Mutawalli' — Definition — Office of mutawalli can be a customary office — Dispute pertaining to the office of mutawalli of a mosque situated in Lakshadweep — Mosque is presently a public waqf registered with the Lakshadweep Waqf Board — Respondents claimed to be descendants of one Saint 'U', who was stated to have built this mosque, and who was its first mutawalli — They claimed that by customary tradition, the office of the mutawalli of the mosque vested with their family — Appellants claimed to be khateebs (sermon-givers) in the mosque — Appellants claimed to be suing as representatives of residents of Andrott Island, Lakshadweep — Appellants claimed that a compromise decree was passed on 16.2.1981 in a suit between the appellants' predecessors and Pattakal Thangal as per which the mosque was to be managed by the committee elected by local residents — However, subsequently, respondents filed civil suit before the Waqf Tribunal, praying for a declaration that the office of mutawalli of that mosque was vested with the Pattakal family — Waqf Tribunal declared that the compromise deed was void but dismissed respondent's suit — Revision petition — High Court decreed that the office of mutawalli was vested with respondents by custom — Whether the High Court exceeded the scope of its revisional jurisdiction — Held, No — Whether the respondents have pleaded and proved that they have a customary right to the office of mutawalli in this mosque — Held, Yes — Whether judgment of the High Court was sustainable — Held, Yes — Dismissing the appeal, Held,

A. It is well settled that ordinarily, while revisional jurisdiction does not entitle the High Court to interfere with all findings of fact recorded by lower Courts, the High Court may correct a finding of fact if it has been arrived at without consideration of material evidence, is based on misreading of evidence, is grossly erroneous such that it would result in miscarriage of justice, or is otherwise not according to law. (Para 12).

B. Importantly, the scope of such revisional jurisdiction is wider when the High Court is vested with the power to examine the legality or propriety of the lower Court's order under the statute from which the revisional power arises. In such a situation, the High Court may also examine the correctness of findings of fact, and re-appraise the evidence. (Para 12).

C. As rightly noted by the Tribunal, it is not disputed that Ubaidulla had come to Andrott and converted the people of the island from Hinduism to Islam. The Tribunal also observed that the respondents/plaintiffs were Ubaidulla's descendants "by all probabilities", keeping in mind the historical materials produced. It was further observed that historians were of the unanimous opinion that Ubaidulla was the first Kazi/mutawalli of the mosque

Judgment dated August 1, 2019 in C.A. No. 9586 of 2010 with C.A. No. 9588 of 2010, C.A. No. 9587 of 2010.

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and that members of his family had held the office of Kazi in succession. However, in spite of these observations, the Tribunal did not go on to render a finding to the effect that the respondents had been holding the post of mutawalli in succession. Instead, it concluded that Ubaidulla was an alien who could not have owned land on the island, and hence, the mosque could not have been constructed by him, and there was no positive evidence that he and his descendants were mutawallis of the Jumah mosque. (Para 13).

D. The High Court noted that the findings of the Tribunal contradicted its earlier observations, and held that since the mosque was constructed as long ago as in the seventh century, no evidence other than the historical material on record could be obtained to show, that in all probability, Ubaidulla had indeed constructed the mosque. There could not be specific or direct evidence of the donation of land for constructing the mosque, or of the construction of mosque itself, and so on. The Court was rightly of the opinion the Tribunal need not have probed further for positive proof after noting all the historical facts proved. (Para 13).

E. Thus, it is evident that the High Court in the impugned judgement has not entered into a rehearing or reassessment of the findings of fact arrived at by the Wakf Tribunal. Rather, the Court has rightly noted that the Tribunal did not apply the appropriate standard of proof to be applied in a civil suit, i.e. the standard of preponderance of probability. Therefore, it cannot be said that the High Court exceeded the scope of its revisional jurisdiction in any manner. (Para 13).

F. We agree with the opinion of the High Court that since this issue relates to a mosque constructed almost 1300-1400 years ago, it is impossible to find contemporary proof of the construction of the same. The Gazetteer for the Lakshadweep Islands, as recently as 1977, has recorded that Ubaidulla was the first musaliyar in Andrott and is buried in the Andrott mosque. The Gazetteer, as well as the then Collector R.H. Ellis, gave credence to this account in spite of inaccuracies relating to the date of conversion of the inhabitants. (Para 15).

G. It is important to note at this stage that the Gazette is an official record evidencing public affairs, and its genuineness is presumed under Section 81 of the Evidence Act, 1872. Moreover, under Section 35 of the Evidence Act, an entry made by the Gazetteer in discharge of his official duty is a relevant fact. Any fact recorded by the Gazetteer may also be considered as expert opinion under Section 45 of the Evidence Act. Therefore, the contents of the Gazette can be taken into account to discover the historical materials contained therein, which the Court may consider in conjunction with other evidence and circumstances in adjudicating a dispute, even if it may not be conclusive evidence of the fact-in-issue. (Para 15).

H. It now remains to be seen whether the material relied upon by the High Court was sufficient to establish a customary right to the office of mutawalli in favour of the respondents. We would like to reiterate at this stage that it is not under dispute that this office can be customary. This is also evident from the definition of 'mutawalli' in Section 3(i) of the Waqf Act, 1995, which includes a person who is mutawalli by virtue of any custom. (Para 16).

I. At the outset, it is pertinent to note that Muslim law does not recognize an inherent right of succession to the office of mutawalli. (Para 17).

J. However, various scholars on Muslim law have opined that such a right may be shown on the basis of certain exceptions, which includes the creation of a custom to that effect. (Para 18).

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K. A claim of hereditary succession may be accepted if it is founded in a direction to that effect by the waqif (i.e. the founder of the waqf). Such a direction may be presumed from a practice of successive appointments made from amongst the waqifs family members. However, in the above decision, the Court also observed that the standard of proof in respect of such a custom would be stricter in the case of a public waqf than for a waqf whose object was to provide for the maintenance of the founder's family. (Para 19).

L. Finally, the Waqf Act, 1995 itself acknowledges that a waqf may have a hereditary mutawalli. This is evident from the proviso to Section 69(2), dealing with the power of the Waqf Board to frame a scheme for the administration of a waqf. (Para 21).

M. It can be concluded from the above discussion that a person claiming a customary right to succeed to the office of mutawalli would have to show that the waqif intended for the office to devolve through a practice of hereditary succession. In the absence of any express directions in the waqfnama to this effect, the claimant would have to show that such practice has been in existence throughout the history of the trust, and not merely for a few generations, such that the waqif's intention that the office should be hereditary can be presumed. The burden of proof would be higher with respect to a public waqf, such as the suit waqf in the instant case, than a family trust. (Para 22).

N. We may now consider what the principles governing the establishment of a custom under Muslim law are. It is a settled position of law that a custom in order to be legal and binding must be certain, reasonable and acted upon in practice for a long period with such invariability and continuity that it has become the established governing rule in a community by common consent. It is equally settled that it is incumbent upon the party relying on the custom to plead and prove it. (Para 23).

O. Thus, we may conclude that while no person can claim the office of mutawalli merely by virtue of being an heir of the waqif or the original mutawalli, if they can show through a long-established usage or custom that the founder intended that the office should devolve through hereditary succession, such usage or custom should be followed. Additionally, the practice would have to comply with the requirements which are generally applicable while proving a custom, i.e. it must be specifically pleaded, and should be ancient, certain, invariable, not opposed to public policy, and must be proved through clear and unambiguous evidence. (Para 24).

P. From the aforementioned discussion, we can conclude that the appellants' contention that the post of Kazi and mutawalli was the same in Lakshadweep islands and therefore if the respondents have lost the right to one office, they cannot claim the other is only partly correct. We say so because, it is true that prior to the enforcement of the Wakf Act, 1954 in the year 1968 in the Lakshadweep islands, the word 'mutawalli' was not in use on the islands, and the word 'Kazi' encompassed a person functioning as mutawalli of a mosque. This has also been noted by the Tribunal in its judgement. However it is incorrect to say that the person who was working as mutawalli/Kazi loses the post of mutawalli also after he lost the post of Kazi. (Para 28).

Q. Therefore, we find that the High Court has rightly concluded that at the time of the institution of OS No. 1/1998, the respondents were within their rights to seek the relief of the office of mutawalli even after their claim to the office of Kazi was defeated. Further, given the distinction between a statutory Kazi and a mutawalli, the appointment of Kunnasada Hamzakoya in 1998 will not constitute a breach of the respondents' custom in respect of the office of mutawalli. (Para 28).

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R. In any event, a singular artificial break or gap in the exercise of a customary right, that too by executive orders, would not lead to abrogation of the customary right itself, unless such break constitutes a recurring infringement or leads to conferment of title in the opposite party. (Para 29).

S. We find it relevant to discuss what the entry in the List of Waqfs showing that the mosque was under the supervision of Amins and Karanavans precisely means, since this was the broader social backdrop in which the respondents' custom existed. A perusal of the "Report of the Commissioner for the Scheduled Castes and Scheduled Tribes" for the year 1953, on page 284, reveals that the Amin is the executive officer appointed by the government for the Lakshadweep islands. The Karanavans are the heads of different local families who are appointed to assist the Amin in trying civil and criminal cases. Hence, these are executive authorities which are separate from the mutawalli of a mosque. The Tribunal itself has noted in its judgement that the Jumah mosque may have been under the supervision of the then administrative authorities as it was a very important mosque on Andrott Island, but the Amins and Karanavans were not directly managing the affairs of the mosque. Therefore, we find that the mention of the 'Amin and Karanavan' system in the List of Waqfs will not weaken the respondents' argument based upon reliance on such List. (Para 31).

T. Though it is possible that the mutawalli belonging to the respondents' family may have been advised by other authorities, this does not mean the respondents per se did not hold the office of mutawalli. Hence we are unable to accept the appellants' argument that the respondent's customary right was breached due to the presence of advisory authorities such as the Amins and Karanavans or the committee formed in 1966. Rather, it strengthens the argument in favour of the respondents, to show that notwithstanding the changes in the administrative mechanism of Andrott Island over the years, which is inevitable in any territory, it is the Patakkal family which has been at the helm of affairs at the mosque. (Para 31).

U. We also find ourselves unable to agree with the contention of the appellants that the violations of Order XXIII Rule 3B, CPC while passing the compromise decree dated 16.02.1981 in O.S. No. 10/1974 are merely procedural and do not vitiate the decree, and that the decree should therefore be regarded as proof of breach of custom. (Para 32).

V. Under Order I Rule 8, CPC, which pertains to representative suits, a person may sue or defend on behalf of others and for the benefit of others having the same interest, with the permission of the Court. The object of Order I Rule 8 is to facilitate the decision of questions in which a large number of persons are interested without recourse to ordinary procedure. Per Order XXIII Rule 3B, in order to compromise in a representative suit, it is necessary to obtain the leave of the Court. Before grant of leave to compromise, the Court needs to give notice in such a manner as it may think fit, to such persons as may appear to it to be interested in the suit. (Para 32).

W. It is pertinent to note that it is not clear whether the suit in O.S. No. 10/1974 was filed under Order I Rule 8 or not. Even assuming that we accept the respondents' contention that the said suit was not strictly filed under Order I Rule 8, it would be regarded in the nature of a representative suit for the purposes of Explanation (c) to Order XXIII Rule 3B. Explanation (c) provides that the term 'representative suit' includes suits where the compromise decree passed therein becomes binding on persons not named as parties

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to the suit. In O.S. No. 10/1974, Pattakal Koyammakoya was representing the respondent family's interests in his capacity as Karanavan of the family. Hence the compromise decree, if upheld, would prejudice the family's customary right to the office of mutawalli and the terms thereof would become final and binding by virtue of Section 96(3), CPC. Thus, it is clear that the two conditions mentioned supra in relation to representative suits have to be complied with if the compromise decree passed in O.S. No. 10/1974 is to be held valid. (Para 32).

X. The Tribunal as well as the High Court, on considering the compromise decree passed and the records thereof, have on facts concluded that the parties to the decree did not obtain leave of the court and did not give notice to other persons who were interested in the suit, i.e., members of the Pattakal family, as required under Order XXIII Rule 3B. The appellants before this court have also not disputed that the compromise decree was without leave of the court and without notice to interested family members. As is evident from the foregoing discussion, such violations of Order XXII Rule 3-B cannot be said to be merely procedural, and go to the root of the matter since they deprive the affected parties of the chance to question the terms of the compromise that they are going to be bound by. Since both the conditions required under Order XXIII Rule 3B were not complied with, the compromise decree was void. (Para 32).

Y. Further, we find that in addition to the above procedural violation, the compromise decree is also illegal insofar as it fails to comply with Section 60 of the Wakf Act, 1954, which provides that no suit in any Court by or against the mutawalli of a wakf relating to the rights of the mutawalli shall be compromised without the sanction of the Wakf Board. Rather than obtaining the sanction of the Wakf Board prior to the decree, the compromise decree mentions in paragraph 7 that the decisions taken therein are to be subsequently intimated to the Wakf Board. Hence, we find ourselves in agreement with the findings of the lower Courts that the compromise decree was illegal and void. (Para 32).

Z. Thus, we are of the view that the appellants have not been able to establish that there was a breach in the respondents' customary right of holding the post of mutawalli due to the formation of the committee in 1966 which existed till 1972 or due to the compromise decree which is declared as void. (Para 33).

AA. There cannot be any dispute that the mutawalli has no right in the property belonging to the waqf, and is merely a superintendent or manager. Hence, the respondents' right to office of mutawalli does not divest the waqf of its public character. Moreover, the exercise of any customary right to succession will be necessarily subject to the provisions of the Waqf Act, 1995, which provides broad powers to the Waqf Board for supervising the administration of a waqf. For example, Section 64 of the Waqf Act, 1995 provides for the removal of the mutawalli, and Section 69 of the Act deals with the power of the Board to frame a scheme for the administration of the waqf under certain contingencies. (Para 34).

BB. As noted in the above decision, even if the mutawalli belongs to the family of the waqif, he is not immune from removal in the case of mismanagement of the waqf, and must administer the waqf in accordance with the principles of common prudence and probity. Having regard to the above principle, and to the provisions of the Waqf Act which take care of contingencies in case of mismanagement, etc., it cannot be said that the respondents' exercise of customary right to the office of mutawalli is unreasonable or violates public policy. (Para 34).

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'CC. In light of the foregoing discussion, we have no hesitation to reach the conclusion that the respondents have been able to establish a customary right to the office of mutawalli of the Jumah mosque, under the facts and circumstances of this case, which is not unreasonable or opposed to public policy. The respondents have through clear and unambiguous evidence shown a practice of continuous and invariable devolution of the office of mutawalli through successive appointments from within the Patakkal family, beginning with the institution of the mosque itself. Adopting the principle enunciated in Phatmabi and Kalandar Sahib (supra), we find that this evidence is sufficient to draw a presumption that such hereditary devolution was as per the intention of Ubaidulla, the original wakif, therefore also satisfying the specific requirements mentioned supra for proving a custom of hereditary succession to the office of mutawalli. (Para 35).

Referred: Sayed Ahamedkoya Thangal vs Administrator [1997 (2) KLJ 362]; Mt. Sardar Bibi vs Haq Nawaz Khan [AIR 1934 Lahore 371]; Hindustan Petroleum Corporation Ltd. vs Dilbahar Singh [(2014) 9 SCC 78 = 2014(9) SCALE 657]; Ram Dass vs Ishwar Chander [(1988) 3 SCC 131 = 1988(1) SCALE 1137]; Bala Shankar Mana Shankar Bhattjee vs Charity Commissioner, Gujarat State [1994 Suppl.(2) SCR 687 = 1994(3) SCALE 796]; Atimannessa Bibi vs Abdul Sobhan [1916 (43) Cal 467]; Shah Gulam Rahumtulla Sahib vs Mahommed Akbar Sahib [8 Mad. H.C. Rep. 63 (1875)]; Phatmabi vs Haji A. Musa Sahib [(1915) 38 Mad. 491]; Kalandar Batcha Sahib vs Jailani Sahib [AIR 1930 Mad 554]; H.H. Mir Abdul Hussein Khan vs Bibi Sona Dero [AIR 1917 PC 181]; Ramalakshmi Ammal vs Sivanantha Perumal Sethurayar [(1871-72) 14 Moo IA 570]; Muniandi Kone vs Sri Ramanatha Sethupathi [AIR 1982 Madras 170]; K.A Srinivasa Ayyangar vs S. Ramanujachariar [1941 (1) M.L.J 322].

Mohan M. Shantanagoudar, J.— Interlocutory Application No. 93605 of 2018 in Civil Appeal No. 9586 of 2010 for deleting the names of appellant Nos. 3 and 4 and respondent No. 7 from the array of parties is allowed.

2. These appeals arise out of the judgment dated 18.12.2007 of the High Court of Kerala at Ernakulam in C.R.P. Nos. 460/2006 and 462/2006. By the impugned judgement, the High Court decreed O.S. No. 1/1998 and dismissed O.S. No. 1/2001. It is relevant to note that O.S. No. 1/1998 was filed by the common respondents in these appeals, whereas O.S. No. 1/2001 was filed by the appellants in C.A. Nos. 9587/2010 and 9588/2010.

3. The present dispute pertains to the office of *mutawalli* of the Andrott Jumah mosque situated in Lakshadweep. The mosque is presently a public waqf registered with the Lakshadweep Waqf Board. The respondents herein are the seniormost male members of the different *thavazhies* (branches of descendants through the female line) of the Pattakal family. They claim to be the descendants of one Saint Ubaidulla, who is stated to have built the Andrott Jumah mosque, and who was its first *mutawalli*. Thus, they claim that by customary tradition, the office of the *mutawalli* of the mosque is vested with their family. It is their case that the members of the family choose the *mutawalli* from amongst themselves, and Respondent No. 1 is functioning as the present *mutawalli* of the mosque.

The appellants in C.A. No. 9586/2010 are members of the Aliyathammuda *tharawad* and claim to be the *khateebs* (sermon-givers) in the mosque. The appellants in the connected appeals C.A. Nos. 9587/2010 and 9588/2010 claim to be suing as representatives of

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residents of Andrott Island, Lakshadweep. The common contention of the appellants in these three appeals is that the Jumah mosque was built by the inhabitants of Andrott island and was first administered by the 'Amin and Karanavan' system (i.e. by the executive officer assisted by the nominated heads of local families), and subsequently by a committee of elected public representatives from 1966-1972. The president of such committee from 1966-1972 was the respondents' predecessor Pattakal Koyammakoya Thangal, who was removed from presidency in 1974 after a dispute arose. It may be noted that while the appellants in C.A. No. 9586/2010 claim that the system of management by an elected committee continued after the dispute, the appellants in connected appeals C.A. Nos. 9587/2010 and 9588/2010 claim that due to this dispute, management of the mosque broke down. However, their common claim is that the respondents never had a customary right to the office of *mutawalli*, and the right to select the *mutawalli* should vest with the people of the local area.

4. It is also their common claim that a compromise decree was passed on 16.02.1981 in O.S. No. 10/1974 between the appellants' predecessors and Pattakal Koyammakoya Thangal, as per which the mosque was to be managed by the committee elected by local residents. The appellants' contention is that even if there was any customary right vested with the respondents, it was breached by the formation of the committee and passing of the compromise decree. However, subsequently, the respondents filed civil suit O.S. No. 1/1998 before the Waqf Tribunal, Kavarathi praying for a declaration that the office of *mutawalli* of the Jumah mosque is vested with the Pattakal family. Initially, the suit was decreed in their favour, but the High Court on appeal remanded it back to the Waqf Tribunal for fresh disposal.

5. After remand, the Waqf Tribunal by its judgment dated 20.05.2006 held that there was no evidence to show that the mosque was being managed by an elected committee. Though the Tribunal declared that the compromise deed in O.S. No. 10/1974 was void, as no application was made for leave of the Court, and the respondents' family was not given notice as required under Order XXIII Rule 3B of the Civil Procedure Code (for short "CPC"), it found that the respondents, on their part, had not produced any positive evidence to show that Ubaidulla was the first *mutawalli* of the Jumah mosque, and that the customary right to the office of *mutawalli* was vested with their family i.e. Pattakal family. Rather, the right to manage the mosque was vested with the local residents. Hence, it dismissed the suit and directed the parties along with the Waqf Board to draft a scheme for the management of the mosque. Against this judgment, the respondents filed a revision petition before the High Court.

6. The High Court in the impugned judgment found that there was no evidence to show that anyone apart from the respondents had functioned as *mutawalli* of the mosque at any point of time. It held that the committee in existence from 19661972 was only a committee for overseeing the repairs and maintenance of the mosque, and not for management thereof, and agreed with the Tribunal's reasoning with respect to the compromise decree being void. On this basis, it decreed that the office of *mutawalli* was vested with the respondents by custom. Hence, these appeals by the various appellants before us.

7. It is important to note that counsel for the various appellants have admitted that the office of *mutawalli* can be a customary office. However, their contention is that such an office can be *heritable* by custom only if it is specifically pleaded and proved; which was not done by the respondents in this case.

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8. Learned senior counsel for the appellants, Shri Shekhar Naphade, emphatically argued before us that the High Court has exceeded the scope of its revisional jurisdiction under Section 83(9) of the Waqf Act, 1995, and acted like a first appellate Court by re-appreciating the evidence on record; and that the High Court has decreed the respondents' customary right by placing reliance upon legends, mythologies, fiction and outdated materials, which do not specifically state that Ubaidulla was the first *mutawalli* of the Jumah mosque.

That the book *'Futhuhathul Jesair'* (**Ex A37**) should not have been relied upon, as it was published after the filing of the suit, and Respondent No. 2 in his deposition in O.S. No. 1/1998 admitted that it was written by his uncle's brother-in-law. According to the appellants, it was purposefully written to support the respondents' case. Reliance was also placed upon **Ex B8** and **Ex B9** to show that the Pattakal family was not managing the mosque in 1921 and 1923.

That in the Lakshadweep islands, the office of Kazi and *mutawalli* are one and the same, and the Kerala High Court in *Sayed Ahamedkoya Thangal v. Administrator,* (1997) 2 KLJ 362, had held that the respondents' family i.e. the Pattakals did not have a hereditary right to the office of Kazi and therefore could not challenge the appointment of a Kazi under the Kazis Act, 1880. This order having attained finality, it was now not open to the respondents to argue in favour of a hereditary right to the office of *mutawalli,* when such right has been denied for the office of Kazi; and that the respondents themselves admitted in the plaint in O.S. No. 1/1998 that the office of *mutawalli* and Kazi is one and the same, but conveniently sought only the office of *mutawalli* in relief.

That the respondents have undergone partition amongst themselves, but the two partition deeds produced before the Tribunal do not mention which branch of the family would continue to hold the office of *mutawalli,* and the same belies the respondents' case that it was a hereditary right within the family.

That the compromise decree is binding against the respondents since the irregularity therein found by the Tribunal was only procedural, and that the burden was on the respondents to show that the decree was void, since there is a presumption under Section 114(e) of the Indian Evidence Act, 1872 that judicial acts have been regularly performed.

Lastly, learned counsel argued that the material on record clearly shows that the public of Andrott Island has always had a role in the management of the mosque, which is registered as a public waqf, and even if the respondents have a customary right to the office of *mutawalli,* it is against public policy to let the management rights of a public waqf vest in one family.

9. Per contra, learned counsel for the respondents has drawn attention to the Tribunal's finding that the documentary evidence showed that it was the respondents' family which was managing the mosque property. On the other hand, there was no documentary evidence to show that the committee of public representatives formed in 1966 was managing the mosque.

He reiterated the argument made before the Tribunal pertaining to Sections 4 and 5 of the Wakf Act, 1954, under which a List of Wakfs is published by the Wakf Board after due inquiry by the Survey Commissioner. Before the Tribunal, the respondents had produced **Ex A3,** the Gazette notification issued by the Lakshadweep Wakf Board containing the List of Wakfs published under Section 5, which showed that the office of *mutawalli* of the Jumah mosque was held by "*members of pattakal (family) under the supervision of Amins and Karanavans*". Learned counsel also referred to **Ex A4** and **Ex A5,** the certified copy of the entry in the

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statutory Register of Wakfs, and the receipt for wakf registration dated 5.3.1967 respectively, both of which show the name of the respondents' predecessor Pattakal Koyammakoya as *mutawalli* for the Jumah mosque.

Learned counsel relied upon these documents to contradict the claim that the committee constituted in 1966 was managing the mosque at that time. Further, since these documents were not challenged by the appellants before the institution of the suit, they could not now claim that the respondents were not holding the office of *mutawalli*.

The respondents relied upon the judgment of the Full Bench of the Lahore High Court in *Mt. Sardar Bibi v. Haq Nawaz Khan,* AIR 1934 Lahore 371, wherein it was held that a long established custom practiced by a family or community cannot be abrogated by a mere individual declaration to that effect, but such abrogation has to be inferred from the course of conduct of the family or community over an extended period of time. Hence, even if the appellants' arguments with respect to the committee or the compromise decree were accepted, the respondents' customary right to office of *mutawalli* would not be abrogated simply because Pattakkal Koyammakoya Thangal took up of the presidency of the committee or entered into the compromise dated 16.02.1981 as Karanavan of the Pattakal family.

Learned counsel for the respondents finally stressed that both the Courts have rightly held that the compromise decree dated 16.02.1981 was not only illegal but also void; that merely because of certain small gaps in the 1920s in which the Pattakal family did not hold the office of *mutawalli*, the customary office held by the family could not be held to be discontinued; and that mere artificial breaks, that too for small periods and only on a couple of occasions, could not, in law, break the continuity in the administration of the mosque by the Pattakal *mutawalli*.

10. From the aforementioned arguments, the following issues arise:-

Firstly, whether the High Court exceeded the scope of its revisional jurisdiction; and

Secondly, whether the respondents have pleaded and proved that they have a customary right to the office of *mutawalli* in the Jumah mosque.

11. Regarding the appellants' argument on the scope of the revisional jurisdiction of the High Court against an order of the Waqf Tribunal, it is pertinent to note Section 83(9) of the Waqf Act, 1995 which provides that:

> "No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:
> Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the *correctness, legality or propriety of such determination* and may confirm, reverse or modify such determination or pass such other order as it may think fit."
> (emphasis supplied)

12. It is well settled that ordinarily, while revisional jurisdiction does not entitle the High Court to interfere with all findings of fact recorded by lower Courts, the High Court may correct a finding of fact if it has been arrived at without consideration of material evidence, is based on misreading of evidence, is grossly erroneous such that it would result in miscarriage of justice, or is otherwise not according to law (see the decision of the Constitution Bench of this Court in *Hindustan Petroleum Corporation Ltd v. Dilbahar Singh,* (2014) 9 SCC 78). Importantly, the scope of such revisional jurisdiction is wider when the High Court is vested with the power to examine the legality or propriety of the lower Court's order under the statute from which

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the revisional power arises. In such a situation, the High Court may also examine the correctness of findings of fact, and re-appraise the evidence (see *Ram Dass* v. *Ishwar Chander*, (1988) 3 SCC 131). It is in this perspective that the argument of the appellants must be considered.

13. As rightly noted by the Tribunal, it is not disputed that Ubaidulla had come to Andrott and converted the people of the island from Hinduism to Islam. The Tribunal also observed that the respondents/plaintiffs were Ubaidulla's descendants *"by all* probabilities*", keeping in mind the historical materials produced.* It was further observed that historians were of the unanimous opinion that Ubaidulla was the first Kazi/*mutawalli* of the mosque and that members of his family had held the office of Kazi in succession. However, in spite of these observations, the Tribunal did not go on to render a finding to the effect that the respondents had been holding the post of *mutawalli* in succession. Instead, it concluded that Ubaidulla was an alien who could not have owned land on the island, and hence, the mosque could not have been constructed by him, and there was no positive evidence that he and his descendants were *mutawallis* of the Jumah mosque.

The High Court noted that the findings of the Tribunal contradicted its earlier observations, and held that since the mosque was constructed as long ago as in the seventh century, no evidence other than the historical material on record could be obtained to show, that in all probability, Ubaidulla had indeed constructed the mosque. There could not be specific or direct evidence of the donation of land for constructing the mosque, or of the construction of mosque itself, and so on. The Court was rightly of the opinion the Tribunal need not have probed further for positive proof after noting all the historical facts proved.

Thus, it is evident that the High Court in the impugned judgement has not entered into a rehearing or reassessment of the findings of fact arrived at by the Wakf Tribunal. Rather, the Court has rightly noted that the Tribunal did not apply the appropriate standard of proof to be applied in a civil suit, i.e. the standard of preponderance of probability.

Therefore, it cannot be said that the High Court exceeded the scope of its revisional jurisdiction in any manner.

14. To consider the appellants' argument that the Pattakal family did not have a customary right to the office of *mutawalli* of the Jumah mosque, we may first address the minor argument raised by the appellants with respect to the respondents' partition deeds. The Tribunal in its judgment has specifically noted that the partition deeds only relate to the division of properties within the *tharawad* and do not deal with the right of management of the mosque. The respondents themselves are claiming the office of *mutawalli* as a customary right, not as a proprietary right. It has even been admitted by learned counsel for the appellants during the course of arguments that the same cannot be a proprietary right. Hence, the partition deeds could not have made any provision with respect to the office of *mutawalli*, and the non-mentioning of this office in the partition deeds will not prejudice the claim of the respondents to a customary right to succeed to this office.

15. We would now like to address the appellants' contention that the materials adduced by the respondents to show that they have continuously held the office of *mutawalli* should not have been relied upon by the High Court, as they were not contemporary and were fictitious in nature. We find ourselves unable to agree with this contention for the reasons laid out below.

We have gone through the material which the High Court has relied upon to grant the respondents' claim. The first is **Ex A36,** *A Short Account of the Laccadive Islands and Minicoy,* by R.H. Ellis, published in the year

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Ellis was at that time the Collector for the territory. The book mentions on page 16 that Saint Ubaidulla was regarded as the first *musaliyar* (proselytizer) in the area, and his descendants till 1920 held the office of Kazi of Andrott Island. The second is a note prepared in 1977 by the Gazetteer for the Lakshadweep islands. Though this document was not marked as an exhibit, counsel for the appellants stated that it had nevertheless been placed and relied upon before the Tribunal and the High Court. This publication on page 44 notes that Ubaidulla was the first *musaliyar* in Andrott and his grave is enshrined within the Andrott mosque and regarded with deep veneration.

The High Court also noted the observation in the book *Deepolpathy* (published in 1960) **(Ex A35)** that the respondent Pattakal family was descended from Saint Ubaidulla, who was the first Kazi of the mosque, and that members of the Pattakal family were its traditional Kazis, and continued to be so at the time of writing. The High Court also appreciated an entry in the Encyclopedia Britannica (edition unspecified), as well as certain remarks in the Arabic book *Futhuhathul Jesair* **(Ex A37),** to the same effect.

We agree with the opinion of the High Court that since this issue relates to a mosque constructed almost 1300-1400 years ago, it is impossible to find contemporary proof of the construction of the same. The Gazetteer for the Lakshadweep Islands, as recently as 1977, has recorded that Ubaidulla was the first *musaliyar* in Andrott and is buried in the Andrott mosque. The Gazetteer, as well as the then Collector R.H. Ellis, gave credence to this account in spite of inaccuracies relating to the date of conversion of the inhabitants.

It is important to note at this stage that the Gazette is an official record evidencing public affairs, and its genuineness is presumed under Section 81 of the Evidence Act, 1872. Moreover, under Section 35 of the Evidence Act, an entry made by the Gazetteer in discharge of his official duty is a relevant fact. Any fact recorded by the Gazetteer may also be considered as expert opinion under Section 45 of the Evidence Act. Therefore, the contents of the Gazette can be taken into account to discover the historical materials contained therein, which the Court may consider in conjunction with other evidence and circumstances in adjudicating a dispute, even if it may not be conclusive evidence of the fact-in-issue (see *Bala Shankar Mana Shankar Bhattjee v. Charity Commissioner, Gujarat State,* 1994 Suppl. (2) SCR 687). Such a record cannot be challenged by the appellants merely on the ground that it is not a recent publication.

Moreover, irrespective of the date of conversion of the island's inhabitants, had Ubaidulla not had a significant connection to the mosque, there would have been no reason for him to be buried there and for the tomb to be venerated. Even if the book *Futhuhathul Jesair* **(Ex A37)** is disregarded on the ground that it was written by Respondent No. 2's relative (that too after the suit was filed), other independent historical materials corroborate that Ubaidulla was the first *mutawalli* of the mosque, that he married a female convert and established the Pattakal tharawad, *and that after his demise, his descendants, i.e. the* Pattakal family, were holding the office of Kazi and managing the mosque as *mutawallis* turn by turn.

Moreover, as the High Court has rightly observed, these materials refer to the history of the island, its administration, the local culture and economy, etc., all of which constitute historical facts, and these materials qualify as historical literature. Hence, we disagree with the appellants' contention that these materials are legendary or mythological in nature.

The appellants, on the other hand, have not produced any contrary historical opinion that states that Ubaidulla was not the first

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mutawalli and that his descendants did not continue to hold the office of *mutawalli*, or any historical proof to show that the mosque was being managed by local residents or by a committee. Thus, we find no reason to interfere with the finding by the High Court that the respondents have held the office of mutawalli *of the mosque since its establishment.*

16. It now remains to be seen whether the material relied upon by the High Court was sufficient to establish a customary right to the office of *mutawalli* in favour of the respondents. We would like to reiterate at this stage that it is not under dispute that this office can be customary. This is also evident from the definition of '*mutawalli*' in Section 3(i) of the Waqf Act, 1995, which includes a person who is *mutawalli* by virtue of any custom.

17. At the outset, it is pertinent to note that Muslim law does not recognize an inherent right of succession to the office of *mutawalli. In Atimannessa Bibi v. Abdul Sobhan,* (1916) 43 Cal 467, the High Court of Calcutta laid down the proposition as follows:

> "...though a descendant of the founder has a preferential claim to the office of *mutawalli*, he does not become *mutawalli* by right of inheritance but has to be appointed such by the "Qadi" who may be supersede him if he is not qualified."

An almost identical position was taken by the High Court of Bombay in *In Re Mahomed Haji Haroon Kadwani,* ILR (1935) 59 Bom 424. Similarly, the High Court of Calcutta in *Bebee Syedun v. Syed Allah Ahmad,* W.R. 1864, 327 held that hereditary succession is extremely unlikely in offices in Mohammedan religious endowments.

18. However, various scholars on Muslim law have opined that such a right may be shown on the basis of certain exceptions, which includes the creation of a custom to that effect. In this respect, we may refer to the following discussion by S.A. Khader in ***Law of Wakfs*** (1999, page 33):

> "Hereditary right to the office of mutawalli: Muslim law does not recognise any right of inheritance or rule of hereditary succession to the office of mutawalli. *There are two exceptions to this principle*:
>
> (1) Where the founder has laid down the rule of hereditary succession to the office in which case the rule has to be adhered to, and
>
> (2) *Where the office of mutawalli becomes hereditary by custom in which case the custom should be followed."*
>
> (emphasis supplied)

A similar observation has been made by Mulla in Principles of Mahomedan Law *(21st edn., 2017, Prof. Iqbal Ali* Khan ed.) (for short **"Mulla")** on page 253:

> "The Mahomedan law does not recognize any right of inheritance to the office of mutawalli. *But the office may become hereditary by custom, in which case, the custom should be followed."*
>
> (emphasis supplied)

19. We have also given due consideration to several judgments of various High Courts which appear to support the above observations, inasmuch as they recognise that an exception can be made to the general rule against hereditary succession and lay down certain principles in this regard for proving such an exception.

In *Shah Gulam Rahumtulla Sahib v. Mahommed Akbar Sahib,* 8 Mad. H.C. Rep. 63 (1875), the question before the High Court was whether the office of the custodian of a waqf could devolve through primogeniture. The Court opined in this case that in cases of succession to the office of the custodian of a waqf, succession would be determined in terms of the rules established by the founder of the waqf, which could be inferred from evidence of usage.

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Another leading precedent in this regard is *Phatmabi v. Haji A. Musa Sahib*, (1915) 38 Mad. 491. In this case, an heir of the previous *mutawalli* laid claim to the office through hereditary devolution. In this backdrop, the High Court of Madras observed as follows on page 494:

> *"Where there has been a series of appointments of Mutawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication* relating to the mode in which the successive appointments have to be made." (emphasis supplied)

On page 495 it was further observed:

> "The law does not directly empower the Mutawalli of every waqf to appoint his successor but *if in regard to any particular waqf it is proved that the Mutawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin and was founded on some provisions contained in the waqfnama or some oral directions given by the waqif empowering the Mutawallis to nominate their successors.* Provisions in the waqfnama empowering the Mutawallis to nominate their successors are so usual that it would perhaps be representing the present state of authorities if it were said that the Courts assume the existence of such a provision in the dedication, unless the contrary is proved. It will be seen therefore that a *claim based on the allegation either that the office is hereditary or that the Mutawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the waqif at the time when the dedication was made."* (emphasis supplied)

The above observations of the Court indicate that a claim of hereditary succession may be accepted if it is founded in a direction to that effect by the waqif (i.e. the founder of the waqf). Such a direction may be presumed from a practice of successive appointments made from amongst the waqifs family members.

However, in the above decision, the Court also observed that the standard of proof in respect of such a custom would be stricter in the case of a public waqf than for a waqf whose object was to provide for the maintenance of the founder's family. Hence, the High Court in the said matter of *Phatmabi* rejected the claim of Phatmabi on the ground that she had only been able to show three successive appointments from her family, and there was nothing to show such persons had succeeded as a matter of right of inheritance.

Similarly, in *Kalandar Batcha Sahib v. Jailani Sahib,* AIR 1930 Mad 554, the plaintiff claimed a right to the office of the trustee, being the closest male heir of the predecessor. The High Court of Madras held that while there was no absolute right to be appointed as a hereditary trustee under Mahomedan law, when the founder intended the position of trustee to be hereditary, such fact should be considered in the appointment of trustees, unless there were strong reasons for doing otherwise. In this case, it was found that the history of devolution of the trust, from the original founder of the trust onwards, showed that the trustee was always appointed from the founder's family, and hence the office of the trustee was to be regarded as hereditary. Accordingly, the suit was decreed.

20. It is also important to note that even the decisions which have held that there is no right to hereditary succession to the office of mutawalli under Muslim law do not support the appellants' contention that there cannot be an exception by way of custom to the general rule affirmed in those decisions.

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In Atimannessa (supra) and *In Re Mahomed Haji* (*supra*), since the claimants did not plead the existence of a *custom* of hereditary succession, the Court did not have an occasion to rule on the aspect, and hence both the decisions are silent in this regard. In *Bebee Syedun* (supra), while it was held that in the absence of sufficient evidence of a custom by descent, there would be a presumption against hereditary succession to the office of *mutawalli,* crucially, the Court did not find that such a custom could not exist at all. Rather, the claim was rejected as the plaintiff had not gone back far enough to establish a custom, as he had only shown three generations of succession to the office of *mutawalli.*

21. Finally, the Waqf Act, 1995 itself acknowledges that a waqf may have a hereditary *mutawalli.* This is evident from the proviso to Section 69(2), dealing with the power of the Waqf Board to frame a scheme for the administration of a waqf, which states that:

> "Provided that where any such scheme provides for the removal of any hereditary mutawalli, the scheme shall also provide for the appointment of the person next in hereditary succession to the mutawalli so removed, as one of the members of the committee appointed for the proper administration of the waqf."

22. It can be concluded from the above discussion that a person claiming a customary right to succeed to the office of *mutawalli* would have to show that the waqif intended for the office to devolve through a practice of hereditary succession. In the absence of any express directions in the waqfnama to this effect, the claimant would have to show that such practice has been in existence throughout the history of the trust, and not merely for a few generations, such that the waqif's intention that the office should be hereditary can be presumed. The burden of proof would be higher with respect to a public waqf, such as the suit waqf in the instant case, than a family trust.

23. We may now consider what the principles governing the establishment of a custom under Muslim law are. It is a settled position of law that a custom in order to be legal and binding must be certain, reasonable and acted upon in practice for a long period with such invariability and continuity that it has become the established governing rule in a community by common consent. It is equally settled that it is incumbent upon the party relying on the custom to plead and prove it.

In this regard, we may fruitfully refer to the following observations from Fyzee's *Outlines of Muhammedan Law* (5th edn., 2008, Prof. Tahir Mahmood ed., p. 49) (for short **"Fyzee"**):

> "First, the burden lies heavily upon the person who asserts to plead the custom relied upon and prove clearly that he is governed by custom and not by the general law. Secondly, as to the proof of custom, there is in law no presumption in favour of custom and *the custom must be ancient, certain and not opposed to public policy."* (emphasis supplied)

The leading case with respect to the requirements of proving a custom is the decision of the Privy Council in *H.H. Mir Abdul Hussein Khan v. Bibi Sona Dero,* AIR 1917 PC 181. Relying upon its previous decision in *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar,* (1871-72) 14 Moo IA 570, the Council observed as follows:

> "It is of the essence of special usag es modifying the ordinary law of succession that *they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence.* It is only by means of such evidence that the Courts can be assured

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of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." (emphasis supplied)

24. Thus, we may conclude that while no person can claim the office of *mutawalli* merely by virtue of being an heir of the waqif or the original *mutawalli,* if they can show through a long-established usage or custom that the founder intended that the office should devolve through hereditary succession, such usage or custom should be followed. Additionally, the practice would have to comply with the requirements which are generally applicable while proving a custom, i.e. it must be specifically pleaded, and should be ancient, certain, invariable, not opposed to public policy, and must be proved through clear and unambiguous evidence.

25. Whether the aforementioned requirements have been satisfied in the present case or not is to be considered.

As far as the requirement of specific pleadings is concerned, we find that the appellants' argument that the respondents have not specifically pleaded their customary right is patently incorrect, insofar as the respondents in paragraph 2 of their plaint in O.S. No. 1/1998 have specifically pleaded that the office of the *mutawalli* is vested in the Pattakal family *'by virtue of immemorial custom and usage.'*

26. Coming to the question of whether the respondents have discharged the burden of proving a legal and binding custom in their favour.

As mentioned above, the Tribunal and the revisional Court have, on facts, found that historical materials unanimously establish that Saint Ubaidullawas the first *mutawalli* of the mosque, which was constructed around the seventh century AD, and his descendants continued to hold the post after his death.

Additionally, the Tribunal and the High Court have taken note of multiple documents placed on record by the respondents, showing that the Pattakal family was managing the mosque property in an unbroken chain of succession. These include, inter alia, **Ex A1,** a compromise petition dated 6.12.1892 acknowledging the rights of Pattakal Ahmed Khadiyar Koya in the administration of the Jumah mosque, **Ex A2,** another compromise petition of the year 1933 which refers to Pattakal Kunhikoya as the Kazi, **Ex A21,** a complaint dated 22.03.1935 filed by the *mukri* (muezzin) of the mosque against the then *mutawalli* Pattakal Kunhikoya, **Ex A3-5** and **Ex A11,** showing that Pattakal Koyammakoya was the *mutawalli* prior to his death in 1981, **Ex A6-9,** consisting of demand notices and receipts for annual contributions made by the mosque, which show that Patakkal Pookoya Thangal was Pattakal Koyammakoya's successor from 1981 till his death in 1996, and **Ex A17-20,** which prove that the present *mutawalli* is Respondent No. 1 Patakkal Cheriyakoya. These documents establish that from 1892 to present, it is the respondents' family members who have been succeeding to the office of *mutawalli* continuously. Therefore, it is proved that the practice of succession of the respondents to the office of *mutawalli* of the Jumah mosque has been in existence since antiquity, and is certain and invariable.

27. It may now be considered, *firstly,* whether the alleged intervention of third parties have led to breaches in the invariability and continuity of the custom, through the statutory appointment of a Kazi in 1998 and the appointment of a non-Pattakal Kazi in 1921 and 1923, and *secondly,* whether the respondents have themselves committed such breaches through their predecessor's participation in the committee formed in 1966, and by entering into a compromise decree dated 16.02.1981.

28. With respect to the contention pertaining to the appointment of a Kazi in 1998,

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it is admitted that one Kunnasada Hamzakoya was appointed as Kazi of Andrott Island under the Kazis Act, 1880. Previous to this appointment, the respondents had challenged the government's notification inviting applications for the post before the High Court in *S.A. Thangal* (*supra*), on the ground that their hereditary right to succession to the office of Kazi would be abrogated by the statutory appointment, but their petition was dismissed. It is on the basis of this judgment that the government proceeded to appoint such Kazi.

As was rightly observed by the High Court, the Tribunal's finding that the Pattakal family had lost its vested right in the office of *mutawalli,* based on the finding in *S.A. Thangal* that they had no hereditary right to the office of Kazi of the mosque, was based on a wrong understanding of facts and law. The dictum laid down in S.A. *Thangal,* which was heavily relied upon by the appellants during their arguments before this Court, will not come to the aid of the appellants in this matter, inasmuch as the said judgement was rendered in a different context. It is no doubt true that in *S.A. Thangal*, it was observed that the petitioner therein (who was a member of the Patakkal family) could not claim that the position of Kazi was hereditary in nature, particularly after the coming into force of the Kazis Act, 1880 (which was made applicable to Lakshadweep in the year 1970). However, the judgment also acknowledged that by virtue of Section 4 of the Kazis Act, if the respondents were performing the functions of a traditional Kazi prior to enforcement of the Act, they could continue to do so, notwithstanding the appointment of another person as a Kazi under the Act. This is evident from the operative portion of the judgement, which reads thus:

> "13. Therefore, the petitioner cannot claim that the position of Kazi is hereditary in nature. Even if the petitioner's contention that he succeeds to the deceased Kazi, the position being hereditary in nature, is accepted, that will not prevent the Administration choosing a Kazi in terms of the Kazis Act. *Appointment of Kazi made under the Act shall not be deemed to prevent any person discharging any of the functions of the Kazi as per Section 4 of the said Act."* (emphasis supplied)

The relevant section in this regard, Section 4(c) of the Kazis Act, 1880 reads as follows:

> **"4. Nothing in Act to confer judicial or administrative powers; or to render the presence of Kazis necessary; or to prevent any one acting as Kazi:** Nothing herein contained, and no appointment made hereunder, shall be deemed...
>
> (c) *to prevent any person discharging any of the functions of a Kazi."* (emphasis supplied)

Hence, even as per the decision in *S.A. Thangal,* the respondents could discharge some of the functions of a traditional Kazi despite the appointment of a different person as a Kazi under the Kazis Act.

From the aforementioned discussion, we can conclude that the appellants' contention that the post of Kazi and mutawalli was the same in Lakshadweep islands and therefore if the respondents have lost the right to one office, they cannot claim the other is only partly correct. We say so because, it is true that prior to the enforcement of the Wakf Act, 1954 in the year 1968 in the Lakshadweep islands, the word *'mutawalli'* was not in use on the islands, and the word 'Kazi' encompassed a person functioning as *mutawalli* of a mosque. This has also been noted by the Tribunal in its judgement. However it is incorrect to say that the person who was working as mutawalli/ Kazi loses the post of *mutawalli* also after he lost the post of Kazi.

The office of Kazi disputed in *S.A. Thangal* is a statutory appointment under the

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Kazis Act, 1880. It can be inferred that after the enforcement of the Kazis Act in 1970, a legal distinction between the office of *mutawalli* and statutory office of Kazi came into play in the Lakshadweep islands. The Kazis Act pertains to the appointment of a Kazi for a local area where his presence may be required for performing certain rites and ceremonies, whereas the respondents in their plaint have clearly stated that they are claiming the office of " *mutawalli-cum-Traditional Kazi*' of the Jumah mosque specifically. They are not contesting the decision in *S.A. Thangal* or seeking appointment to the statutory post of Kazi.

Therefore, we find that the High Court has rightly concluded that at the time of the institution of OS No. 1/1998, the respondents were within their rights to seek the relief of the office of *mutawalli* even after their claim to the office of Kazi was defeated. Further, given the distinction between a statutory Kazi and a *mutawalli,* the appointment of Kunnasada Hamzakoya in 1998 will not constitute a breach of the respondents' custom in respect of the office of *mutawalli.*

We would like to emphasize that we have not been called upon to decide whether the respondents have a customary right to be the Kazi of the mosque, since the decision in *S.A. Thangal* is not in challenge before us. Therefore, we desist from looking any further into the matter.

29. The appellants' argument that the respondents' claim to the office of *mutawalli* is defeated by the appointment of certain third parties as Kazis in the 1920s, i.e. before the enforcement of Kazis Act,1880 in the area, must also be considered in the light of the above discussion.

The appellants have relied on **Ex B8** and **Ex B9** in this respect. **Ex B8** is letter of Kazi Sayedkoya dated 25.05.1921 informing Amin Kachery, Andrott that his uncle Attakoya Thangal had been functioning as Kazi in his place while he was travelling, and that Kazi Sayedkoya had subsequently resumed the post. **Ex B9** is the order of R.H. Ellis dated 12.02.1923 which inter alia assigned one Shaikinteveedu Kunhikoya to be the karnavar of Andrott and one Kasmikoya to perform the functions of Kazi of the mosque. The appellants claim that these documents show that the Pattakal family was not managing the mosque in that period.

The respondents have not challenged the validity of the above documents. In fact, we find that in **Ex B5,** it has been admitted by Pattakkal Koyammakoya (the respondents' predecessor), who was the plaintiff in O.S. No. 10/1974, in which the compromise decree dated 16.02.1981 was passed, that the Shaikinteveedu family, to which the Kazis appointed in 1921 and 1923 belonged, does not belong to the Pattakkal *tharawad.* He further admitted that Sayedkoya was appointed by the people as Kazi due to hostility towards the Pattakkal family, and the government had accepted such appointment. After Sayedkoya's tenure expired, nobody from Sayedkoya's family was appointed and all the succeeding Kazis were from the Pattakal family. It can be inferred that even prior to the enforcement of the Kazis Act, the government appointed a Kazi for Andrott Island, for a limited duration only, on the request of the inhabitants. Therefore, such appointment would not prejudice the respondents' customary right to manage the Jumah mosque. In any event, a singular artificial break or gap in the exercise of a customary right, that too by executive orders, would not lead to abrogation of the customary right itself, unless such break constitutes a recurring infringement or leads to conferment of title in the opposite party (see the decisions of the Madras High Court in *Muniandi Kone v. Sri Ramanatha Sethupathi,* AIR 1982 Madras 170, and *K.A Srinivasa Ayyangar v. S. Ramanujachariar,* 1941 (1) M.L.J 322).

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The appellants have not been able to show that apart from the instances mentioned in Ex B8 or B9, anybody else was functioning as the Kazi-cum-*mutawalli* of the mosque since ages prior to the filing of the suit, so as to constitute a recurring infringement or to confer title upon a third party. On the other hand, the respondents have produced considerable documentary evidence to show that members of the Pattakal family were functioning as *mutawalli* since the establishment of the mosque. Thus, the appellants' argument in this regard fails.

30. We must now consider whether the appellants have been able to prove that the respondents had themselves breached their customary right such that the custom was abrogated. Learned counsel for the appellants firstly drew our attention to **Ex B5,** the deposition of Patakkal Koyammakoya, plaintiff in O.S. No. 10/1974, mentioned *supra.* He admitted that a committee was formed on 25.11 1966, composed of 14 members from 4 localities of Andrott Island, of which he was President. Hence, the appellants contend that the respondents cannot claim that it was just a repair committee and not for the management of the mosque.

It is true that in **Ex B5,** Patakkal Koyammakoya admitted to the formation of the committee in 1966. However, he had earlier categorically deposed that the committee was for overseeing the repair and maintenance work of the mosque. Moreover, in his cross-examination, he stated that though he was continuously elected as President of the committee, he could not remember whether a committee was elected after 1972. He also stated that there was no committee on the date of deposition (i.e. 30.04.1977). Therefore, it is evident that the committee was only in existence from 1966 to 1972 and that too only to advise the *mutawalli* in relation to the repair and maintenance of the mosque. It must also be noted that both the Tribunal and the High Court have found that the appellants have not produced any documentary evidence to controvert the deposition in **Ex B5,** and to show that a committee was functioning for the management of the mosque after 1972. We find ourselves in agreement with the said finding.

On the other hand, we find merit in the respondents' submission that the entries made in and around 1967 regarding the Jumah mosque in the List of Wakfs and the Register of Wakfs under the Wakf Act, 1954, mentioned *supra,* evidence that the office of *mutawalli* was customarily vested in the respondents, and not in the committee, during the period to which the entries pertain. Since the List of Wakfs **(Ex A3)** relied upon by the respondents is a Gazette notification, the entry contained therein showing that the office of *mutawalli* was held by the Patakkal family will constitute a relevant fact under Sections 35, 45 and 81 of the Evidence Act, as mentioned in our discussion *supra* pertaining to the relevance of the Gazetteer's Report of 1977.

Further, it must be noted that the List of Wakfs is published only after the Survey Commissioner has conducted a preliminary enquiry into the waqf property and after the Commissioner's report is examined by the Waqf Board under Sections 4 and 5 of the Wakf Act, 1954. Both the Tribunal and the High Court have concurrently found that it is an admitted fact that an enquiry was made by the Waqf Board pertaining to the Jumah mosque in 1967. Appellant No. 1 had also deposed before the Tribunal about having participated in this enquiry, after which the List was published. Thereafter, no complaint was made against the entry in the List. Hence, the appellants cannot at this stage claim that the entry made is incorrect.

The Register of Wakfs is prepared by the Wakf Commissioner, an official appointed by the State Government, hence an entry made

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therein is an entry made by a public official in performance of his official duty and is considered a relevant fact under Section 35 of the Evidence Act. Hence the entry made in the Register of Wakfs (Ex A4) showing Pattakal Koyammakoya as the *mutawalli* of the Jumah mosque is a relevant fact for the purpose of deciding this dispute.

31. It is apposite to note that the Tribunal found that there was a discrepancy insofar as the List of Wakfs mentioned that the Pattakal *mutawalli* was under the supervision of Amins and Karanavans, whereas the Register entry only mentioned Pattakal Koyammakoya as the *mutawalli*. As mentioned *supra*, the appellants have also claimed that the mosque was managed under the 'Amin and Karanavan' system. In this regard, it must be noted that while evaluating the respondents' claim to a customary right to the office of *mutawalli*, the social conditions in which this right was exercised must be taken into account. The following observations of **Fyzee** (5th edn., 2008) on page 50 are relevant in this respect:

> "As to the evidence of custom, specific instances of its acceptance as law may be proved; such evidence may be supplemented by general evidence; previous decisions in which the custom has been accepted as binding are important pieces of evidence but their reasoning may not be binding; the court must scrutinize the custom set up jealously and *must be careful not to be misled by pitfalls due to nnfamiliarity with social conditions."*

We find it relevant to discuss what the entry in the List of Waqfs showing that the mosque was under the supervision of Amins and Karanavans precisely means, since this was the broader social backdrop in which the respondents' custom existed. A perusal of the "Report of the Commissioner for the Scheduled Castes and Scheduled Tribes" for the year 1953, on page 284, reveals that the Amin is the executive officer appointed by the government for the Lakshadweep islands. The Karanavans are the heads of different local families who are appointed to assist the Amin in trying civil and criminal cases. Hence, these are executive authorities which are separate from the *mutawalli* of a mosque. The Tribunal itself has noted in its judgement that the Jumah mosque may have been under the supervision of the then administrative authorities as it was a very important mosque on Andrott Island, but the Amins and Karanavans were not directly managing the affairs of the mosque. Therefore, we find that the mention of the 'Amin and Karanavan' system in the List of Waqfs will not weaken the respondents' argument based upon reliance on such List.

Though it is possible that the *mutawalli* belonging to the respondents' family may have been advised by other authorities, this does not mean the respondents per se did not hold the office of *mutawalli*. Hence we are unable to accept the appellants' argument that the respondent's customary right was breached due to the presence of advisory authorities such as the Amins and Karanavans or the committee formed in 1966. Rather, it strengthens the argument in favour of the respondents, to show that notwithstanding the changes in the administrative mechanism of Andrott Island over the years, which is inevitable in any territory, it is the Patakkal family which has been at the helm of affairs at the mosque.

32. We also find ourselves unable to agree with the contention of the appellants that the violations of Order XXIII Rule 3B, CPC while passing the compromise decree dated 16.02.1981 in O.S. No. 10/1974 are merely procedural and do not vitiate the decree, and that the decree should therefore be regarded as proof of breach of custom.

Under Order I Rule 8, CPC, which pertains to representative suits, a person may

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sue or defend on behalf of others and for the benefit of others having the same interest, with the permission of the Court. The object of Order I Rule 8 is to facilitate the decision of questions in which a large number of persons are interested without recourse to ordinary procedure. Per Order XXIII Rule 3B, in order to compromise in a representative suit, it is necessary to obtain the leave of the Court. Before grant of leave to compromise, the Court needs to give notice in such a manner as it may think fit, to such persons as may appear to it to be interested in the suit.

It is pertinent to note that it is not clear whether the suit in O.S. No. 10/1974 was filed under Order I Rule 8 or not. Even assuming that we accept the respondents' contention that the said suit was not strictly filed under Order I Rule 8, it would be regarded in the nature of a representative suit for the purposes of Explanation (c) to Order XXIII Rule 3B. Explanation (c) provides that the term 'representative suit' includes suits where the compromise decree passed therein becomes binding on persons not named as parties to the suit. In O.S. No. 10/1974, Pattakal Koyammakoya was representing the respondent family's interests in his capacity as Karanavan of the family. Hence the compromise decree, if upheld, would prejudice the family's customary right to the office of *mutawalli* and the terms thereof would become final and binding by virtue of Section 96(3), CPC. Thus, it is clear that the two conditions mentioned *supra* in relation to representative suits have to be complied with if the compromise decree passed in O.S. No. 10/1974 is to be held valid.

The Tribunal as well as the High Court, on considering the compromise decree passed and the records thereof, have on facts concluded that the parties to the decree did not obtain leave of the court and did not give notice to other persons who were interested in the suit, i.e., members of the Pattakal family, as required under Order XXIII Rule 3B. The appellants before this court have also not disputed that the compromise decree was without leave of the court and without notice to interested family members. As is evident from the foregoing discussion, such violations of Order XXII Rule 3-B cannot be said to be merely procedural, and go to the root of the matter since they deprive the affected parties of the chance to question the terms of the compromise that they are going to be bound by. Since both the conditions required under Order XXIII Rule 3B were not complied with, the compromise decree was void.

Further, we find that in addition to the above procedural violation, the compromise decree is also illegal insofar as it fails to comply with Section 60 of the Wakf Act, 1954, which provides that no suit in any Court by or against the *mutawalli* of a wakf relating to the rights of the *mutawalli* shall be compromised without the sanction of the Wakf Board. Rather than obtaining the sanction of the Wakf Board prior to the decree, the compromise decree mentions in paragraph 7 that the decisions taken therein are to be *subsequently* intimated to the Wakf Board. Hence, we find ourselves in agreement with the findings of the lower Courts that the compromise decree was illegal and void.

Moreover, as rightly argued by learned counsel for the respondents by placing reliance on *Sardar Bibi* (*supra*), which has also been favourably cited by Mulla (21st edn., 2017) on page 14, the abrogation of custom cannot be inferred from a mere individual declaration (i.e. the admissions made by Pattakal Koyammakoya Thangal in the decree) in the absence of any continuous course of conduct by the family to that effect. The respondents' family was not given notice before passing of the compromise decree and did not have any say with respect to the terms framed therein, and hence it cannot be said that the decree is binding against them.

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33. Thus, we are of the view that the appellants have not been able to establish that there was a breach in the respondents' customary right of holding the post of *mutawalli* due to the formation of the committee in 1966 which existed till 1972 or due to the compromise decree which is declared as void.

34. Learned counsel for the appellants argued that even if it is proved that the respondents have a customary right, such custom violates public policy and is unreasonable, as one family should not be allowed to monopolize the management of a public waqf. We are unable to agree with this contention. There cannot be any dispute that the *mutawalli* has no right in the property belonging to the waqf, and is merely a superintendent or manager. Hence, the respondents' right to office of *mutawalli* does not divest the waqf of its public character. Moreover, the exercise of any customary right to succession will be necessarily subject to the provisions of the Waqf Act, 1995, which provides broad powers to the Waqf Board for supervising the administration of a waqf. For example, Section 64 of the Waqf Act, 1995 provides for the removal of the *mutawalli*, and Section 69 of the Act deals with the power of the Board to frame a scheme for the administration of the waqf under certain contingencies.

We also find it relevant to refer to the following observations of the Bombay High Court in *In re Mahomed Haji Haroon* (*supra*), which were made in the context of a waqf created for charitable purposes:

> "In accordance with generally prevalent Muslim sentiments,—and the law of waqifs supports these sentiments,—members of the family of the waqif ought to be given preference in appointment as trustees...I do not, therefore (in spite of the deference I should like to show to the Advocate General's point that unless outsiders are appointed as trustees the trust may become entirely a family affair) consider that there must necessarily be any outsider amongst the trustees. On the contrary I think the Muslim law does not dread the management of waqifs being retained in the family of the waqif. It disapproves of the introduction of an outsider in the administration at least of such a trust as is before me, unless the members of the waqifs family show their unfitness to be trustees. I take this opportunity, however, of observing that though descendants of the waqif are favoured by the Court, when appointing a mutawalli, this does not mean that they have a hereditary right to be mutawallis, still less that their descent will protect them from removal if there is any mismanagement. The trustees that are now being appointed ought to be particularly careful in the administration of the trust. They should utilize the funds for such purposes and in such a manner that there may not be the least ground for any aspersion being cast against them. No suspicions should be allowed to arise that the funds are not being utilized for the most suitable and proper objects. Every portion of the funds should be manifestly put to uses entirely in accordance with the principles of Islam, which is a progressive and enlightened religion."

As noted in the above decision, even if the *mutawalli* belongs to the family of the waqif, he is not immune from removal in the case of mismanagement of the waqf, and must administer the waqf in accordance with the principles of common prudence and probity. Having regard to the above principle, and to the provisions of the Waqf Act which take care of contingencies in case of mismanagement, etc., it cannot be said that the respondents' exercise of customary right

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to the office of *mutawalli* is unreasonable or violates public policy.

35. In light of the foregoing discussion, we have no hesitation to reach the conclusion that the respondents have been able to establish a customary right to the office of *mutawalli* of the Jumah mosque, under the facts and circumstances of this case, which is not unreasonable or opposed to public policy. The respondents have through clear and unambiguous evidence shown a practice of continuous and invariable devolution of the office of *mutawalli* through successive appointments from within the Patakkal family, beginning with the institution of the mosque itself. Adopting the principle enunciated in *Phatmabi* and *Kalandar Sahib (supra),* we find that this evidence is sufficient to draw a presumption that such hereditary devolution was as per the intention of Ubaidulla, the original wakif, therefore also satisfying the specific requirements mentioned *supra* for proving a custom of hereditary succession to the office of *mutawalli*.

36. Therefore, the appeals are dismissed and the impugned judgment and order is confirmed.

2019(10) SCALE 284

MANOHARAN *Appellant*

VS

STATE BY INSPECTOR OF POLICE,
VARIETY HALL POLICE STATION, COIMBATORE *Respondent*

CORAM: R.F. NARIMAN, SANJIV KHANNA AND SURYA KANT, JJ.

CRIMINAL LAW — IPC — SECTION 302/34, 364A, 376 & 201 — PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 [AS AMENDED BY AMENDMENT BILL, 2019] — SECTION 5 & 6 — Rape and murder after kidnapping the two children for ransom — Death sentence — Circumstantial evidence — Confessional statement — A young 10 years old girl gangraped after which they were poisoned and throwing them into a canal while they were conscious — Prosecution case that one 'M' at 7.50 a.m. on 29.10.2010, borrowed a vehicle from PW.7, picked up two children, a girl aged 10 years old and her brother aged 7 years old from outside a temple as the children were preparing to go to school — 'M' was seen by PW.3, the priest of that temple and by PW.9, grandmother of two children, taking the children away in that vehicle — 'M' then drove the children to a petrol pump at around 8.15 a.m. on the same day, and at 9.30 a.m. picked up appellant from his house — Children were then taken to a remote area and rape committed on the minor girl whose hands were tied by both 'M' and appellant — Thereafter, considering that the girl had been brutally raped (her anus having ruptured), two accused bought 'cow dung' powder, mixed it in milk and allegedly administered to the two children — As both children ingested only a small portion of the cow dung powder mixed with milk, they did not die — 'M' and appellant threw children in a canal — 'M' was arrested on the same night at PW.7's house — 'M' was shot dead by the police on 9.11.2010 in an encounter — Appellant was arrested on 31.10.2010 and bodies of two children recovered from the canal — Confession of appellant was recorded

Judgment dated August 1, 2019 in Crl.A. Nos. 1174-1175 of 2019 (Arising out of SLP(Crl.) Nos. 7581-7582 of 2014).

[SCA < 302 >]

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Yale Law Journal

Volume 37
Issue 3 *Yale Law Journal*

Article 1

1928

LEGAL PERSONALITY

BRYANT SMITH

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BRYANT SMITH, *LEGAL PERSONALITY*, 37 YALE L.J. (1928).
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YALE LAW JOURNAL

Vol. XXXVII JANUARY, 1928 No. 3

LEGAL PERSONALITY[1]

BRYANT SMITH

To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality.[2] If society by effective sanctions and through its agents will coerce *A* to act or to forbear in favor of *B*, *B* has a right and *A* owes a duty.[3] Predictability of societal action, therefore, determines rights and duties and rights and duties determine legal personality.

Whatever the controversies about the "essential nature" of legal personality, there seems to be a uniform concurrence in these as respectively the test of its existence in a given subject, and the manner in which it is conferred, whether upon a natural person or upon an inanimate thing.

Among definitions to be found in discussions of the subject, perhaps the most satisfactory is that legal personality is the capacity for legal relations.[4] But there is, nevertheless, an objection to the word "capacity" which seems of some importance. It suggests the possibility that the subject may have a capacity for legal relations without yet having become a party to such relations. A minor with capacity to marry is not necessarily married, whereas, when legal personality is conferred, the sub-

[1] This paper was read before the Round Table on Business Associations at the meeting of the Association of American Law Schools at Chicago in December, 1926.

[2] GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) 27; SALMOND, JURISPRUDENCE (5th ed. 1916) 272; HOLLAND, JURISPRUDENCE (9th ed. 1900) 88; POLLOCK, A FIRST BOOK OF JURISPRUDENCE (1923) 114.

[3] Corbin, *Legal Analysis and Terminology* (1919) 29 YALE LAW JOURNAL 163; *ibid.*, *Jural Relations and Their Classification* (1921) 30 YALE LAW JOURNAL 226; HOLMES, COLLECTED LEGAL PAPERS (1921) 167 *et seq.*

[4] SALMOND, *op. cit. supra* note 2, at 272; HOLLAND, *op. cit. supra* note 2, at 88, 91; *cf.* Geldart, *Legal Personality* (1911) 27 L. Q. REV. 90, 95.

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ject by that very act is made a party to legal relations. It would seem preferable, therefore, to define legal personality either as an abstraction of which legal relations are predicated, or as a name for the condition of being a party to legal relations.

It is believed that this is all there should be to the story. But legal philosophers and students of jurisprudence have not been content with so simple an explanation. They have sought for the "internal nature" of legal personality, for an abstract essence of some sort which legal personality requires. Thus Mr. Gray thinks there can be no right, and therefore no legal personality, without a *will* to exercise the right. "That a right should be given effect," says he, "there must be an exercise of will by the owner of the right." [5] But, after having adopted the premise that a will is of the essence of a right, he then proceeds to explain how it is that certain human beings without wills and even inanimate objects do have legal personality, a task which he complains is the most difficult "in the whole domain of Jurisprudence." [6]

Mr. Salmond, on the other hand, discovers a different quality which, by his definition, is essential to a right. "No being is capable of rights," says he, "unless also capable of interests which may be affected by the acts of others," and "no being is capable of duties unless also capable of acts by which the interests of others may be affected." [7] But Mr. Salmond's presupposition of an intrinsic essence does not give him as much trouble as did Mr. Gray's, for no sooner has he discovered the necessity of an interest to the existence of a right than he also discovers that the same act of investiture which attributes the right also attributes the interest. He defines a legal person, therefore, as "any being to whom the law attributes a capacity of interests and, therefore, of rights, of acts and, therefore, of duties." [8] This is substantially the same conclusion Mr. Gray reached with respect to the necessity of a will. Where there is no will in fact the law attributes one. So long as it has unlimited power of attribution, neither theory need hinder the sovereign in bestowing legal personality upon whomever or whatever it will.

A more difficult task than to define the concept itself is to explain this persistent tendency to make it mysterious. It is believed, however, without professing to give an adequate explanation, that some light can be thrown on the subject by contrasting the typical case of a human being, acting alone and in his own right, with some of the marginal cases. A Hindoo idol,

[5] *Op. cit. supra* note 2, at 25, 26.
[6] *Ibid.* 28.
[7] *Op. cit. supra* note 2, at 273.
[8] *Ibid.*

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being a legal person, it has been held, has peculiar desires and a will of its own which must be respected.[9] A corporation, it is said, "is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own." [10] A ship, described as a "mere congeries of wood and iron," on being launched, we are told, takes on a personality of its own, a name, volition, capacity to contract, employ agents, commit torts, sue and be sued.[11] Why do lawyers and judges assume thus to clothe inanimate objects and abstractions with the qualities of human beings?

The answer, in part at least, is to be found in characteristics of human thought and speech not peculiar to the legal profession. Men are not realists either in thinking or in expressing their thoughts. In both processes they use figurative terms. The sea is *hungry*, thunder *rolls*, the wind *howls*, the stars *look down* at night, time is not an abstraction, rather it is "father time" or the "grim reaper"; the poet sees darkness as "the black cheek of night," or complains that "time's fell hand" has defaced the treasures of "outworn buried age." Speech is forceful as its terms are concrete. Word pictures stir the imagination and enrich the language. Even if it were possible to inhibit this disposition to speak in images and even if the inhibition would produce clarity in legal analysis, it would be to purchase the end at too great a price.

Another aspect of this same phenomenon is that men are not apt in the invention of original terms for abstract ideas. Without being a philologist, one may know that, in its beginnings, language deals with the material and tangible world.[12] When, after generations of mental development and the accumulation of knowledge, abstract ideas finally begin to appear and multiply, the tendency is inevitably to stretch old words to new uses and to crowd the abstractions in under concrete terms which cover a bundle of ideas with which the newcomer appears to have most in common. To do so serves the double purpose of supplying a word where one is needed, and of obtaining a welcome for the new idea by introducing it under a familiar name.

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[9] Pramatha Nath Mullick v. Pradyumna Kumar Mullick, L. R. 52 I. A. 245 (1925); see Comment (1925) 41 L. Q. REV. 419.

[10] Maitland, quoted by Geldart, *op. cit. supra* note 4, at 93.

[11] Justice Brown in Tucker v. Alexandroff, 183 U. S. 424, 438, 22 Sup. Ct. 195, 201 (1902), cited by Justice McKenna in The Western Maid, 257 U. S. 419, 436, 42 Sup. Ct. 159, 162 (1922).

[12] "Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative, or fictional." HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 30.

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This disposition to label the field of abstractions with the names of a physical world is not confined to poetry or the higher reaches of literature. It has invaded also the prosaic legal vocabulary. Negotiations *take place* and *ripen* into a contract whose rights and duties *attach* and later *mature*. If the contract is *closed* it is *binding*, but may be *broken*. If not closed, notice may *operate* a *retraction* of the offer. A rule is said to be *settled* that the defendant must *restore* his adversary to the *position* he *occupied* before it was *altered*, and to *rest*, or to be based upon such and such *grounds*. A guarantee which we call *open* may be *withdrawn* or *recalled*. All these words, which bear unmistakable evidence of having been borrowed from the dictionary of the physical and the tangible, are taken from two pages of Corbin, *Cases on Contracts*, without by any means exhausting the material. The very sound of the word "break" resembles that of breaking a stick. Whether or not there is onomatopoeia in its origin, we hazard the statement that men broke many sticks before anyone ever broke his word, and still more before they became law breakers.[13]

Another characteristic of human thinking, relevant to the inquiry, is that which for certain purposes disregards human beings as individual units of classification and arranges its distinctions on the basis of functions. Eleven men as applicants for admission to the university are distinct individuals each with his own credentials; but as football players they become a team. For some purposes, each student in a university is a distinct and an individual problem, differing in essential particulars from every other student enrolled. For other purposes these individual peculiarities are of no importance and lose themselves in the junior class. For still other purposes, faculty, students, president, administrative officers and board of control, all fade out of the picture and become just Harvard, Yale, or Chicago. And so it is with any group. They are individuals in severalty or a unital aggregate, depending on the purpose in mind.

The same faculty which ignores the individual in the group function, also, for relevant purposes, divides a single human being into different functions. A man is said to be a good neighbor but a bad citizen, an affectionate husband and a stern father, a competent banker but a poor soldier. Even a scarecrow, for a particular purpose, *is* a human being, or a human being may be a scarecrow. The parable of the Samaritan shows how a stranger from distant parts may for some purposes be a

[13] It would be interesting to speculate whether the application to contracts of terms of biology and horticulture, such, for example, as "ripen" and "mature," had anything to do with judicial aversion to the doctrine of anticipatory breach!

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neighbor. Nor is this method of analysis confined to our dealings with human beings. It characterizes our mental reactions throughout the whole field of experience. The same faculty of the mind, which, in certain circumstances and for certain purposes, looks upon the universe as one, in other circumstances and for other purposes, breaks up the atom.

If we bear in mind these characteristics of our mental processes, we may be able to discover in them an explanation of the phenomenon of legal personality as exemplified in the more difficult cases of legal persons which combine many human beings in one, or subdivide a single human being, or which are not predicated of human beings at all. The typical subjects of rights and duties, of course, are normal human beings, acting in a single capacity and in their own right. It is between such persons, so circumstanced, that most disputes come to be settled; it is around them and with reference to them that legal ideas develop. The wording of laws, the language of the courts, the statements of causes of action, the forms of the writs, contemplate such beings as the parties plaintiff and defendant in litigation. By repetition the language becomes habitual, the forms grow rigid, the behavior patterns are fixed.[14] Then, for some reason or other, it becomes necessary or convenient to deal with an inanimate object such as a ship, or with a human being in a multiple capacity, as a trustee or a guardian, or with an association of human beings in a single capacity, as a partnership or a corporation. A merchant, for example, who has furnished supplies for a voyage, or a boss stevedore who has renovated the ship, cannot reach the owner of the vessel, who is outside the jurisdiction. The obvious solution is to get at the ship itself and, through it, satisfy the owner's obligations. But to devise a new system of jurisprudence for the purpose, to work out new forms and theories and processes, would too severely tax the ingenuity of the profession. The alternative is for the judges to shut their eyes to the irrelevant differences between a ship and a man and to treat the ship as if it were a man for the purpose of defending a libel. The master of the vessel appears in court to represent the ship and the ship vindicates the rights or makes vicarious atonement for the wrongs of its owner.[15]

"'I have tasted eggs, certainly', said Alice (in Wonderland), who was a very truthful child: 'but little girls eat eggs quite as much as serpents do, you know.'

"'I don't believe it' said the Pigeon, 'but even if they do, why, then, they're a kind of serpent; that's all I can say!'"

[14] For significance of habit in shaping legal institutions, see Moore, *Rational Basis of Legal Institutions* (1923) 23 COL. L. REV. 609.

[15] For other and similar "fictions," see GRAY, *op. cit. supra* note 2, at 30.

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So it is that the ship, a kind of a man, takes on a personality, acquires volition, power to contract, sue and be sued. If it must have some of the qualities of human beings to adapt itself to the novel situation and avoid embarrassment both to itself and to the court, the law can readily bestow them by the simple process of attribution.[16]

The ship, therefore, derives its personality from the compelling fact that it sails the seas between different jurisdictions. In the case of the corporation, the demand, although perhaps equally compelling, is for other reasons. Of the mental processes previously discussed, that which ignores the individual in the group function is most responsible for the phenomenon of corporate personality.

Large aggregations of capital carry tremendous economic advantages. To accumulate the requisite funds, it is necessary to draw from a large number of investors. It is impracticable that each investor have an active part in the conduct of the enterprise. If he cannot participate he will not invest if, in doing so, he must hazard his entire fortune in a venture over which he has only the most limited control. The solution is to limit his risk to the amount of his contribution. This done, the shareholder becomes irrelevant to the purposes of one who wishes to do business with the group enterprise.[17]

There is also great economic advantage in an unbroken continuity of effort. If a dissolution and the necessity for reorganization followed the death or the transfer of interest of any individual shareholder, the enterprise could not function. The solution is found in perpetual succession, by virtue of which each shareholder becomes still less significant, and even presidents and boards of directors lose their identity in the regular flow of successors.

If a creditor wishes to enforce a claim against the enterprise, it is impracticable and unnecessary to make all the participants, in whatever degree, parties to the action. The solution is to permit the organization to sue and be sued in a group name.

So it is that for one purpose and another, it becomes convenient, if not indeed necessary, to let the individual participants fade out of the picture and to look upon the organization

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[16] This purely functional justification of the personality of a ship is only suggestive, of course, and does not profess to be historical. Justice Holmes finds its history in the primitive notion which gave life to things that moved; but thinks its survival may be due to its utility. HOLMES, THE COMMON LAW (1881) 28.

[17] The shareholder "is the least interesting, the least momentous fact in corporate life, as an individual after he has entered the corporate sphere." Deiser, *The Juristic Person* (1909) 57 U. PA. L. REV. 300, 301; see also, Vinogradoff, *Juridical Persons* (1924) 24 COL. L. REV. 594, 595.

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as a unit.[18] And so it is that the corporation, like the ship, comes to be fitted into the old behavior patterns and to be treated and spoken of as if it were a natural person.

Whenever society, in the administration of justice, sees fit to disregard the individual members of an organization for a particular purpose, and for that purpose to look upon the organization as a unit, the organization to that extent or for that purpose becomes a legal person. This is true even where the group is organized as a partnership or other unincorporated association.

The single human being in a dual or multiple capacity is not ordinarily regarded by writers as a part of the subject of legal personality.[19] The corporation sole, as exemplified in the parson, the bishop, or the crown, has been given a hearing and dismissed as either "natural man or juristic abortion."[20] Except for the corporation sole, it is usually assumed that one human being is only one legal person, in however many different capacities he may function. But such an assumption, consistent though it may be with some of the language we use, does not describe our conduct. As an individual in his own right, A can transfer property to himself as trustee,[21] or do business with himself as a member of a firm to which he belongs,[22] or, in a triple

[18] "The germ of the corporate idea lies merely in a mode of thought; in thinking of several as a group, as one." Raymond, *The Genesis of the Corporation* (1906) 19 HARV. L. REV. 350.

[19] "This concept of the oneness of personality is bound up in our concept of a man. The trustee and the same man conducting his private business has one and the same personality . . . The law may take the position that one person in fact can have but one legal personality, or that he may have many . . . The legal theory that a man is one legal person . . . has this in its favor—the theory corresponds to the facts." Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism* (1915) 29 HARV. L. REV. 158, 161.

"When a man is executor, administrator, trustee, bailee, or agent, we do not feel it necessary to speak of corporateness or artificial personality." 3 MAITLAND, COLLECTED PAPERS (1911) 242.

"A human being is, in the nature of things, a unit. A philosopher might entertain a doubt upon this,—*homo* might seem to him merely a convenient word to designate a large number of molecules. But the common law judges seem never to have doubted." Warren, *Collateral Attack on Incorporation* (1908) 21 HARV. L. REV. 305. For a recognition and treatment of this phenomenon as a distinctive feature of the subject of legal personality, see SALMOND, *op. cit. supra* note 2, at 278. "Every contract, debt, obligation, or assignment requires two persons; but those two persons may be the same human being." *Ibid.*

[20] 3 MAITLAND, *op. cit. supra* note 19, at 243.

"A queer creature that is always turning out to be a mere mortal man just when we have need of an immortal person." 3 *ibid.* 280.

[21] Smith's Estate, 144 Pa. 428, 22 Atl. 916 (1891).

[22] Farney v. Hauser, 109 Kan. 75, 198 Pac. 178 (1921); Huffman Farm Co. v. Rush, 173 Pa. 264, 33 Atl. 1013 (1896).

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capacity, as an executor he can transfer property to himself as a trustee.[23] What shall we call such distinctions as these, if not distinctions of legal personality?

In an action in 1429 against the Commonalty of Ipswich and one Jabe, the defense was made that Jabe was a member of the Commonalty of Ipswich and therefore was being named twice as defendant in the same action, that if the defendants were found guilty Jabe would be charged twice over, that if the Commonalty should be found guilty, and Jabe not guilty, the result would be that Jabe was both guilty and not guilty. The case is cited in Pollock and Maitland to illustrate the failure to recognize the personality of Ipswich,[24] but it illustrates also, and equally well, does it not, the failure to distinguish Jabe as a private individual from Jabe as a member of the Commonalty? [25]

We smile at such a defense, as the naive reasoning of a time long past, and, indeed, we may boast that in many particulars we are more at home with the problems of dual personality than were those lawyers of 500 years ago.[26] But we have, nevertheless, missed some distinctions of the sort whose recognition we might have found very useful. In this, the 20th century, it is still the law, except where changed by statute, that a partner cannot, in a court of law, sue the firm of which he is a member,[27] nor can one firm sue another where the two have a common member.[28] Jabe the legal person is still only Jabe the human being. In 1920 the United States Supreme Court held that the federal income tax, levied on all classes alike, was, as applied to the salaries of federal judges, a violation of the constitutional prohibition against reducing their salaries while in office.[29] A provision intended to protect the judges from mistreatment in their office as judges, was misapplied, was it not, to exempt them from their obligations as private citizens? The distinction be-

[23] Williams v. Cobb, 242 U. S. 307, 37 Sup. Ct. 115 (1916).

[24] 1 HISTORY OF ENGLISH LAW (2d ed. 1899) 493.

[25] For another case illustrating the same sort of confusion, see *ibid.* 492.

[26] For example, in Bank of Syracuse v. Hollister, 17 N. Y. 46 (1858), *S*, acting as agent for the holder of a check, in contemplation of law, demanded payment of himself as teller of the bank on which it was drawn. Acting as teller, he refused to pay himself as agent for the holder, because the drawer had no funds in the bank. Then, as teller, he handed the check back to himself as agent for the holder and as agent for the holder he returned it to himself as notary public to have it protested for non-payment. After he had protested it as notary, he delivered it back to himself as agent for the holder and, thereupon, in that capacity, turned it over to his principal, the owner. Such multiplicity we take as a matter of course.

[27] MECHEM, ELEMENTS OF PARTNERSHIP (2d ed. 1920) § 199.

[28] Thompson v. Young, 90 Md. 72, 44 Atl. 1037 (1899).

[29] Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. 550 (1920).

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tween Jabe as a private individual and Jabe as a member of the Commonalty of Ipswich is only slightly more obvious than the distinction between *X* as a judge on the bench and *X* as an ordinary member of the community.

But enough of dual personality. It is submitted that the breaking up of human beings into plural capacities is not only an appropriate, but a most important, part of the subject of legal personality.[30] Whenever society, through its legislatures and courts, sees fit for a particular purpose to give effect to rights and duties in a human being in more than one capacity, such human being, for that purpose and to that extent, becomes more than one legal person.

It is believed that most of the confusion of thought with respect to the subject comes from the disposition to read into legal personality the qualities of natural human personality.[31] So Mr. Gray gets his "will" [32] and so Mr. Salmond his "interest." [33] So it is that Mr. Geldart is led to observe that:

> "If corporate bodies are really like individuals the bearers of legal rights and duties, they must have something in common which qualifies them to be such and if that is not personality we may fairly ask to be told what it is." [34]

As evidence of the personality of such bodies, apart from the personality of the individuals who compose them, we are reminded that the same individuals may form two distinct corporations.[35] But the same has been held of partnerships.[36] We are

[30] "In recognizing the possibility of one man having, as we should say, two capacities, a natural and a politic or official capacity, the law made an important step; these are signs that it was not easily made." 1 POLLOCK & MAITLAND, *op. cit. supra* note 24, at 506.

Whether the profession wishes to regard this as a problem in legal personality or not, the phenomenon has long been common property. In "Iolanthe," one of Gilbert and Sullivan's comic operas, the old Lord Chancellor, who has fallen in love with his rich and beautiful young ward, faces with trepidation the dilemma which confronts him by reason of the numerous capacities in which he has to deal with the situation. "Can the Lord Chancellor," he asks, "give his own consent to his own marriage with his own ward? Can he marry his own ward without his own consent? And if he marries his own ward without his consent, can he commit himself for contempt of his own court? Can he appear by counsel before himself to move for arrest of his own judgment? Ah, my lords, it is indeed painful to have to sit upon a woolsack which is studded with such thorns as these."

[31] "It is personality, not human nature, that is fictitiously attributed by the law to bodies corporate." SALMOND, *op. cit. supra* note 2, at 272.

[32] *Supra* notes 4, 5.

[33] *Supra* notes 6, 7.

[34] Geldart, *op. cit. supra* note 4, at 97.

[35] Brown, *The Personality of the Corporation and the State* (1905) 21 L. Q. REV. 365, 366.

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referred also to a so-called group mind [37] and cited the obvious fact that people behave differently and get different results in an organization than when acting alone. But the isolated individual will also behave differently in different circumstances, and yet there is no need to read this variety into his legal personality. If it should suit the convenience of the economist or the sociologist to recognize in the group an economic or a social personality, he would certainly be privileged to do so, and, if he did, doubtless he would fix upon some one or more of the various aspects of group behavior as the identifying quality which the group must share with a natural person. But the ship, the corporation and the natural person all require the same thing to make them legal persons, namely, to be a party to legal relations. None of them requires anything more.

The voluminous arguments about whether corporate personality is real or fictitious, are, for the most part, to no purpose, chiefly for lack of a definition of terms.[38] One man's reality is

[36] West & Co. v. The Valley Bank, 6 Ohio St. 169 (1856); Second Nat'l Bank of Oswego v. Burt, 93 N. Y. 233 (1883).

[37] "In every group of men acting together for a common purpose, the common purpose inevitably begets a common spirit which is real, though it may be vague and indefinite to us because our vision is limited, or because the group is in the making. The group becomes, or tends to become, a unit, and as Bluntschli so well said, a mere sum of individuals as such can no more become a unit than a heap of sand can become a statute. So a symphony is something more than a mere concurrence of sounds and a cathedral than so much stone and mortar. . . The group is not an organism (natural), and numberless difficulties have to be overcome when the group mind seeks realization in the external world . . . The difficulties will be overcome somehow, though possibly the group may never pass beyond the state when action of the whole is only possible by combined action of each of the parts." Brown, *op. cit. supra* note 35, at 368, 369.

[38] For discussions by "realists" see: GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (1900), Maitland's Introduction; Geldart, *loc. cit. supra* note 4; Laski, *The Personality of Associations* (1916) 29 HARV. L. REV. 404; chapter on "Moral Personality and Legal Personality" 3 MAITLAND, *op. cit. supra* note 19.

"Much disinclined though he may be to allow the group a real will of its own, just as really real as the will of a man, still he has to admit that if *n* men unite themselves in an organized body, jurisprudence, unless it wishes to pulverize the group, must see *n* plus 1 persons. And that for the lawyer should I think be enough . . . A fiction that we needs must feign is somehow or another very like the simple truth." *Ibid.* 316.

For discussions by non-realists, see: FREUND, THE LEGAL NATURE OF CORPORATIONS (1896); Cohen, *Communal Ghosts and other Perils in Social Philosophy* (1919) 16 JOURNAL OF PHILOSOPHY, PSYCHOLOGY, AND SCIENTIFIC METHOD 673. The latter writer would be tempted "to conclude that the quarrel between those who believe in the reality of corporate personality and those who believe it is fictional is a quarrel over words," were it not that "no question of this sort can be *merely* verbal, because

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another man's fiction.[39] In a sense, every idea that enters the human mind is a fact and has reality. In another sense it may be a fiction. One may as well ask if the "Private Life of Helen of Troy" is real or fictitious. There is certainly such a book. The legal personality of a corporation is just as real as and no more real than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty.[40]

If, without suggesting that there is an analogy for all purposes, we compare title with personality, it may be that we shall clarify somewhat our ideas about the latter term. To say that a subject has legal personality is to say that it is a

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words are most potent influences in determining thought as well as action." *Ibid.* 681. If, by the reality of group personality, it is meant that group persons "have all the characteristics of those we ordinarily call persons," Mr. Cohen thinks that "we are dealing with the kind of a statement which is believed because it is absurd." *Ibid.* 680.

"Whether the corporation is a fictitious entity, or whether it is a real entity, with no real will, or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest. On either theory the duties imposed by the state are the same. GRAY, *op. cit. supra* note 2, at 55. That a corporation is only a bundle of working rules, see COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) c. 4.

The difficulty is that we conceive of a corporation as something ultimate, or absolute and fundamental and so attempt to define it. The limit of any useful definition is only a certain aspect or for a particular purpose. "At one time it (the corporation) appears to be an *association* of persons, at another time *a person;* at one time it is an independent existence separate from its members, at another, a dummy concealing the acts of its stockholders. At one time it is a fiction existing only in contemplation of law and limited strictly to the powers granted in the act that created it; at another it is a set of transactions giving rise to obligations not authorized expressly by the charter, but read into it by operation of law." *Ibid.* 291.

This paper is interested in the corporation as a functional aspect of an organized group of which legal rights and duties are predicated. Other aspects of the corporation may be just as important for other purposes, but they are strangers to its legal personality.

[39] The possibilities for discussion are suggested by Mr. Kocourek's distinctions. According to him, corporate personality is not a fiction but a fact. But neither, says he, is it real, nor is it either natural or artificial. Rather, it is a conceptual fact. Kocourek, *Review of Holfeld, Fundamental Legal Conceptions* (1923), (1924) 18 ILL. L. REV. 231 *et seq.* To our mind, Mr. Kocourek's is a discriminating treatment, and yet, without further definition, a conceptual fact may as well be a fiction for lack of correspondence to an objective world. For some purposes this would satisfy the definition of a fiction.

[40] "The legal personality of the so-called natural person is as artificial as is that of the thing or group which is personified. In both cases the character or attribute of personality is but a creation of the jurist's mind—a mere conception which he finds it useful to employ in order to give logical coherence to his thought." WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW (1924) 34.

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party to legal relations without indicating in particular what the relations are. To say that one has title, is to say that one is a party to a particular class of legal relations, namely, those which go with the ownership of property. In either case, if one takes away all the rights, powers, privileges and immunities that shelter under the term, there is nothing left except the shelter which, thereafter, is but a word without a meaning.[41] To regard legal personality as a thing apart from the legal relations, is to commit an error of the same sort as that of distinguishing title from the rights, powers, privileges and immunities for which it is only a compendious name. Without the relations, in either case, there is no more left than the smile of the Cheshire Cat after the cat had disappeared.

The concession theory, that the corporation must be created by legislative act, has mystified the concept of corporate personality. But this theory, as well as the fiction theory, was devised for a purpose.[42] Joint stock companies and de facto corporations testify that the legislative grant is by way of control rather than an act of creative magic.[43] That the legislature has seen fit "to interpose a non-conductor through which," to quote Justice Holmes, "it is impossible to see the men behind" [44] is properly effective to the extent of the legislative intent, but it does not mean, either that the non-conductor is to make a Frankenstein creature of the corporation, or that the same non-conductor may not properly be applied in appropriate situations to unincorporated associations.[45] The distinction is in degree and not in kind.

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[41] HOHFELD, *op. cit. supra* note 12, at 23–64; HEARN, LEGAL RIGHTS AND DUTIES (1883) 186.

[42] Dewey, *The Historic Background of Corporate Legal Personality* (1926) 35 YALE LAW JOURNAL 655; Raymond, *op. cit. supra* note 18, at 362; 3 MAITLAND, *op. cit. supra* note 19, at 308 *et seq.*; Geldart, *loc. cit. supra* note 4; 1 POLLOCK & MAITLAND, *op. cit. supra* note 24, at 502.

[43] 3 MAITLAND, *op. cit. supra* note 19, at 389. "The sovereign act was not creation, but permission." Raymond, *op. cit. supra* note 18, at 363; Warren, *loc. cit. supra* note 19; *ibid. De Facto Corporations* (1907) 20 HARV. L. REV. 456; Deiser, *op. cit. supra* note 17, at 304.

[44] Donnell v. Safe Co., 208 U. S. 267, 273, 28 Sup. Ct. 288, 289 (1908).

[45] "The extent to which a group is treated as one by those dealing with it depends entirely on the demands of practical convenience." Raymond, *op. cit. supra* note 18, at 352.

"There is therefore nothing in the nature of things which prevents a court from recognizing as a legal unit a body of persons unauthorized by the sovereign to act as a unit, but in fact acting as a unit." Warren, *op. cit. supra* note 19, at 309.

"If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty-bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will 'denature' the facts; in other words, he will make a mess and call it law." 3 MAITLAND, *op. cit. supra* note 19, at 314.

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We have assumed that to be a legal person is to be a party to legal relations, and have seen that the sovereign can, and, if it suits its purposes, does, confer legal personality upon subjects that are not human beings. If we are to be consistent with these premises, we shall have to abandon the idea sponsored by Austin, Hohfeld, Justice Holmes, and others, that only natural persons are parties to legal relations.[46] In so far as legal persons and natural persons are the same, this is true. But if the sovereign power confers legal personality upon a ship, or an idol, or upon an abstraction, such as one of the functional aspects of an individual or of an organized group, such ship or idol or functional aspect ipso facto is a party to legal relations. To insist that only human beings are competent to the part is to confuse the concept of legal personality, in the same way as reading into the concept, when applied to non-human subjects, the attributes of human beings.

It is true, of course, that the benefits and burdens of legal personality in other than human subjects, on ultimate analysis, result to human beings, which, we have no doubt, is what the writers above cited mean. But the very utility of the concept, particularly in the case of corporate personality, lies in the fact that it avoids the necessity for this ultimate analysis.[47]

And this leads us back to the question put in the beginning, as to why lawyers and judges assume to clothe inanimate objects

[46] HOHFELD, *op. cit. supra* note 12, at 75, 76, 198, 199, 200 and notes.

"The only entities who can really be invested with rights are natural persons." Baty, *The Rights of Ideas—And of Corporations* (1920) 33 HARV. L. REV. 358, 360.

"All rights reside in, and all duties are incumbent upon, physical or natural persons." AUSTIN, JURISPRUDENCE (5th ed. 1885) 354, quoted by HOHFELD, *op. cit. supra* at 200.

"There are not two kinds of persons. There is but one, and the law makes its enactments only for men." Deiser, *op. cit. supra* note 17, at 231.

[47] "It is beside the question that ultimate rights reside in the individuals. That question may well rest until we have to deal with the individual." Deiser, *op. cit. supra* note 17, at 234.

"Rights must at times be administered without reference to this ultimate holder—that is, without reference to the person who may in the end derive the benefit of them." *Ibid.* 300.

It is submitted that these are more discriminating than the statements quoted in the preceding note. So is the statement that: "Every right belongs to a legal *unit* or *units;* every obligation binds a legal *unit* or *units.*" Warren, *op. cit. supra* note 19, at 305.

That the personality of a corporation is only a "shorthand expression," or a mere "figment," "for the sake of brevity in discourse," does not distinguish the corporate legal personality from the legal personality of a human being. To say that *X*, a human being, has a right against *Y*, is merely a shorthand way of predicting that in certain contingencies governmental agencies will bring some one of a variety of sorts of pressure to bear on *Y* to make him act or forbear in certain particulars in *X*'s favor. See Corbin, *op. cit. supra* note 3, at 164.

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and abstractions with the qualities of human beings, a question which we trust we may now be permitted to modify so as to ask why it is that on such objects and abstractions we confer legal personality. Mr. Dewey says we do not make molecules and trees legal persons because "molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them." [48] But, though the function of legal personality, as the quotation suggests, is to regulate behavior, it is not alone to regulate the conduct of the subject on which it is conferred; it is to regulate also the conduct of human beings toward the subject or toward each other. It suits the purposes of society to make a ship a legal person, not because the ship's conduct will be any different, of course, but because its personality is an effective instrument to control in certain particulars the conduct of its owner or of other human beings. The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse.

If we grant this, we should be in a position to make effective use of the concept, without overworking it on the one hand, as it may be we have done in the case of corporations, or making too little use of it on the other, as we may have done in the case of unincorporated associations. It is conventional and orthodox to say that a corporation is a legal person and a partnership is not. The statement is only partially true. For some purposes a partnership is a legal person [49] and for some purposes a corporation is not.[50] But, aside from its inaccuracy, there is a double danger in such an unqualified statement. One we have already noted, namely, that the use of the word "person," in accordance with Mr. Hohfeld's "principle of linguistic contamination," is an open invitation to read into the concept the qualities of natural persons, which, according to the statement, would be attributed to a corporation and denied to a partnership.[51] The other danger

[48] *Op. cit. supra* note 42, at 661.

[49] BURDICK, PARTNERSHIP (3d ed. 1917) 83.

[50] (1926) 5 TEX. L. REV. 77, 78, 79.

[51] "It is unfortunate that the word Person, as a technical term, should have found lodgment in jurisprudence, for the idea connoted by it is quite distinct from the meaning attached to it by the moralist or psychologist, and, the difference not being steadily kept in mind, much confusion of thought has resulted." WILLOUGHBY, *op. cit. supra* note 40, at 31, 32.

"The power of words is such that, this word person once launched into circulation, has attached to it an absolute value." Deiser, *op. cit. supra* note 17, at 231.

"There is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied." Justice Holmes in Guy v. Donald, 203 U. S. 399, 406, 27 Sup. Ct. 63, 64 (1906).

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is that the two propositions, thus defined, may be exalted to the dignity of principles from which to deduce conclusions.[52] Indeed, corporate personality is the principle from which much, if not most, of the present law of corporations, in form at least, has actually been deduced. We say in form, because the facility with which corporate personality has adapted itself to the inevitability of the deductive process suggests that not infrequently there is something more compelling than the major premise back of the phraseology of the opinions or between the lines, which demands a workable conclusion.[53]

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[52] One writer makes the fateful statement that "whatever deductions may be made from the theorem (of corporate personality), what corollaries may be said to flow from it, must inevitably be made," a statement hardly to be reconciled with the same writer's treatment of the theorem as a "working principle." Deiser, *op. cit. supra* note 17, at 307, 308.

[53] The Continental Tyre and Rubber Co. v. Daimler Co. [1915] 1 K. B. 893, [1916] 2 A. C. 307, is a happy illustration. The plaintiff in that case, suing in an English court on contract for a debt, was a corporation chartered under English law and doing business in England. All of its directors and shareholders, however, were Germans living in Germany, except the secretary who was a naturalized Englishman, formerly German, who held one share. The case was tried during the World War and the question arose whether the company was English or German within the meaning of the Enemy Trading Act. In the Court of Appeal the corporate personality prevailed, so that the enemy character of the directors and share-holders had no effect either upon the character of the firm or upon its power to sue. In the House of Lords, Lord Halsbury, disagreeing with the conclusion, had to rely on a different principle. He chose for his purpose that which makes lawful means unlawful if used for unlawful ends. Lord Parmoor agreed with Lord Halsbury's conclusion, but as a deductive logician he displayed greater astuteness and finesse in getting the desired result without going back on the corporate entity. Like a Daniel come to judgment, he decided what he called the principle issue for the plaintiff, namely, that it was an English company despite the enemy character of its directors; but, even so, it was helpless to appoint a solicitor to represent it in litigation without the act of the Germans, so that it could not sue. "The pound of flesh is yours, but be careful of the blood!"

Having regard to the logical method exemplified in passages of these opinions, may we not yet hope to learn how many angels can sit on the point of a needle? But it would be unfair to judge the court by its method. In occasional passages the real reasons become articulate. For example, in Lord Justice Bulkley's observation that, "If the personality of the corporators can for no purpose be regarded, there is nothing to prevent alien enemies from owning and sailing British ships under the British flag," ([1915] 1 K. B. 918), or in Lord Halsbury's objection that, "It seems to me too monstrous to suppose that . . . enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English court of justice." [1916] 2 A. C. 316. Having regard to such passages, as well as to the conclusion finally reached, we may take comfort in the suggestion that the inevitability of a major premise is perhaps not so inevitable after all.

But the corporation is sometimes more insistent on its personality, as, for example, in People's Pleasure Park Co. v. Rohleder, 109 Va. 439, 61

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It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, or to insist that because it has been decided that a partnership is not a legal person for some purposes it cannot therefore be so for any purposes, is to make of both corporate personality and partnership impersonality a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits.[54] Issues do not properly turn upon a name. Kynge had the right idea, when, in 1293, in answer to Spigurnel's objection that his client was not a cousin, so as to sue out a writ of cosinage, he urged that, since there was no other remedy available to him, a man's great-great-grandfather was his cousin for that purpose.[55] If the court had followed this reasoning, we may doubt whether even Kynge would have thought the decision an authority on which to fix degrees of consanguinity for other purposes. A Brooklyn traffic court last summer decided that a hearse is a pleasure vehicle. The issue was whether hearses should drive in a traffic lane assigned to pleasure vehicles or in another traffic lane assigned to trucks and other commercial

S. E. 794 (1908), where a sale of lands to a corporation composed entirely of negroes, to be used as a recreation ground for negroes, was held not to violate a "condition" that the title should never vest in "persons of African descent."

That there is nothing ultimate or absolute in the personality of the corporation is evident from decisions holding the same corporation to be a legal person in one litigation and for one purpose, Sloan Shipyards Corporation v. Emergency Fleet Corporation, 258 U. S. 549, 42 Sup. Ct. 386 (1921); and not a legal person in another litigation for another purpose. United States v. Walter, 263 U. S. 15, 44 Sup. Ct. 10 (1923).

That the same is true of the impersonality of unincorporated associations is attested by decisions holding the same joint stock company to be a legal person for the purpose of being prosecuted under a criminal law, United States v. Adams Express Co., 199 Fed. 321 (W. D. N. Y. 1912); and not a legal person for the purpose of getting into the federal courts on diversity of citizenship, Rountree v. Adams Express Co., 165 Fed. 152 (C. C. A. 8th, 1908); and again, to be a legal person for being served with process, Adams Express Co. v. State, 55 Ohio 69, 44 N. E. 506 (1896). See (1926) 36 YALE LAW JOURNAL 254 *et seq.*

As courts of law are not consistent in decrying the personality of the firm, so courts of equity are not consistent in admitting it. The very same court will at one time deal with the firm as a person, and at another time assert that it is not an entity. Brannan, *The Separate Estates of Non-Bankrupt Partners in the Bankruptcy of a Partnership* (1907) 20 HARV. L. REV. 589.

[54] The position of the chairman of the committee that drafted the Uniform Partnership Act, that a legal fiction (or postulate) should not be permitted to shut off an examination of the merits of an issue is, it is believed, eminently sound. Lewis, *op. cit. supra* note 19, at 297.

[55] Y. B. 20 & 21 Edw. I, 154.

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vehicles. The propriety of the decision, I take it, is unquestioned. But if some later court, on the authority of that case, should apply to hearses a Sunday law against driving pleasure vehicles on the Sabbath, the decision would be neither good logic nor good sense.

Whether a corporation, or a partnership, or other unincorporated association is to be treated as a legal person in any particular respect, is improperly decided unless decided on its own merits. That it is so regarded in other respects, though perhaps relevant, is certainly not conclusive. Cases accumulate in which the courts have recognized a partnership entity,[56] and at the same time cases also accumulate in which the courts look behind the corporate veil.[57] Thus it is that the utility of the concept breaks down the partnership dogma, while, on the other hand, the abuse of the concept exposes limitations on the corporate dogma.[58] Legal personality is a good servant, but it may be a bad master.[59]

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[56] Crane, *The Uniform Partnership Act, A Criticism* (1915) 28 HARV. L. REV. 762; Cowles, *The Firm as a Legal Person* (1903) 57 CENT. L. J. 343.

[57] (1926) 36 YALE LAW JOURNAL 254; (1926) 5 TEX. L. REV. 77; (1926) 10 MINN. L. REV. 598.

[58] *Persona Ficta* "has repaid the hospitality of the law . . . by making the legal household permanently uncomfortable." Deiser, *op. cit. supra* note 17, at 131. If this is true, it has been unnecessarily so.

[59] Without committing him to anything that appears therein, the writer wishes to acknowledge his very great indebtedness to Prof. Walter Wheeler Cook, on whose major ideas of jurisprudence he has drawn freely in the foregoing discussion.

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Secondary Schools were given the revised scale of Rs 300-600 with effect from the date mentioned in the order but out of the Trained Graduate Teachers having degrees of M.A. in First Class or Second Class only 25 per cent were given that scale.

10. The Punjab order said specifically that Masters/Mistresses will be eligible to the Lecturer's Grade only if they have post-graduate qualification in the subject of their teaching. In Himachal Pradesh while giving the scale of Rs 300-600 to 25 per cent of Trained Graduate Teachers with M.A. degrees in First or Second Class, when it was said 'on Punjab analogy', it only meant that such scale will be given to Teachers on the analogy of the Punjab pattern, but it will be limited only to 25 per cent of the total strength.

11. In the result this appeal is dismissed. However, in the circumstances of the case, there will be no order as to costs.

12. Before we part with this order, we may mention that it was brought to our notice that later rules have been framed in respect of revision of scales of pay in respect of different categories of employees including Trained Graduate Teachers by the State of Himachal Pradesh under Article 309 of the Constitution. As such we make it clear that the view expressed in this judgment relates only to the aforesaid statutory order which was communicated by letter dated September 30, 1970.

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(BEFORE DR T.K. THOMMEN AND R.M. SAHAI, JJ.)

Civil Appeal No. 896 of 1992†

M.V. ELISABETH AND OTHERS .. Appellants;

Versus

HARWAN INVESTMENT AND TRADING PVT. LTD., HANOEKAR HOUSE, SWATONTAPETH, VASCO-DE-GAMA, COA .. Respondent.

With

Transfer Case No. 27 of 1987

M.V. ELISABETH AND ANOTHER .. Petitioners;

Versus

M/s HARWAN INVESTMENT AND TRADING CO. AND ANOTHER .. Respondents.

Civil Appeal No. 896 of 1992 and Transfer Case No. 27 of 1987, decided on February 26, 1992

† From the Judgment and Order dated April 26, 1985 of the Andhra Pradesh High Court in O.S. Appeal No. 2 of 1984

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Constitution of India — Arts. 225 and 226 — Admiralty jurisdiction of High Courts — Nature and scope — Maritime claim against outward foreign ship — High Courts have inherent and plenary jurisdiction to deal with such claim in accordance with general principles and applicable statutory law and order arrest of the ship — When can arrest be ordered — After arrest and owner's appearance, proceedings continue in personam — Action in rem as practised in England and US stated — Admiralty Court Act, 1861 (24 and 25 Victoriae) — Colonial Courts of Admiralty Act, 1890 (53 and 54 Victoriae, c. 27), Ss. 2, 3 and 7 — Colonial Courts of Admiralty (India) Act, 1891 (Act 16 of 1891) — Andhra State Act, 1953 (Act 30 of 1953), S. 30 — States Reorganisation Act, 1956, S. 52 — Indian Carriage of Goods by Sea Act, 1925, S. 2 — Merchant Shipping Act, 1958, Ss. 3(15), 443, 444 — CPC, 1908, Ss. 20(c) and 19 — High Courts

Constitution of India — Arts. 215, 226 and 225 and 372 — Inherent and plenary jurisdiction of High Courts — High Courts are superior courts of record having original and appellate jurisdiction — Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of Supreme Court, High Courts have unlimited jurisdiction, including jurisdiction to determine their own powers — History of High Courts in India — Position compared with High Court in England (Para 66)

Merchant Shipping Act, 1958 — S. 3(15) — Foreign ships, on entering Indian waters, fall within the jurisdiction of the High Court concerned

Merchant Shipping Act, 1958 — Ss. 443 and 444 — 'Damage caused by a ship' — Meaning and scope of the expression — Not confined to physical damage only — Expression includes all maritime questions or claims — Words and phrases

Indian Carriage of Goods by Sea Act, 1925 — Confers a right to arrest an outward foreign ship in respect of any damage caused by it

(English) Colonial Courts of Admiralty Act, 1890 — S. 2(2) — 'Whether existing by virtue of any statute or otherwise' — Significance and import of word 'otherwise' in the context — Words and phrases (Paras 69 and 99)

International Law — Merchant ship, though generally governed by the laws of the flag State, subjects itself to the jurisdiction of a foreign State as it enters its waters (Paras 71 and 74)

Practice and procedure — Where statutes do not provide remedy and remedy has to be sought by recourse to basic principles, it is the duty of court to devise procedural rules by drawing analogy from other systems of law and practice and expediency (Para 64)

Jurisdiction — Access to courts — Is a right vested in every citizen — Held, cannot be denied even when statutes are silent — Court can render justice according to justice, equity and good conscience — CPC, 1908, S. 9

Constitution of India — Preamble — "Sovereignty" — Judicial power is an aspect of — It vests in the people and is articulated in the provisions of the Constitution and the laws of India

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Interpretation of Statutes — Jurisdiction of court — Statutes should be so construed that absence of provision conferring jurisdiction may not jeopardise the right to access to court for redressal of grievances (Para 90)

The plaintiff-respondent, a private limited company having its registered office in Goa, instituted a suit against defendant 1 — appellant, a vessel of foreign nationality owned by a foreign company defendant 2, in Andhra Pradesh High Court invoking its admiralty jurisdiction by means of an action in rem. The case of the plaintiff is that the defendants acted in "breach of duty" by leaving the port of Marmagao on February 8, 1984 and delivering the goods to the consignee in breach of the plaintiff's directions to the contrary, thereby committing conversion of the goods entrusted with them. The vessel was arrested when it entered the Port of Vishakhapatnam on April 13, 1984 after returning from foreign ports. On the owner of the vessel entering appearance and providing security by furnishing a Bank Guarantee under protest, the vessel was released from detention. The defendants raised a preliminary objection that the plaintiff's suit against a foreign ship owned by a foreign company not having a place of residence or business in India was not liable to be proceeded against on the admiralty side of the High Court by an action *in rem* in respect of a cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the *carriage of goods from a port in India to a foreign port*. It was contended that no High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo because Section 6 of the Admiralty Court Act, 1861 (read with the Colonial Courts of Admiralty Act, 1890) conferring admiralty jurisdiction on Indian High Courts confined it to 'claims for damage to cargo imported'. The High Court overruled the preliminary objection. Question was whether the High Court rightly held that the suit was maintainable. Before the Supreme Court thus the crucial question was about jurisdiction of the High Court. Dismissing the appeal

Held :

Per Thommen, J.

The Andhra Pradesh High Court, as a successor to the Madras High Court, is vested with all the appellate and original jurisdiction, including admiralty jurisdiction to order the arrest and detention of a ship. (Para 67)

The High Court rightly assumed jurisdiction by the arrest of the vessel while it was lying in the port of Vishakapatnam. The High Court of Andhra Pradesh undoubtedly possesses jurisdiction over claims relating to inward and outward cargo. (Paras 93 and 94)

Admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior court of record administering justice in relation to persons and things within its jurisdiction. The British statute assimilating Indian High Courts to the position of the English High Court in respect of admiralty jurisdiction is an enabling legislation and it is but one of the strands of jurisdiction vested in the High Court by virtue of the constitutional provisions. The jurisdiction of the High Court is governed by the Constitution and the laws, and the continuance in force of the existing laws is not a fetter but an additional source of power. Access to

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court for redressal of grievance being an important right of every person, it is essential that the jurisdiction of the courts is construed harmoniously and consistently with its vital function in that respect, so that absence of legislation will not jeopardise that right. The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Article 225, does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is, unless barred, unlimited. To the extent not barred expressly or by necessary implication, the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Courts as superior courts. The 1890 and 1891 Acts specifically conferred admiralty jurisdiction on the Indian High Courts by reason of their being courts of unlimited jurisdiction. These Acts did not create any separate or distinct jurisdiction, but merely equated the Indian High Courts to the position of the English High Court (united and consolidated as that Court has been since 1875) for the exercise of admiralty powers within the jurisdiction of the former. There is, therefore, no reason why the jurisdiction of the Indian High Courts should have been considered to have frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890.

(Paras 88, 90, 14, 17, 25, 91, 26 and 27)

Kamalakar Mahadev Bhagat v. *Scindia Steam Navigation Co. Ltd.*, AIR 1961 Bom 186: 62 Bom LR 995; *Sahida Ismail (Mrs)* v. *Petko R. Salvejkov*, AIR 1973 Bom 18: 74 Bom LR 514: 1972 Mah LJ 798; *Jayaswal Shipping Company* v. *S.S. Leelavati*, AIR 1954 Cal 415. 94 CLJ 54: 58 CWN 468; *Rungta Sons Pvt. Ltd.* v. *S.S. 'Edison Mariner'*, (1961-62) 66 CWN 1083; *Reena Padhi (Smt)* v. *'Jagdhir'*, AIR 1982 Ori 57: 1982 JS CTL 132; *National Co Ltd.* v. *Asia Mariner*, (1968) 72 CWN 635, *overruled*

Yuri Maru (The), Woron (The), 1927 AC 906: 43 TLR 698, *dissented from*

Delhi Judicial Service Association, Tis Hazari Court, Delhi v. *State of Gujarat*, (1991) 4 SCC 406: JT (1991) 3 SC 617; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: (1982) 2 SCR 365, *relied on*

Caetano and Maria (The), (1882) 7 PD 137: 46 LT 835; *Gas Float Whitton (The), No. 2* (1896) P. 47; *'Kasan' (The)*, 167 ER 268; *'Bahia' The*, 167 ER 298, *referred to*

Maritime law is as much a part of the general legal system as any other branch of the law. It is within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the High Court concerned. This power of the court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them. This jurisdiction can be assumed by the High Court concerned, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the

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High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action. (Paras 59, 65, 88 and 82)

Naresh Shridhar Mirajkar v. *State of Maharashtra*, AIR 1967 SC 1: (1966) 3 SCR 744, *relied on*

Halsbury's Laws of England, 4th edn., Vol. 10, para 713, *relied on*

Raja Soap Factory v *S.P. Shantharaj*, AIR 1965 SC 1449: (1965) 2 SCR 800, *distinguished*

Actions *in rem* were resorted to by courts in England and U.S. as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of the *res*; or, in his absence, proceed against the *res* itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the *res*. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice. (Para 64)

The admiralty action *in rem*, as practised in England or in the United States, is unknown to the civil law. In countries following the civil law, all proceedings are initiated by actions *in personam*. The President of the Court having competence in the matter has the power to order an attachment of the ship if he is convinced that the plaintiff is likely to lose his security unless the ship is detained within jurisdiction. His hands are not fettered by the technicalities of an action *in rem* and the scope of the proceedings are not limited to maritime liens or claims. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. (Paras 57 and 58)

D.C. Jackson, *Enforcement of Maritime Claims*, (1985) Appendix 5, p. 437 *et seq.*, *relied on*

Currie v. *M'Knight*, (1897) AC 97, *relied on*

Once a foreign ship is arrested in Indian waters by an order of the High Court, in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue in personam against the owner as in any other suit. All actions in the civil law — whether maritime or not — are *in personam*, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim. (Paras 92 and 58)

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The arrest of the vessel while in Indian waters by an order of the High Court concerned, as defined under the Merchant Shipping Act, 1958 [Section 3(15)] attracts the jurisdiction of the competent court to proceed with the trial, as in the case of any other suit, as an action against the owner, and any decree obtained by the plaintiff is executable against any property of the owner available within jurisdiction, including the security furnished by him for release of the vessel. The Act being essentially regulatory in character, the various authorities, tribunals and Courts entrusted with the administration and enforcement of its provisions are specifically stated. In view of Section 3(15) a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time — i.e., at the time when the jurisdiction of the High Court is invoked, or, where the cause of action wholly or in part arises. (Paras 92 and 77)

Sections 443 and 444 relate to detention by reason of damage caused in any part of the world by a foreign ship to property belonging to the Government of India or to an Indian citizen or company. In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction, the words 'damage caused by a ship' appearing in Section 443 of the Merchant Shipping Act, 1958 should not be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods. The expression is wide enough to include all maritime questions or claims. Damage can also be caused to property by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants by reason of the negligent operation and management of the vessel. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised acts or negligent conduct on the part of the shipowner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of the person aggrieved, is liable to be detained when found within Indian jurisdiction by recourse to Sections 443 and 444 of the Merchant Shipping Act, 1958 read with the appropriate rules of practice and procedure of the High Court. These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to invoke the inherent jurisdiction of a superior court. (Paras 78 and 79)

Victoria (The), (1887) 12 PD 105: 56 LJP 75; *Vera Cruz (No. 2) (The)*, (1884) 9 PD 96: 53 LJP 33; *Jade (The)*, (1976) 1 All ER 920: (1976) 1 WLR 430; *Currie* v. *M'Knight*, (1897) AC 97, *approved*

Halsbury's Laws of England, 4th ed., Vol. I(1), para 319, N.12, *referred to*

The Merchant Shipping Act empowers the High Court concerned to arrest a ship in respect of a substantive right. A right conferred by the Indian Carriage of Goods by Sea Act, 1925 in respect of outward cargo is one of those rights which can be enforced by arrest and detention of the foreign ship in order to found jurisdiction over the vessel and its owners, just as it can be done in respect of inward cargo by reason of the substantive rights conferred by the Admiralty Court Act, 1861 read with the Colonial Courts of Admiralty Act, 1890, and other rules of law. The same principle must hold good for carriage under a

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charterparty. These and other laws, such as the law of contract, tort, crime, mortgage, marine insurance, customs, port operations, etc., and the Civil and Criminal Procedure Codes as well as the relevant rules of court regulating procedure and practice together constitute the body of substantive and procedural laws governing claims relating to inward and outward cargo, and such claims are enforceable against foreign ships by recourse to arrest and detention when found within jurisdiction. Accordingly the Andhra Pradesh High Court, as a successor to the Madras High Court, does not lack admiralty jurisdiction in respect of claims relating to outward cargo. (Para 81)

All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. All foreign ships entering Indian waters are presumed to know that they fall within the jurisdiction of this country during their stay here. The power to arrest a foreign vessel, while in the waters of a coastal State, in respect of a maritime claim, wherever arising, is a demonstrable manifestation and an essential attribute of territorial sovereignty. This power is recognised by several international conventions. These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognised by the generality of maritime States, and can therefore be regarded as part of our common law. The want of ratification of these conventions is apparently not because of any policy disagreement, but perhaps because of other circumstances, such as lack of an adequate and specialised machinery for implementation of the various international conventions by co-ordinating for the purpose the Departments concerned of the Government. Such a specialised body of legal and technical experts can facilitate adoption of internationally unified rules by national legislation. It is appropriate that sufficient attention is paid to this aspect of the matter by the authorities concerned.

(Paras 89, 93, 94 and 74)

Holdsworth: *A History of English Law*, Volumes 1, 5 and 8; Marsden: *Select Pleas of the Court of Admiralty*, Volumes I and II; *Law and Custom of the Sea, ibid.* Volumes I and II; Gilmore and Black: *Law of Admiralty*, 1957; Roscoe: *Admiralty Practice*, 5th ed. p. 29; *A History of English Law*, W.S. Holdsworth, Vol. 1, pp. 558; See D.C. Jackson, *Enforcement of Maritime Claims*, (1985) Appendix 5, p. 437 *et seq.*, *referred to*

Fehmarn (The), (1958) 1 All ER 333: (1958) 1 WLR 159; *The United States* v. *The Big Malek Adhel*, 43 US (2 How) 210 (1844); *Harmer* v. *Bell*, (1851) 7 Moo PC 267: 13 ER 884; *Jade (The)*, (1976) 1 All ER 920: (1976) 1 WLR 430; *Bardot* v. *The American Ship or Vessel 'Augusta'*, (1873) 10 Bom HCR 110, *referred to*

Schooner Exchange v. *M'Faddon*, (1812) 11 US (7 Cranch) 114: 3 L Ed 287, *relied on*

Nagendra Singh: *International Maritime Law Conventions*, *British Shipping Laws*, Vols. I to IV; Benedict: *The Law of American Admiralty*, 6th Ed., pages 121 and 122, *relied on*

In equating the admiralty jurisdiction of the Indian High Court to that of the English High Court, Section 2(2) of the Colonial Court of Admiralty Act, 1890 significantly refers to the admiralty jurisdiction of the High Court in England 'whether existing by virtue of any statute or otherwise'. This is an enabling statute, and not a statute of limitation of power. It aids, and does not fetter, the growth of jurisdiction. The words 'statute or otherwise' should not be so construed as to exclude the various sources from which the admiralty

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jurisdiction in England developed. Apart from statutes, the powers of that Court were derived from custom and practice and the principles developed by common law and equity as well as by the generally recognised principles of civil law developed and practised in Europe. (Para 69)

The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience. (Para 86)

Per Sahai, J. (concurring)

Law of Admiralty progressed gradually from ordinary courts, to courts of Admiralty and ultimately to High Court commencing in commercial expediency, equity and justice and ending with statutory enactments covering entire field from collision of ships to cargo even. All this was existing when the 1890 Act was enacted. But the statutes of 1840 and 1861 were not exhaustive and English courts could take cognizance for various wrongs either in tort or contract. Therefore when colonial courts were conferred jurisdiction it was not restricted or confined to statutes, as the power was being conferred on High Courts which were, then and even now, not only courts of unlimited civil jurisdiction but higher courts possessed of every jurisdiction which was not expressly or impliedly conferred on other courts. The word 'otherwise' literally means in a different way. Effect of its use in 1890 Act in law, was to confer not only statutory jurisdiction possessed of by English courts but all that which was being exercised or was capable of being exercised either under custom and practice or for sake of equity and justice. The expression 'otherwise' has to be construed as permissive of jurisdiction. Legislations may create a right or it may recognise one founded on custom or practice. Admiralty statutes in England fell in the latter category. Right to proceed against owner of ship for wrongs done on high seas was accepted and followed. Statutes of 1840 and 1861 provided legislative base only. Viewed in the background of enactment of 1890 it would be too artificial to confine the exercise of power by the High Courts in Admiralty to what was contained in 1861 Act. Even otherwise, for deciding the jurisdiction exercised by the High Court in India founded on jurisdiction exercised by the High Court of England it is not necessary to be governed by the decision given by English courts. Law develops by pragmatic approach to problems arising under an Act and not by abdication or surrender. The 1890 Act is an unusual piece of legislation expansive in scope, wider in outlook, opening out the wings of jurisdiction rather than closing in. It's authority and power to exercise jurisdiction was linked with power exercised by the High Court in England, the width of which was not confined to statute but went deep into custom, practice, necessity, and even exigency. (Para 99)

One basic difference between the jurisdiction of High Court of England and of Indian High Courts is that the English courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme

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Court Act but the High Courts in our country are established under the Constitution. Under it Article 225 preserved the jurisdiction, including inherent jurisdiction, which existed on the date the Constitution came into force and Article 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but as repository of power to reach its arms to do justice. A citizen carrying on business which is a fundamental right cannot be rendered helpless on the premise that the jurisdiction of High Courts stood frozen either under statute of England or any custom or practice prevailing there or the High Court of England cannot exercise the jurisdiction. A citizen of a colonial state may or may not but a citizen of an independent republic cannot be left high and dry. The construction of law has to be in consonance with sovereignty of a State. The apprehension that assumption of such jurisdiction would be on general attributes of sovereignty is not well founded. This coupled with expansive jurisdiction that the High Courts enjoyed in relation to Admiralty under 1890 Act preserved under Article 225 provided justification for direction to arrest the ship, for the tortious act done by master or owner of the ship in respect of goods carried outside the port even if there was no specific provision like Section 6 of the 1861 Act. Entertaining a claim arising out of breach of contract in relation to cargo taken out of any Indian port pertains to jurisdiction. It must arise out of statute. But the power to direct arrest of a ship in exercise of the jurisdiction is one relating to competency. The High Courts in India, being courts of unlimited jurisdiction, repository of all judicial power under the Constitution except what is excluded, are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction. Since the jurisdiction to entertain a suit on tort or contract in relation to cargo going out of the country in a ship is found to exist under the 1890 Act the High Court of Andhra Pradesh was competent to direct arrest of the foreign ship when it appeared in Indian waters. The High Court, therefore, rightly negatived the objection to issue direction to arrest the ship. (Para 100)

State of Madras v. *C.G. Menon,* AIR 1954 SC 517: (1955) 1 SCR 280: 1954 Cri LJ 1337; *Hailey (The),* LR 2 PC 193; *Halsbury's Laws of England,* IVth Ed., Vol. 1; *Maritime Liens* by D R. Thomas; *Maritime Law* by Christopher Hill; *The Ironsides,* 167 ER 205; *The St. Cloud,* 167 ER 269 *The Norway,* 167 ER 347; *Carter History of English Courts*; Lord Stowell in *'The Hercules'* 2 Dod. 371, *referred to*

R-M/AT/11163/S

Advocates who appeared in this case :

Raju Ramachandran and Jagan Mohan Rao, Advocates, for the Appellants;

G.L. Sanghi, Senior Advocate (S.K. Mehta, Dhruv Mehta, Amarik Vachher and Arvind Verma, Advocates, with him) for the Respondents.

The Judgments of the Court were delivered by

THOMMEN, J.— We grant leave in SLP (C) No. 10542 of 1985 which arises from the order of the Division Bench of the Andhra Pradesh High Court affirming the finding of the learned Single Judge that the respondent's suit against the appellants was maintainable and that the High Court was competent to try the same in exercise of its admiralty jurisdiction. The Transferred Case No. 27 of 1987 is the appeal filed by defendants 1 and 2 against the judgment of the learned Single Judge of the

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Andhra Pradesh High Court decreeing the suit. The case stood transferred to this Court pursuant to this Court's Order dated November 25, 1986.

2. By our Order dated August 28, 1991 we allowed Civil Appeal No. 3392 of 1991 filed by defendant 3 against the order of the High Court dismissing its petition for condonation of delay in presenting O.S.A.S.R. No. 39789 of 1988 in the High Court. We held that the appeal filed by defendant 3 had to be heard on the merits particularly on the question of law regarding the liability of the agent.

3. We shall now deal with the appeal arising from SLP (C) No. 10542 of 1985 where the only question is whether the learned Judges of the High Court have rightly held that the respondent's suit was maintainable in respect of a cause of action alleged to have arisen on or after February 1, 1984 when the vessel, M.V. Elisabeth, was lying in the Port of Marmagao; on February 8, 1984 when the vessel left the Port without issuing bills of lading or other documents for the goods shipped as required by the plaintiff-shipper; and, subsequently when the goods were discharged and handed over to the consignee at the port of destination at Ras-A1-Khaimah, United Arab Emirates during the period from February 13, 1984 to February 19, 1984, notwithstanding the direction of the plaintiff not to deliver the goods by reason of the buyer's failure to pay the agreed price. Defendant 1, M.V. Elisabeth, is a vessel of foreign nationality and it is owned by defendant 2 which is a foreign company carrying on business in Greece, and defendant 3 is stated to be the local agent of defendant 2 at Goa.

4. The plaintiff is a private limited company having its registered office in Goa. The case of the plaintiff is that the defendants acted in "breach of duty" by leaving the port of Marmagao on February 8, 1984 and delivering the goods to the consignee in breach of the plaintiff's directions to the contrary, thereby committing conversion of the goods entrusted with them. The suit was instituted in Andhra Pradesh High Court invoking its admiralty jurisdiction by means of an action *in rem*. The vessel was arrested when it entered the Port of Vishakhapatnam on April 13, 1984 after returning from foreign ports. On the owner of the vessel entering appearance and providing security by furnishing a Bank Guarantee under protest in the sum of Rs 14,25,000, the vessel was released from detention.

5. The defendants moved an application in the High Court raising a preliminary objection to the jurisdiction of that court. They contended that the plaintiff's suit against a foreign ship owned by a foreign company not having a place of residence or business in India was not liable to be proceeded against on the admiralty side of the High Court by an action *in rem* in respect of a cause of action alleged to have arisen by reason of a

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tort or a breach of obligation arising from the *carriage of goods from a port in India to a foreign port*. They did not, however, contend that the alleged cause of action not having arisen in Andhra Pradesh, the suit ought not to have been filed in Andhra Pradesh. Their sole contention on the question of jurisdiction was as regards the lack of admiralty jurisdiction of any court in Andhra Pradesh or any other State in India to proceed *in rem* against the ship on the alleged cause of action concerning carriage of goods from an Indian port to a foreign port. The preliminary objection was overruled by the learned Single Judge and his order was confirmed by the learned Judges of the Division Bench by their order which is challenged in SLP (C) No. 10542 of 1985. The suit was finally decreed by the learned Single Judge and appeal therefrom is the subject-matter of the case transferred to this Court.

6. The crucial question for our consideration is, therefore, the dispute about jurisdiction. If that question were to be answered in favour of the defendants, it would be unnecessary to express any view on the merits of the Transferred Case, for suit itself would then stand dismissed.

7. Mr Raju Ramachandran, appearing for the appellants (defendants), raises a fundamental objection as to the assumption of admiralty jurisdiction over a foreign ship in respect of a claim arising in connection with the carriage of goods from an Indian port to a port outside India. The High Court, he says, ordered the arrest of the vessel in purported exercise of its jurisdiction on the admiralty side. The power of the High Court on the admiralty side is, however, contained in and confined to the provisions of the Admiralty Court Act, 1861 (24 & 25 Victoriae, C. 10) made applicable to India by the Colonial Courts of Admiralty Act, 1890 (53 & 54 Victoriae, C. 27) (which are Acts of the British Parliament) read with the Colonial Courts of Admiralty (India) Act, 1891 (Act 16 of 1891) declaring certain Indian Courts of unlimited civil jurisdiction as colonial courts of admiralty and declaring the High Court of Judicature at Madras as one of such courts. Mr Ramachandran does not dispute that by reason of the Andhra State Act, 1953, and the States Re-organisation Act, 1956 read with the Government of India Acts, 1915 and 1935 and the Constitution of India, the High Court of Andhra Pradesh has, like the High Courts of Madras, Bombay and Calcutta, such admiralty jurisdiction as was granted by the British statutes referred to above. But that jurisdiction, counsel says, was not wider than what was granted under the British statutes. The extent of admiralty jurisdiction and the judicial power peculiar to that jurisdiction, as conferred on the Indian High Courts, remained frozen as on the date of the Admiralty Court Act, 1861. The wider powers assumed by the British Courts under the subsequent statutes of that country did not enlarge the admiralty jurisdiction of the Indian

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High Courts. In the absence of any subsequent British or Indian statute widening the admiralty jurisdiction of the Indian High Courts, the jurisdiction of the Andhra Pradesh High Court over a foreign ship by means of an action *in rem* does not extend to any matter falling outside the Admiralty Court Act, 1861. The only provision of that Act respecting cargo is what is contained in Section 6 which is confined to goods 'carried into any Port in England or Wales in any ship ....'. Applying that provision to India by reason of the statutes referred to above, the Indian High Court exercising admiralty jurisdiction has no power to deal with any claim concerning outward cargo because Section 6 is confined to inward cargo. The plaintiff's case is founded on certain facts which clearly fall outside the ambit of Section 6 of the Admiralty Court Act, 1861. Consequently, the arrest of the vessel in purported exercise of admiralty jurisdiction *in rem*, concerning a claim relating to outward cargo, was null and void and of no effect. This argument, supported as it is by considerable scholarly research on the part of counsel, amounts to an invocation to admit incompetence and disability on the part of the Indian Judicial System to render justice for want of legislative grant of power. Counsel is fortified in his submission by certain decisions of Calcutta, Bombay and other High Courts.

8. Mr G.L. Sanghi, appearing for the respondent-plaintiff, on the other hand, submits that the impugned judgment of the High Court is sound and correct and requires no interference by this Court because what the High Court has stated is based on a realistic appreciation of the need for liberal construction of the statutes so as to support assumption of jurisdiction to render justice where justice is required to be done rather than resorting to a technical or narrow or pedantic construction resulting in a state of helplessness. Counsel says that every person has a right to approach the Court of the land for appropriate remedy in respect of claims against a foreign ship and its owner, and to deny him that right and to compel him to pursue remedy in a foreign country according to an unfamiliar system of law and practice in strange and uncertain conditions, and consequently incurring high expenses with all the uncertainties of such a pursuit, is unjust and uncalled for. All major systems of law the world over recognise the competence of the coastal State to assume jurisdiction over a foreign ship entering its waters in respect of certain well-recognised claims, irrespective of where the cause of action arose or where the defendant has his place of residence or business. The reason for this wide exercise of jurisdiction is that the foreign owner being not available within jurisdiction, and the stay of the foreign ship in the waters of the coastal State being necessarily brief, jurisdiction over the ship has to be exercised by its arrest and detention by means of an action *in rem*. Counsel submits that the High Court being a court of record with unlimited jurisdiction, it was never intended by the British Parliament that the admiralty power

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conferred on certain High Courts should remain frozen as on the date of the passing of the Admiralty Court Act, 1861 and the subsequent changes in the law of Great Britain should not widen the jurisdiction of the Indian High Courts. In any case, counsel submits, the colonial statutes should not be so construed as to stand in the way of the Indian High Courts exercising unlimited jurisdiction except where the jurisdiction is barred expressly or by necessary implication. In the absence of any such bar, the powers of the High Court are unlimited and there is no merit in the preliminary objection to the jurisdiction of the High Court.

9. The Andhra Pradesh High Court is the successor to the Madras High Court in respect of the territories transferred from Madras and included in the State of Andhra which was formed by the Andhra State Act, 1953 (Act 30 of 1953). Vishakhapatnam is one of the areas so included in the State of Andhra. Section 30 of this Act provides:

> "30. *Jurisdiction of Andhra High Court.*— The High Court of Andhra shall have, in respect of the territories for the time being included in the State of Andhra, all such original, appellate and other jurisdiction as, under the law in force immediately before the prescribed day, is exercisable in respect of the said territories or any part thereof by the High Court at Madras."

10. The High Court of Andhra was redesignated as the High Court of Andhra Pradesh when the State was so named by the States Re-organisation Act, 1956. Section 52 of that Act provides:

> "52. *Jurisdiction of High Courts for new States.*— The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's Court for an existing State."

In the port of Vishakhapatnam the Andhra Pradesh High Court has thus the same jurisdiction as was vested in the Madras High Court prior to the transfer of that territory. The question is as regards the extent and nature of that jurisdiction.

11. The powers of the Madras High Court are traceable to the Admiralty Court Act, 1861 (24 & 25 Victoriae, C. 10) by reason of the Letters Patent of 1865 read with the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891. By the last two Acts, the Madras High Court was invested with the same admiralty jurisdiction as was vested in the High Court of England. The Letters Patent of 1865 declared that the High Court of Madras would and continue to be a court of record and that it would exercise ordinary, original and civil jurisdiction within its local limits to try and determine suits. The Government of India Act, 1915 declared that all the High Courts established by Letters Patent were courts of record and had such

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original and appellate jurisdiction including admiralty jurisdiction as had been vested in them by Letters Patent. The Government of India Act, 1935 declared that 'every High Court shall be a court of record' and that its jurisdiction, the law administered by it and the powers of the judges were the same as immediately before the commencement of Part III of that Act (Sections 220 and 223). Article 225 of the Constitution of India declares:

> "... [T]he jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:
>
> Provided ...."

Article 215 says:

> "215. *High Courts to be courts of record.*— Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

12. In a number of decisions of the Calcutta and Bombay High Courts, the admiralty jurisdiction of the High Courts in India has been historically traced to the Charters of 1774 and 1798, as subsequently expanded and clarified by the Letters Patent of 1823, 1862 and 1865 read with the Admiralty Court Act, 1861, the Colonial Courts of Admiralty Act, 1890, and the Colonial Courts of Admiralty (India) Act, 1891 and preserved by Section 106 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and Article 225 of the Constitution of India. The pre-Constitution enactments have continued to remain in force in India as existing laws: See Section 18 of the Indian Independence Act, 1947 and Article 372 of the Constitution of India. See *Kamalakar Mahadev Bhagat* v. *Scindia Steam Navigation Co. Ltd.*[1]; *Sahida Ismail (Mrs)* v. *Petko R. Salvejkov*[2]; *Jayaswal Shipping Company* v. *'S.S. Leelavati'*[3]; *Rungta Sons Pvt. Ltd.* v. *S.S. 'Edison Mariner'*[4] and *Reena Padhi (Smt)* v. *'Jagdhir'*[5]. The view taken in these decisions is that the admiralty jurisdiction of the High Court in India does not extend beyond the ambit of the provisions of the (English) Admiralty Court Act, 1861. Further expansion of the jurisdiction of the English High Court under various statutes did not expand the jurisdiction of the Indian High Courts. This means, no High Court in India has jurisdiction to order the

1 AIR 1961 Bom 186 : 62 Bom LR 995
2 AIR 1973 Bom 18 : 74 Bom LR 514 : 1972 Mah LJ 798
3 AIR 1954 Cal 415 : 94 CLJ 54 : 58 CWN 468
4 (1961-62) 66 CWN 1083
5 AIR 1982 Ori 57 : 1982 JS CTL 2

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arrest and detention of a foreign ship in an action *in rem* in respect of a cause of action relating to outward cargo, as distinguished from inward cargo.

13. The rationale of these decisions is that the chartered High Courts in India are Colonial Courts of Admiralty under Act 16 of 1891 exercising the same jurisdiction as was vested in the High Court of Admiralty in England under the Admiralty Court Act, 1861, and the subsequent merger of the English High Court of Admiralty with the English High Court of Justice in 1875 and the expansion of jurisdiction of that High Court under subsequent statutes did not expand the admiralty power of the Indian High Court or merge it with its ordinary original civil jurisdiction. P.B. Mukharji, J. of the Calcutta High Court in *Jayaswal Shipping Company* v. *'S.S. Leelavati'*[6], highlights this aspect thus: (AIR Cal p. 421)

> "Courts of Admiralty are courts of specific jurisdiction and if a controversy does not come within their specific jurisdiction, they cannot entertain it, and in that respect are unlike the courts of residuary jurisdiction such as the Common Law Courts or in India the Courts of ordinary original civil jurisdiction."

In *National Co. Ltd.* v. *Asia Mariner*[6] S.K. Mukherjea, J. of the Calcutta High Court states:

> "The High Court at Calcutta as a Court of Admiralty is, therefore, a Court of prescribed jurisdiction. Its jurisdiction is prescribed by clause 26 of the Charter of 1774 and by Section 2(2) of the Colonial Courts of Admiralty Act, 1890. The jurisdiction has not been extended or modified by any statute. None of the subsequent British statutes by which the Admiralty Jurisdiction of the High Court in England has been extended or affected have been made applicable to India."

14. The High Court as a Court of Admiralty is thus treated as a separate entity exercising a distinct and specific or prescribed or limited jurisdiction. This reasoning is based on the assumption that the continuance in force of the Colonial Courts of Admiralty Act, 1890 as an existing law carves out a distinct jurisdiction of the High Court limited in ambit and efficacy to what has been granted by the Admiralty Court Act, 1861, and that jurisdiction has remained stultified ever since. This restrictive construction is, in our view, not warranted by the provisions of the Constitution. The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Article 225, does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is, unless barred, unlimited. To the extent not barred

6 (1968) 72 CWN 635, 647

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expressly or by necessary implication, the judicial sovereignity of this country is manifested in the jurisdiction vested in the High Courts as superior courts.

15. S.K. Mukherjea, J., however, continues (*ibid.*, para 94):

> "The Admiralty Court Act, 1861, although repealed in part in relation to England and Wales, remains in force in India. None of the subsequent English statutes relating to Admiralty jurisdiction over cargo claims or contract of carriage have been made applicable to the High Courts in India exercising jurisdiction in Admiralty."

16. A similar view is echoed in other decisions on the point. In *Kamalakar Mahadev Bhagat* v. *Scindia Steam Navigation Co. Ltd.*[1] a learned Judge of the Bombay High Court stated: (AIR Bom p. 190)

> "It will thus be seen that the High Court of Judicature at Bombay in particular being one of the Colonial Courts of Admiralty under Act 16 of 1891 today exercises the same admiralty jurisdiction as was exercised by the High Court of Admiralty in England in 1890 when the Colonial Courts of Admiralty Act was passed by the British Parliament. We have, therefore, to examine and ascertain as to what was the scope and nature of jurisdiction of the High Court of Admiralty in England either under any statute or otherwise in the year 1890, because, it would be just that jurisdiction which is exercisable by the High Court of Judicature at Bombay down to date."

With respect we disagree. All this is reminiscent of a bygone age. The learned Judge failed to take note of the fact that in 1890 the Court of Admiralty had ceased to be a separate and distinct institution. By the Judicature Act of 1873, the High Court of Admiralty was merged with the High Court of Justice. It is, however, true that the substantive powers in admiralty matters were derived from the Admiralty Court Act, 1861, and those powers were not widened until 1920. The learned Judge further observes: (AIR Bom p. 200)

> "In my opinion, therefore, the present suit falls within the exclusive Admiralty jurisdiction of the High Court and could not have been filed on the Ordinary Original Side of the High Court, much less in the City Civil Court. In this view of the matter, I am unable to agree with the view expressed by the learned Principal Judge of the City Civil Court that actions in personam used to be entertained in the Common Law Courts in England in respect of damage done by a ship on high seas and that even at present in England it is open to a suitor to file an action in personam in the King's Bench Division in respect thereof. In my opinion, no such action ever lay in the Common Law Courts of England, nor can it ever lie in the Queen's Bench Division of the High Court of England at the present time."

All this observation, as we shall presently see, is inconsistent with the true character of the constitution of the courts in England and the powers

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exercised by them consequent upon the statutory changes between 1873 and 1981.

17. It is true that the Colonial statutes continue to remain in force by reason of Article 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

18. We do not accept the reasoning of the High Courts in the decisions cited above on the question of jurisdiction, whatever be the correctness of their decisions on the peculiar facts of those cases in regard to which we express no view. But the narrow view adopted in those decisions on the source and ambit of the admiralty jurisdiction of the High Courts is, in our opinion, not warranted.

19. Mr Ramachandran has laid much stress on the decision of the Privy Council in *Yuri Maru (The), Woron (The)*[7] which was relied on by the Bombay High Court in *Sahida Ismail*[2] to come to the conclusion, which it did, as to the lack of jurisdiction of the Indian High Courts to go beyond what was permitted by the Colonial Courts of Admiralty Act, 1890.

20. Before we deal with the decision of the Privy Council, it is important to notice that the Colonial Courts of Admiralty were vested with the same admiralty jurisdiction which was vested in the High Court of England 'whether existing by virtue of any statute or otherwise' and they were entitled to exercise the same jurisdiction in like manner and to the same extent as the High Court in England. We shall now read the provisions of the Colonial Courts of Admiralty Act, 1890, so far as they are material.

> "2. *Colonial Courts of Admiralty.*— (1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty ....
>
> (2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the *like places, persons, matters, and things*, as the Admiralty jurisdiction of the High Court in England, *whether existing by virtue of any statute or otherwise*, and

7 1927 AC 906 : 43 TLR 698

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the Colonial Court of Admiralty may exercise *such jurisdiction in like manner and to as full an extent as the High Court in England*, and shall have the same regard as that Court to international law and the comity of nations.

(3) * * *

Provided as follows:

(*a*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein *substituted for England and Wales*; and ..." (emphasis supplied)

These provisions show that the admiralty jurisdiction conferred on the Colonial Courts of Admiralty was identical to that of the High Court in England. The Colonial Courts of Admiralty were, in relation to their respective territories, invested with the same jurisdiction "over places, persons, matters and things" as in the case of the English High Court in respect of England and Wales. This jurisdiction was derived from the statutes which then existed in England — namely, the Admiralty Court Acts of 1840 and 1861, as well as from other sources such as custom and practice as recognised by the Courts exercising admiralty jurisdiction. This is clear from the words "whether existing by virtue of any statute or otherwise". The proviso makes the position even clearer. What the Colonial Courts of Admiralty Act, 1890 did was not to incorporate any particular English Statute into Indian law for the purpose of conferring admiralty jurisdiction, but to assimilate the competent courts in India to the position of the English High Court in the exercise of admiralty jurisdiction. It would, therefore, appear that any expansion of Admiralty jurisdiction of the High Court in England was intended likewise to expand the jurisdiction of the Colonial Court of Admiralty. This should have been regarded as the position with respect to a Colonial Court of unlimited jurisdiction.

21. Section 3 of this Act provides:

"3. *Power of Colonial legislature as to Admiralty jurisdiction.*— The legislature of a British possession may by any Colonial law—

(*a*) declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty ....

(*b*) confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit:

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Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty."

Section 3 thus draws a distinction between courts of unlimited jurisdiction falling under clause (*a*) and courts of limited jurisdiction falling under clause (*b*). The admiralty jurisdiction of the former was wider than that which was conferred on the latter.

22. Section 7 confers power to make rules of court to regulate the procedure and practice of the court in the exercise of its admiralty jurisdiction. This section provides:

"7. *Rules of Court.*— (1) Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made.

* * *

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full Court, or by any judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the Court can in any case be exercised by a Single Judge, any jurisdiction conferred by this Act may in the like case be exercised by a Single Judge."

23. By virtue of this provision, admiralty rules were made for Calcutta and Bombay High Courts. The Madras High Court adopted admiralty rules by virtue of the powers conferred by the Letters Patent of the High Court and the Government of India Act, 1915.

24. By Act 16 of 1891, certain courts in British India were declared to be Colonial Courts of Admiralty. The High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay were three of the six Courts declared to be Colonial Courts of Admiralty[8]. The preamble to this Act, in so declaring, stated:

"Whereas it is provided by the Colonial Courts of Admiralty Act, 1890, that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty; ...."

25. It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts

8 The other Courts are:
(*a*) The Court of the Recorder of Rangoon
(*b*) The Court of the Resident at Aden
(*c*) The District Court of Karachi

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of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom. The High Courts were declared to be competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is, therefore, neither reason nor logic in imposing a fetter on the jurisdiction of these High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is all the more true because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago. See *Halsbury's Laws of England*, 4th ed. Vol. I(1), para 307; *Halsbury's Statutes of England*, Vol. I, p. 9.

26. Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. As the admiralty jurisdiction of the English High Courts expanded with the progress of legislation, and with the repeal of the earlier statutes, including in substance the Admiralty Court Acts of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts a corresponding growth and expansion of admiralty jurisdiction during the pre-independence era. But a restrictive view was taken on the question in the decisions of the High Courts cited above.

27. There is no reason why the jurisdiction of the Indian High Courts should have been considered to have frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890. If this had not been considered to have happened, and a liberal construction had been adopted by courts, the admiralty jurisdiction of the High Court would in any case have been considered to have progressed up to the level of the English Administration of Justice Act, 1928, which was the last of a series of enactments in England on the subject prior to 1947, and consequently the Indian High Court would have been treated as a consolidated court on the basis of the (English) Supreme Court of Judicature (Consolidation) Act, 1925, exercising identical and unlimited jurisdiction, and not a distinct or 'prescribed' admiralty jurisdiction, limited and confined to the Admiralty Court Act, 1861, as it is now treated to be by some of the High Courts in the decisions cited above. All this is perhaps the result of the reasoning in the decision of the Privy Council in *Yuri Maru (The), Woron (The)*[7].

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28. *The Yuri Maru*[7] which arose from Canada concerned the jurisdiction of the Exchequer Court. The decision is summarised in the headnote as follows:

> "The effect of Section 2, sub-section (2), of the Colonial Courts of Admiralty Act, 1890 (Imp.) is to limit the jurisdiction of Colonial Courts of Admiralty established under the Act to the Admiralty jurisdiction of the High Court of England, as it existed at the passing of the Act; the extension of the Admiralty jurisdiction of the High Court by the Administration of Justice Act, 1920 (Imp.), Section 22, repealed and re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925 (Imp.), Section 22, does not apply to Colonial Courts of Admiralty.
>
> Consequently, the Exchequer Court of Canada, which was established by the Admiralty Act (R. S. Can., 1906, c. 141) as a Colonial Court of Admiralty, has not, under Section 22, sub-section 1(*xii.*), of the above Imperial Act of 1925, jurisdiction in rem to try an action for damages for breach of a charterparty...."

29. The Privy Council thus rejected the contention that the jurisdiction of the Canadian Court of Admiralty was automatically extended with the progress of legislation in England widening the admiralty jurisdiction of the English High Court. Nevertheless, the Privy Council significantly left it to the Canadian legislature to pass appropriate laws for widening the jurisdiction of the Canadian Courts. Speaking for the Board, Lord Merrivale concluded:

> "On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the Courts to set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time be added or excluded is left for independent legislative determination."

30. The Exchequer Court of Canada was established by the Admiralty Act R.S. Canada, 1906, c. 141, as a Colonial Court of Admiralty. It is not clear whether that Court was in its jurisdiction comparable to the Indian High Courts. Assuming that it was comparable at the relevant time, and whatever be the relevance of *Yuri Maru*[7] to courts like the Exchequer Court of Canada, we see no reason why the jurisdiction of the Indian High Courts, governed as they now are by the Constitution of India, should in any way be subjected to the jurisdictional fetters imposed by the Privy Council in that decision. Legal history is good guidance for the future, but to surrender to the former is to lose the latter.

31. A short account of the English statutes on admiralty jurisdiction and the power exercised by the English Courts over foreign ships will be helpful in understanding the nature and extent of the admiralty jurisdiction

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of the Indian Courts. We shall, therefore, briefly discuss the salient features of the admiralty jurisdiction of the English Courts.

32. The customs and practices of the commercial and maritime courts and the Law Merchant administered by them and the jurisdiction assumed by the Admiral over ships and things at sea and the conflict which arose between the Court presided over by him and the common law and equity courts leading to curtailment of the powers of the Admiral and ultimately resulting in consolidation of all the courts by the Supreme Court of Judicature Act, 1873 (which came into force in 1875) are vividly described by eminent scholars of English legal history and maritime law. See Holdsworth's *A History of English Law*, Volumes 1, 5 and 8; Roscoe's *Admiralty Practice*, 5th ed.; Marsden: *Select Pleas of the Court of Admiralty*, Volumes I and II; *Law and Custom of the Sea, ibid.* Volumes I and II; Benedict on *Admiralty*, 6th ed. (1940) Vol. I; Gilmore and Black, *Law of Admiralty*, 1957.

33. The wide jurisdiction vested in the English Courts is derived from ancient principles of Maritime Law developed by custom and practice as well as from subsequent statutes many of which have incorporated the provisions of International Conventions unifying the laws practised in several maritime countries. It is beyond the scope of this judgment to embark on a survey of maritime history except to notice that both the Admiralty Court and the Common Law Courts claimed jurisdiction over cases governed by martime law. Although admiralty Judges were often compelled to abandon jurisdiction to the Courts of Common Law in various matters, maritime cases involving hypothecation, salvage, torts committed on the high seas and the like, where the Common Law Courts could not give effective redress, were left to the jurisdiction of the admiralty Judges. The admiralty had, however, 'fallen into a feeble and neglected condition and for long its proceedings excited no attention'. But in the Eighteenth Century, the learning and ability of Lord Stowell 'raised the Court to a position of the highest importance' (Roscoe's *Admiralty Practice*, 5th ed., p. 14).

34. In the words[9] of Holdsworth:

> "Modern legislation has restored to the court of Admiralty many of the powers, and much of the jurisdiction of which it had been deprived in the seventeenth century. ...But Admiralty law has lost the international character which it once possessed. It is essentially English Law. 'The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English maritime[10] law'. 'Neither the laws of the Rhodians, nor of Oleron, nor of Visby,

9 *A History of English Law*, W.S. Holdsworth, Vol. 1, pp. 558-59

10 *Gaetano and Maria (The)*, (1882) 7 PD 137 : 46 LT 835

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nor of the Hanse towns, are of themselves any part of the Admiralty law of England.... But they contain many principles and statements of marine practice, which, together with principles found in the Digest, and in the French, and other Ordinances, were used by the judges of the English court of Admiralty, when they were moulding and reducing to form the principles and practice of their court'[11]."

35. The Admiralty Court Act, 1840 was the first of a series of statutes extending and defining the jurisdiction of the High Court of Admiralty in England. This Act was followed by the Admiralty Court Act, 1861 conferring larger powers upon the High Court of Admiralty. Section 6 of this Act empowered the High Court of Admiralty to assume jurisdiction over foreign ships in respect of claims to cargo *carried into* any port in England or Wales[12]. Significantly, the Act did not apply to outward cargo. Section 7 of the Act, however, conferred jurisdiction on the High Court of Admiralty "over any claim for damage done by any ship". This Act was followed by the Judicature Act of 1873, which came into force in 1875 and which merged the High Court of Admiralty with the High Court of Justice resulting in a fusion of admiralty law, common law and equity. It is of interest to note that the provision contained in Section 6 of the Admiralty Court Act, 1861 limiting the jurisdiction of the Admiralty Court to claims respecting inward cargo was discarded by the Administration of Justice Act, 1920 which extended the jurisdiction of the High Court to (*a*) any claim arising out of an agreement relating to the use or hire of a ship; (*b*) any claim relating to the carriage of goods in any ship, and (*c*) any claim in tort in respect of goods carried in any ship. The Act thus applied to both inward and outward cargoes.

36. The Admiralty Court Act, 1861 and the subsequent enactments were consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925. The admiralty jurisdiction of the English High Court was

11 *Gas Float Whitton (The)*, (1896) P 47, 48

12 The section reads:

"6. *As to Claims for Damage to Cargo imported.*— The High Court of Admiralty shall have Jurisdiction over any Claim by the Owner or Consignee or Assignee of any Bill of Lading of any *Goods carried into any Port in England or Wales* in any Ship, for Damage done to the Goods or any Part thereof by the Negligence or Misconduct of or for any Breach of Duty or Breach of Contract on the Part of the Owner, Master, or Crew of the Ship, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in England or Wales: Provided always, that if in any such Cause the Plaintiff do not recover Twenty Pounds he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court." (emphasis supplied)

See the observation of Dr Lushington in *The "Kasan"* (January 13, 1863) and in *The "Bahia"* (April 21, 1863) English Report, Vol. 167, pp. 268, 298.

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redefined by this Act to include various matters such as any claim "for damage done by a ship"; any claim "arising out of an agreement relating to the use or hire of a ship"; or "relating to the carriage of goods in a ship"; or "in tort in respect of goods carried in a ship". This jurisdiction was, however, not available if "at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England" [See Section 22(*i*), (*iv*) and (*vii*)]. By the Administration of Justice Act, 1928, the jurisdiction vested in the High Court by the Supreme Court of Judicature (Consolidation) Act, 1925 was declared to belong to all divisions of the High Court. The Admiralty Court was thus empowered to entertain, apart from actions *in rem*, any claim *in personam* which could be brought in any other division of the High Court.

37. By the Administration of Justice Act, 1956, the admiralty jurisdiction of the High Court was further widened and redefined so as to include not only the claims specified under Section 1(*i*) of Part I but also "any other jurisdiction which either was vested in the High Court of Admiralty immediately before the date of the commencement of the Supreme Court of Judicature Act, 1873 (i.e., November 1, 1875), or is conferred by or under an Act which came into operation on or after that date on the High Court as being a court with Admiralty jurisdiction and any other jurisdiction connected with ships or aircraft vested in the High Court apart from this section which is for the time being assigned by rules of court to the Probate, Divorce and Admiralty Division". Sub-section (4) of this section removed the restriction based on the ownership of the ship. It says that the jurisdiction applied to all ships or aircraft, "whether British or not and whether registered or not and wherever the residence or domicile of their owners may be" and "in relation to all claims, wheresoever arising". The jurisdiction in regard to the questions or claims specified under Section 1(*i*) includes "any claim for damage done by a ship", "any claim for loss of or damage to goods carried in a ship", "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship" [See clauses (*d*), (*g*) and (*h*)].

38. These claims are now specifically mentioned under clauses (*e*), (*g*) and (*h*) respectively of Section 20(2) of the Supreme Court Act 1981, amongst other claims, as falling under the Admiralty jurisdiction of the High Court. Part II of this Act is derived substantially from Part I of the 1956 Act which was enacted to give effect to the Brussels Convention of 1952 relating to the arrest of sea-going ships and the rules concerning civil jurisdiction in matters of collision (Cmd 8954).

39. Section 20 of the Supreme Court Act 1981 enumerates various questions and claims falling under the admiralty jurisdiction of the English High Court. Apart from matters covered by the Merchant Shipping Acts 1894 to 1979 [referred to in sub-section (3)] and certain other matters, various questions and claims are enumerated in sub-section

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(2). They include: "any claim for loss of or damage to goods carried in a ship; any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship; any claim for damage received by a ship; and any claim for damage done by a ship"[13].

13 The specific questions and claims enumerated in sub-section (2) of Section 20 of the Supreme Court Act 1981 are:

"(*a*) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(*b*) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(*c*) any claim in respect of a mortgage of or charge on a ship or any share therein;

(*d*) any claim for damage received by a ship;

(*e*) any claim for damage done by a ship;

(*f*) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of—

(*i*) the owners, charterers or persons in possession or control of a ship; or

(*ii*) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,

being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship,

(*g*) any claim for loss of or damage to goods carried in a ship;

(*h*) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(*i*) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under Section 51 of the Civil Aviation Act, 1949, of the law relating to salvage to aircraft and their apparel and cargo);

(*j*) any claim in the nature of towage in respect of a ship or an aircraft;

(*k*) any claim in the nature of pilotage in respect of a ship or an aircraft;

(*l*) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(*m*) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

(*n*) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(*o*) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(*p*) any claim arising out of an act which is or is claimed to be a general average act;

(*q*) any claim arising out of bottomry;

(*r*) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty."

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40. Sub-section (7) of this section specifically provides that the admiralty jurisdiction of the High Court extends to "all ships or aircrafts, whether British or not and wherever the residence or domicile of their owners may be, and to all claims wherever arising". It reads:

"20. (7) The preceding provisions of this section apply—

(*a*) in relation to all ships or aircraft, whether British or not and wherever the residence or domicile of their owners may be;

(*b*) in relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land); and

(*c*) so far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law:

Provided that nothing in this sub-section shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Acts 1894 to 1979."

This jurisdiction is wide enough to cover all claims in tort or contract arising out of any agreement for carriage of goods by sea.[14]

41. The whole jurisdiction of the English High Court is now vested in all the divisions alike. All Divisions of the High Court and all the Judges of that Court have equal power, authority and jurisdiction, although admiralty actions are assigned to the Queen's Bench Division and taken up by the Admiralty Court[15]. The special requirements of an action in personam, namely, the habitual residence or place of business of the defendant or the cause of action having their nexus with England and Wales or the determination of a connected matter in the English High Court or the submission of the defendant to the jurisdiction of that court, are not applicable to a proceeding commenced as an admiralty action *in rem*. See Order 75, Rule 4(3) of the Rules of the Supreme Court, 1965[16].

42. The Civil Jurisdiction and Judgments Act, 1982 enacted into English Law and Scottish Law the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

14 See the principle stated in *Fehmarn (The)*, (1958) 1 All ER 333 : (1958) 1 WLR 159

15 See *Halsbury*, *op. cit.*, 4th ed., Vol. I(I) para 309. See also Supreme Court Act, 1981

16 See also the editor's general note on Order 75, Rule 5 on the practice of the English High Court

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43. Describing the unified court structure in England, Jackson sums up:

> "The Admiralty Court developed independently, having its own battle with common law courts over jurisdictional boundaries. During the 18th and early 19th centuries its influence and power decreased, but through statutes of 1840 and 1861 the court received a firm foundation on which it has built since. It came in from the cold into the general union of courts in 1873-5 and is now integrated into the High Court, being a branch of the Queen's Bench Division....
>
> Once under the umbrella of the unified court structure, common law and equitable principles became directly available in the Admiralty Court. No longer need claimants have to seek these elsewhere and no longer did jurisdictional boundaries necessarily indicate the availability of substantive rights and remedies." [D.C. Jackson, *Enforcement of Maritime Claims*, (1985) p. 8].

44. "The law of admiralty, or maritime law, ... (is the) corpus of rules, concepts, and legal practices governing ... the business of carrying goods and passengers by water." (Gilmore and Black, *The Law of Admiralty*, page 1). The vital significance and the distinguishing feature of an admiralty action *in rem* is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part.

> "... In admiralty the vessel has a juridicial personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty in appropriate cases administers remedies *in rem*, i.e., against the property, as well as remedies *in personam*, i.e., against the party personally ...." (Benedict, *The Law of American Admiralty*, 6th ed., Vol. I p. 3.)

45. Admiralty Law confers upon the claimant a right *in rem* to proceed against the ship or cargo as distinguished from a right *in personam* to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtained security to satisfy judgment. A successful plaintiff in an action *in rem* has a right to recover damages against the property of the defendant. "The liability of the shipowner is not limited to the value of the *res* primarily proceeded against .... An action ... though originally commenced *in rem*, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a

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judgment unless protected by the statutory provisions for the limitation of liability".' (Roscoe's *Admiralty Practice*, 5th ed. p. 29)

46. The foundation of an action *in rem*, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action *in personam* is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action *in rem* is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the *res* or of the bail provided. An action *in rem* lies in the English High Court in respect of matters regulated by the Supreme Court Act 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a 'sistership' i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

> "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner ...." (Per Justice Story, *The United States* v. *The Big Malek Adhel*[17]).

47. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

17 43 US (2 How) 210, 233 (1844)

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48. A ship may be arrested (*i*) to acquire jurisdiction; or (*ii*) to obtain security for satisfaction of the claim when decreed; or (*iii*) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party. (See *Arrest of Ships* by Hill, Soehring, Hosoi and Helmer, 1985).

49. The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the Marshal or any other authorized officer. Any interference with his custody is treated as a contempt of the court which has ordered the arrest. But the Marshal's right under the attachment order is not one of possession, but only of custody. Although the custody of the vessel has passed from the defendant to the Marshal, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. The warrant usually contains a monition to all persons interested to appear before the court on a particular day and show cause why the property should not be condemned and sold to satisfy the claim of the plaintiff.

50. The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into court in lieu of bail". (See *Halsbury's Laws of England*, 4th edn., Vol. 1, p. 375 etc.).

51. The service of the warrant is usually effected by affixing it on the main mast or single mast of the ship. A ship which has been arrested under an order of attachment may be released by the court if sufficient bail is put in to cover the claim of the plaintiff as well as the costs of the action. The sureties are liable for the amount entered in the bail bond.

52. If the ship or cargo under arrest before judgment has not been released by the defendant by putting in sufficient bail, and if the property is found deteriorating, the court has the power to order the sale of the property after notice has been duly issued to the parties interested.

53. If the plaintiff has finally obtained a decree of condemnation and sale of the ship, the court will issue an order to the competent officer

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commanding him to sell the property, in execution of the decree, and to bring the proceeds into court. Thereupon the officer shall issue proper notice and arrange for the sale of the property by auction. The proceeds of the sale are paid into the registry of the court and they shall be disposed of by the court according to law.

54. A personal action may be brought against the defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings *in rem* have been instituted, he submits himself to jurisdiction.

55. An action *in rem* is directed against the ship itself to satisfy the claim of the plaintiff out of the *res*. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff *in personam*. It is, however, imperative in an action *in rem* that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim.

56. It is by means of an action *in rem* that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against". The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right *in rem*. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. [See *Bold Buccleaugh (The)*[18]]. In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights *in rem* (Supreme Court Act 1981). If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against *in personam* in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action *in rem* is thus a means of assuming jurisdiction by the competent court.

18 *Harmer* v. *Bell*, (1851) 7 Moo PC 267 : 13 ER 884

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57. The admiralty action *in rem*, as practised in England or in the United States, is unknown to the civil law. In countries following the civil law, all proceedings are initiated by actions *in personam*. The President of the Court having competence in the matter has the power to order an attachment of the ship if he is convinced that the plaintiff is likely to lose his security unless the ship is detained within jurisdiction. His hands are not fettered by the technicalities of an action *in rem* and the scope of the proceedings are not limited to maritime liens or claims[19]. According to the French law, arrest of a ship is allowed even in respect of non-maritime claims and whether or not the claimant is a secured or unsecured creditor. A vessel may be arrested either for the purpose of immobilising the vessel as security (*Saisie Conservatoire*) or in execution of judgment (*Saisie Execution*) whether or not the claim has any relation to the vessel. Arrest of the vessel has the advantage of forcing the owner to furnish security to guarantee satisfaction of any decree that may be passed against him. On furnishing sufficient security with the Court, he is usually allowed to secure the release of the vessel. Maritime law is part of the general law of France and other 'civil law countries', and is dealt with by the ordinary courts or tribunals. The presence of any property belonging to the defendant within the territorial jurisdiction confers jurisdiction on the French Court. [See the observation of Lord Diplock in *Jade (The)*[20]].

58. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue *in personam*. All actions in the civil law — whether maritime or not — are *in personam*, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim. [See D.C. Jackson, *Enforcement of Maritime Claims*, (1985) Appendix 5][19]. Admiralty actions in England, on the other hand, whether *in rem* or *in personam*, are confined to well defined maritime liens or claims and directed against the *res* (ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownership as the *res* in question.

59. Maritime law is as much a part of the general legal system as any other branch of the law. With the merger of the Admiralty and Common Law Courts in England in 1875 and the fusion of their legal precepts and concepts, this branch of the law, despite its peculiarities about actions *in*

19 See D.C. Jackson, *Enforcement of Maritime Claims*, (1985) Appendix 5, p. 437 *et seq.*

20 (1976) 1 All ER 920, 923 : (1978) 1 WLR 430

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rem, is no longer treated as a separate and independent branch. It is not the exclusive preserve of the English High Court, for certain county courts in that country are specially authorised to exercise this jurisdiction. This is much more true of the civil law system where no distinction is drawn between maritime law and other branches of the law, and they are administered alike by the same courts or tribunals.

60. It may not be correct to say that the admiralty jurisdiction of the English Courts is dependent entirely on statutes. It may be true in a very limited sense as regards the jurisdiction of the High Court after the merger of the High Court of Admiralty with the High Court of Justice by the Supreme Court of Judicature Act, 1873 which came into force in 1875: See Supreme Court of Judicature (Commencement) Act, 1874. Even so, statutes are codifications of legal principles developed by the decisions of Courts and those principles remain the life-blood of the statutes. The observation of Lord Diplock in *Jade (The)*[20] on which much reliance is placed by Mr Ramachandran in support of his arguments, has to be so understood. (See also *Halsbury's Laws of England*, Vol. 1, para 307).

61. Remedy for enforcement of maritime liens was available prior to the introduction of statutes. "Admiralty law was derived from the laws of Oleron, supplemented by the civil law" *per* Lord Halsbury, L.C.; *Currie* v. *M'Knight*[21]. For a long time the Admiralty Court developed the law independently fighting its battles with the Common Law Courts on the question of jurisdictional boundaries. By statutory intervention the court structure came to be unified and substantive rights and remedies became available without regard to jurisdictional boundaries. Although statutes now control the field, much of the admiralty law is rooted in judicial decisions and influenced by the impact of civil law, common law and equity. The ancient maritime codes like the Rhodian Sea Law, the Basilika, the Assizes of Jerusalem, the Rolls of Oleron, the Laws of Visby, the Hanseatic Code, the Black Book of the British Admiralty, Consolato del Mare, and others are, apart from statutes, some of the sources from which the law developed in England. Any attempt to confine admiralty or maritime law within the bounds of statutes is not only unrealistic but incorrect. Although this branch of the law in England is now governed generally by statutes, the law in all its aspects can be understood only by viewing it in the context of decisions of courts and the general principles which are common to common law and equity.

62. Unlike in the "civil law countries", there is no maritime code in England containing all aspects of maritime law. The Merchant Shipping Acts and the Carriage of Goods by Sea Act contain the substantive rules, but the jurisdictional and other aspects of maritime claims have to be traced to numerous other statutes and sources. English Maritime Law 'is still composed of rules having their roots in statute, rules of court and

21 (1897) AC 97

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judicial doctrine of Admiralty, common law and equity'. (See D.C. Jackson, *Enforcement of Maritime Claims*, 1985, p. 9)[19]. See also Halsbury, *op. cit.*, Vol. 1, para 307. As Christopher Hill puts it: "... Britain is a common law country and that Admiralty law has been superimposed over the years by various statutory enactments from time to time. The right to seize a vessel by legal process is therefore partly based on rights conferred by general maritime law and partly upon the right to take legal action of this nature granted by statute ...." *Maritime Law*, 2nd ed., p. 93.

63. In tracing the history of admiralty law in India, it is likewise misleading and incorrect to confine it to statutes. Statutes have been codifications of rules of law as developed by usage, practice and custom. As stated by Westropp, C.J., of the Bombay High Court in *Bardot* v. *The American Ship or Vessel 'Augusta'*[22]:

> "... If we have jurisdiction to entertain this suit, it must be sought for in the general maritime law administered by Courts of Admiralty ... we must hold it to be quite clear that the Statutes 3 and 4 Vict. c. 65 (1840), 24 Vict. c. 10 (1861), and 26 and 27 Vict. c. 24 (1863), do not increase or in any wise affect our jurisdiction either in Admiralty or Vice-Admiralty, and that if we have jurisdiction to entertain this cause, that jurisdiction must be sought for outside those Statutes."

64. Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the court to devise procedural rules by analogy and expediency. Actions *in rem*, as seen above, were resorted to by courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of the *res*; or, in his absence, proceed against the *res* itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the *res*. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice. To the courts of the "civil law countries" in Europe and other places, like problems seldom arise, for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action *in rem* and an action *in personam*.

22 (1873) 10 Bom HCR 110, 113

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65. It is likewise within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the High Court concerned. This power of the court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment.

66. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. (See *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[23]). As stated in *Halsbury's Laws of England*, 4th edn., Vol. 10, para 713:

> "Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court."

67. The observation of this Court in *Raja Soap Factory* v. *S.P. Shantharaj*[24] that Section 151 of the Code of Civil Procedure did not confer on the High Court jurisdiction which was not specifically vested was made in the context of Section 105 of the Trade and Merchandise Marks Act (43 of 1958) which conferred a specific jurisdiction in respect of a passing off action. That observation is not relevant to the question regarding the inherent and plenary jurisdiction of the High Court as a superior court of record. The Andhra Pradesh High Court, as a successor to the Madras High Court, is vested with all the appellate and original jurisdiction, including admiralty jurisdiction to order the arrest and detention of a ship.

68. In decisions such as *Jayaswal Shipping Company* v. *'S.S. Leelavati'*[1]; *Kamalakar Mahadev Bhagat* v. *Scindia Steam Navigation Co. Ltd., Bombay*[1]; *Rungta Sons Private Ltd.* v. *S.S. 'Edison Mariner'*[4]; *National Co. Ltd.* v. *Asia Mariner*[6]; *Sahida Ismail* v. *Petko R. Salvejkov*[2] and *Reena Padhi* v. *'Jagdhir'*[5] the High Courts took an unduly restrictive view of the courts' admiralty jurisdiction by limiting it to what was permitted by the Admiralty Court Act, 1861 and the Colonial Courts of

23 (1966) 3 SCR 744 : AIR 1967 SC 1
24 (1965) 2 SCR 800 : AIR 1965 SC 1449

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Admiralty Act, 1890. This was, in our view, an unjustified abdication of jurisdiction and a self-assumed fetter on competence to render justice.

69. In equating the admiralty jurisdiction of the Indian High Court to that of the English High Court, the Colonial Court of Admiralty Act, 1890 significantly refers to the admiralty jurisdiction of the High Court in England 'whether existing by virtue of any statute or otherwise'. This is an enabling statute, and not a statute of limitation of power. It aids, and does not fetter, the growth of jurisdiction. There is no reason why the words 'statute or otherwise' should be so construed as to exclude the various sources from which the admiralty jurisdiction in England developed. Apart from statutes, the powers of that Court, as seen above, were derived from custom and practice and the principles developed by common law and equity as well as by the generally recognised principles of civil law developed and practised in Europe. There is no reason, as rightly stated by Westropp. C.J. of the Bombay High Court in *Bardot*[20] why the expression 'statute or otherwise' should be so construed as to exclude all these vast areas of legal principles which enriched and strengthened the maritime laws of England. Likewise, there is no reason why those principles should also not be drawn upon to enrich and strengthen the jurisprudence of this country, even if the jurisdiction of our courts were to be, by compulsions of history, considered to be curtailed and dovetailed to the colonial past — a proposition which is neither correct nor consistent with our status as a sovereign republic. It is time to take a fresh look at the old precedents.

70. In this connection we would refer to the recent decision of this Court in *Delhi Judicial Service Association, Tis Hazari Court, Delhi* v. *State of Gujarat*[25]. This Court stated: (SCC p. 452, para 36)

> "The Constitution has assigned a new role to the Constitutional Courts to ensure rule of law in the country .... Time has come to have a fresh look at the old precedents and to lay down law with the changed perceptions keeping in view the provisions of the Constitution."

See also *S.P. Gupta* v. *Union of India*[26].

71. It is well recognised in international law that a merchant ship, though generally governed by the laws of the flag State, subjects itself to the jurisdiction of a foreign State as it enters its waters. The Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 and the Law of the Sea Convention, 1982 affirm that the sovereignty of a State extends over its internal and territorial waters.[27]

25 (1991) 4 SCC 406 : JT (1991) 3 SC 617

26 1981 Supp SCC 87 : (1982) 2 SCR 365, 520-21, 597-98

27 See Nagendra Singh, *International Maritime Law Conventions*, British Shipping Laws, Vols. I to IV

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72. "A foreign vessel, no matter what flag she flies, owes temporary and local allegiance to the sovereign of any port to which she comes. And the persons in such a vessel likewise must obey the laws and regulations of the port. Such jurisdiction is discretionary. Once a foreign vessel passes out of territorial waters, she owes no further duty to the place which she has left, unless she is 'hotly pursued'. But her conduct on the high seas or in foreign ports may subject her to penalties on returning on a subsequent visit." (Benedict, *The Law of American Admiralty*, 6th Edn., pages 121 and 122).

73. In the words of Chief Justice Marshall of the United States Supreme Court "it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the government to degradation, if such (alien) individuals or merchants (trading in ships) did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." (*The Schooner Exchange* v. *M'Faddon*[28]).

74. All foreign merchant ships and persons thereon fall under the jurisdiction of a coastal State as they enter its waters. Subject to the right of 'innocent passage', the coastal State is free to exercise jurisdiction over such ships in respect of matters the consequences of which extend beyond the ships. Such ships are subject to the local jurisdiction in criminal, civil and administrative matters. This jurisdiction is, however, assumed only when, in the opinion of the local authorities, the peace or tranquillity of the port is disturbed, when strangers to the vessel are involved or when the local authorities are appealed to. Questions which affect only the internal order and economy of the ship are generally left to the authorities of the flag State. Coastal States are entitled to assume jurisdiction in respect of maritime claims against foreign merchant ships lying in their waters. These ships are liable to be arrested and detained for the enforcement of maritime claims. The courts of the country in which a foreign ship has been arrested may determine the cases according to merits, provided they are empowered to do so by the domestic law of the country or in any of the cases recognised by the International Convention relating to the Arrest of Seagoing Ships, Brussels, 1952[29]. The maritime claims in respect of which the power of arrest is recognised in law include claims relating to damage caused by any ship either in collision or otherwise; claims relating to carriage of goods in any ship whether by charterparty or otherwise, loss of or damage to goods etc. These principles of international law, as generally recognised by nations, leave no doubt that, subject to the local laws regulating the competence of courts, all foreign ships lying within the waters of a State, including waters in ports,

28 (1812) 11 US (7 Cranch) 114, 143: 3 L Ed 287

29 *See also* the International Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages of April 10, 1926 and May 27, 1967

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harbours, roadsteads, and the territorial waters, subject themselves to the jurisdiction of the local authorities in respect of maritime claims and they are liable to be arrested for the enforcement of such claims.

75. In India, carriage of goods by sea is governed by the Indian Bills of Lading Act, 1856, the Indian Carriage of Goods by Sea Act, 1925, the Merchant Shipping Act, 1958, and general statutes, such as the Marine Insurance Act, 1963, the Contract Act, 1872, the Evidence Act, 1872, the Indian Penal Code, 1860, the Transfer of Property Act, 1882, the Civil Procedure Code, 1908, the Criminal Procedure Code, 1973, the Companies Act, 1956, etc. etc. as well as the general principles of law such as the law of tort, public and private international law etc. In this connection, reference may also be made to the Indian Ports Act, 1908 and the Major Port Trusts Act, 1963 concerning the administration of the port and the jurisdiction over ships in port, the Customs Act, 1962 containing various regulatory measures affecting ships, goods and persons in connection with importation or exportation of goods, as well as the provisions governing employment of labour. The Indian Bills of Lading Act, 1856 emphasises the negotiable and other characteristics of a bill of lading. The Carriage of Goods by Sea Act, 1925, contains the Hague Rules regulating the respective rights and liabilities of the parties to a contract governed by bills of lading or similar documents of title for carriage of goods by sea "from any port in India to any other port whether in India or outside India". The Merchant Shipping Act embodies rules regarding registration of Indian ships; transfers or mortgages of ships or shares; national character and flag; employment of seamen; safety, nuclear ships; collisions, accidents at sea and liability; limitation of liability; navigation; prevention of pollution; investigation and enquiries; wreck and salvage; coasting trade; sailing vessels; penalties and procedure, etc. Many of these provisions have been adopted from rules formulated by various international conventions.

76. It is true that Indian statutes lag behind the development of international law in comparison to contemporaneous statutes in England and other maritime countries. Although the Hague Rules are embodied in the Carriage of Goods by Sea Act, 1925, India never became a party to the International Convention laying down those rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924). The Carriage of Goods by Sea Act, 1925 merely followed the (United Kingdom) Carriage of Goods by Sea Act, 1924. The United Kingdom repealed the Carriage of Goods by Sea Act, 1924 with a view to incorporating the Visby Rules adopted by the Brussels Protocol of 1968. The Hague-Visby Rules were accordingly adopted by the Carriage of Goods by Sea Act 1971 (United Kingdom). Indian legislation has not, however, progressed, notwithstanding the Brussels Protocol of 1968 adopting the Visby Rules or the United Nations Convention on the

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Carriage of Goods by Sea, 1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules are acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. India has also not adopted the International Convention relating to the Arrest of Seagoing Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages[30]. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.

77. The Merchant Shipping Act, 1958 contains various provisions to enforce territorial jurisdiction. The Act being essentially regulatory in character, the various authorities, tribunals and Courts entrusted with the administration and enforcement of its provisions are specifically stated. The High Court is defined under Section 3(15) as follows:

> "3.(15) 'High Court', in relation to a vessel, means the High Court within the limits of whose appellate jurisdiction—
>
> (*a*) the port of registry of the vessel is situate; or
>
> (*b*) the vessel is for the time being; or
>
> (*c*) the cause of action wholly or in part arises;"

Accordingly, a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time — i.e., at the time when the jurisdiction of the High Court is invoked, or, where the cause of action wholly or in part arises.

78. The detention of a foreign ship is authorised in terms of Sections 443 and 444. In view of their vital significance in the enforcement of

30 (*a*) International Convention relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 (IMC);
(*b*) International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, May 10, 1952 (IMC);
(*c*) International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision, Brussels, May 10, 1952 (IMC); and
(*d*) International Conventions for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, and the Revised Convention on Maritime Lines and Mortgages, Brussels, May 29, 1967 (IMC).

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maritime jurisdiction, we shall read these two sections in full. Section 443 defines the character and scope of the power of detention:

"443. *Power to detain foreign ship that has occasioned damage.*— (1) Whenever any *damage* has in any part of the world been *caused* to property belonging to the Government or to any citizen of India or a company *by a ship* other than an Indian ship and at any time thereafter that ship is found within Indian jurisdiction, the High Court may, upon the application of any person who alleges that the damage was caused by the misconduct or want of skill of the master or any member of the crew of the ship, issue an order directed to any proper officer or other officer named in the order requiring him to detain the ship until such time as the owner, master or consignee thereof has satisfied any claim in respect of the damage or has given security to the satisfaction of the High Court to pay all costs and damages that may be awarded in any legal proceedings that may be instituted in respect of the damage, and any officer to whom the order is directed shall detain the ship accordingly.

(2) Whenever it appears that before an application can be made under this section, the ship in respect of which the application is to be made will have departed from India or the territorial waters of India, any proper officer may detain the ship for such time as to allow the application to be made and the result thereof to be communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

(3) In any legal proceedings in relation to any such damage aforesaid, the person giving security shall be made a defendant and shall for the purpose of such proceeding, be deemed to be the owner of the ship that has occasioned the damage." (emphasis supplied)

The power of enforcement of an order of detention of a foreign ship is dealt with by Section 444.

"444. *Power to enforce detention of ship.*— (1) Where under this Act a ship is authorised or ordered to be detained, any commissioned officer of the Indian Navy or any port officer, pilot, harbour master, conservator of port or customs collector may detain the ship.

(2) If any ship after detention, or after service on the master of any notice of, or order for, such detention proceeds to sea before she is released by competent authority, the master of the ship shall be guilty of an offence under this sub-section.

(3) When a ship so proceeding to sea takes to sea, when on board thereof in the execution of his duty any person authorised under this Act to detain or survey the ship, the owner, master or agent of such ship shall each be liable to pay all expenses of, and incidental to, such

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person being so taken to sea and shall also be guilty of an offence under this sub-section.

(4) When any owner, or master or agent is convicted of an offence under sub-section (3), the convicting magistrate may inquire into and determine the amount payable on account of expenses by such owner, master or agent under that sub-section and may direct that the same shall be recovered from him in the manner provided for the recovery of fines."

These provisions relate to detention by reason of damage caused in any part of the world by a foreign ship to property belonging to the Government of India or to an Indian citizen or company. The sections are wide in terms and the expression 'damage' is not necessarily confined to physical damage. Ordinarily damage is caused by physical contact of the ship, such as in collision. But damage can also be caused to property by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants by reason of the negligent operation and management of the vessel, as, for example, when cargo is damaged by exposure to weather or by negligent stowage; or, by the misconduct of those in charge of the ship, like when cargo is disposed of contrary to the instructions of the owner or by reason of theft and other misdeeds. In all these cases, damage arises by reason of loss caused by what is done by the ship or by the breach, negligence or misdeeds of those in charge of the ship. It must however be noticed that the expression 'damage done by any ship' has been construed by the English Courts as not to apply to claims against the carrying ship for damage done to cargo. In *Victoria (The)* the Court so construed Section 7 of the Admiralty Court Act, 1861 (24 Victoriae c. 10)[31]. It has been held to apply only to physical damage done by a ship by reason of its coming into contact with something. See *Vera Cruz (No. 2) (The)*[32]; *Currie* v. *M'Knight*[21] and *Jade (The)*[20]. In view of the specific provisions of the English statutes of 1920, 1925, 1956 and 1981, it was unnecessary for the English Courts to construe the expression broadly so as to include cargo claims and the like. The last two enactments contain an exhaustive list of maritime claims and questions in regard to which the High Court can exercise jurisdiction over any merchant ship by arresting it as it enters the waters of Britain. This power, as already noticed, is available, whatever be the nationality of the ship or its owner or the domicile or place of residence or business of the owner, or wherever the cause of action has arisen. About the words 'damage done by a ship' in Section 7 of the Admiralty Court Act, 1861 and the decision

31 (1887) 12 PD 105 : 56 LJ P 75
Section 7 reads: "The High Court of Admiralty shall have jurisdiction over any Claim for Damage done by any ship."

32 (1884) 9 PD 96 : 53 LJ P 33

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in *Victoria (The)*[31] to the effect that the section had no application to claims against the carrying ship for damage to cargo, the following observation significantly appears in *Halsbury's Laws of England*, 4th ed. Vol. I(1), para 319, N. 12.

> "... [B]ut this question is academic in the light of the fact that jurisdiction in respect of claims for damage to cargo carried in a ship is now expressly given by the Supreme Court Act 1981 Section 20(2)(*g*)."

79. In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction, there is no reason why the words 'damage caused by a ship' appearing in Section 443 of the Merchant Shipping Act, 1958 should be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods. The expression is wide enough to include all maritime questions or claims. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised acts or negligent conduct on the part of the shipowner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of the person aggrieved, is liable to be detained when found within Indian jurisdiction by recourse to Sections 443 and 444 of the Merchant Shipping Act, 1958 read with the appropriate rules of practice and procedure of the High Court. These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to invoke the inherent jurisdiction of a superior court.

80. The Indian Carriage of Goods by Sea Act, 1925 applies to carriage of goods by sea under bills of lading or similar documents of title from a port in India to any other port whether in or outside India. (See Section 2). The Act imposes certain responsibilities and liabilities and confers certain rights and immunities upon the carrier (see Articles III and IV). In respect of a claim relating to an outward cargo, the cargo owner has a right to bring a suit against a shipowner subject to the period of limitation specified under the Act, namely, one year [Article III(6)]. The substantive rights recognised by the statute are of equal application to foreign merchant ships as they are to Indian merchant ships. The Carriage of Goods by Sea Act does not, however, contain any provision for the enforcement of the right by arresting the foreign vessel found in Indian waters. In the absence of arrest, no effective remedy against a foreign owner may be available to the cargo owner. The same is the position with regard to claims relating to cargo carried under a charterparty. It is, therefore, necessary that he should have recourse to the remedy available

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to him under the Merchant Shipping Act. That Act, as stated earlier, confers a right to arrest a vessel in respect of any damage caused by a ship. If that expression, in the absence of any other more appropriate statute, is understood sufficiently broadly as an enabling provision to effectively assume jurisdiction over a foreign ship for the enforcement of a substantive right recognised by law, there would be no difficulty in finding a remedy for the right the law has conferred on the cargo owner.

81. The Merchant Shipping Act empowers the High Court concerned to arrest a ship in respect of a substantive right. A right conferred by the Indian Carriage of Goods by Sea Act, 1925 in respect of outward cargo is one of those rights which can be enforced by arrest and detention of the foreign ship in order to found jurisdiction over the vessel and its owners, just as it can be done in respect of inward cargo by reason of the substantive rights conferred by the Admiralty Court Act, 1861 read with the Colonial Courts of Admiralty Act, 1890, and other rules of law. The same principle must hold good for carriage under a charterparty. These and other laws, such as the law of contract, tort, crime, mortgage, marine insurance, customs, port operations, etc., and the Civil and Criminal Procedure Codes as well as the relevant rules of court regulating procedure and practice together constitute the body of substantive and procedural laws governing claims relating to inward and outward cargo, and such claims are enforceable against foreign ships by recourse to arrest and detention when found within jurisdiction. Viewed in this light, and by this reasoning, the Andhra Pradesh High Court, as a successor to the Madras High Court, does not lack admiralty jurisdiction in respect of claims relating to outward cargo.

82. The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the High Court concerned, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action.

83. The Merchant Shipping Act, 1958 provides a detailed code of substantive and procedural rules regulating shipping as an industry and the control exercised over it by the competent authorities in confirmity with various international conventions which have, under the auspices of International Organisations such as the IMO or the ILO, unified and developed various aspects of shipping laws. Conventions regulating sea traffic, safety of life at sea, employment of seamen, wages, hours of work, social security, etc. are cases in point. Likewise, the substantive rules concerning transport of goods are contained in the Indian Bills of Lading Act, 1856 and the Indian Carriage of Goods by Sea Act, 1925. But the

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jurisdictional questions concerning arrest of foreign ships for enforcement of claims against the shipowner as a transporter of goods, which in England are regulated by the Supreme Court Act 1981, are in many respects left unregulated by Indian legislation. While the provisions of various international conventions concerning arrest of ships, civil and penal jurisdiction in matters of collision, maritime liens and mortgages etc. have been incorporated into the municipal laws of many maritime States, India, as stated above, lags behind them in adopting these unified rules[33]. By reason of this void, doubts about jurisdiction often arise, as in the present case, when substantive rights, such as those recognised by the Carriage of Goods by Sea Act, are sought to be enforced. The remedy lies, apart from enlightened judicial construction, in prompt legislative action to codify and clarify the admiralty laws of this country. This requires thorough research and investigation by a team of experts in admiralty law, comparative law, and public and private international law. Any attempt to codify without such investigation is bound to be futile.

84. No Indian statute defines a maritime claim. The Supreme Court Act 1981 of England has catalogued maritime claims with reference to the unified rules adopted by the Brussels Convention of 1952 on the Arrest of Seagoing Ships[34]. Although India has not adopted the various Brussels

33 See, for example, the Brussels Conventions listed above.
See also the Administration of Justice Act, 1956 and the Supreme Court Act 1981 incorporating the international rules into English law.

34 International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952. Article 1 of this Convention reads:

(1) "Maritime Claim" means a claim arising out of one or more of the following:

(*a*) damage caused by any ship either in collision or otherwise; (*b*) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship; (*c*) salvage; (*d*) agreement relating to the use or hire of any ship whether by charterparty or otherwise; (*e*) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise; (*f*) loss of or damage to goods including baggage carried in any ship; (*g*) general average; (*h*) bottomry; (*i*) towage; (*j*) pilotage; (*k*) goods or materials wherever supplied to a ship for her operation or maintenance; (*l*) construction, repair or equipment of any ship or dock charges and dues; (*m*) wages of Masters, Officers, or crew; (*n*) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner; (*o*) disputes as to the title to or ownership of any ship; (*p*) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship; (*q*) the mortgage or hypothecation of any ship.

(2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

(3) "Person" includes individuals, partnerships and bodies corporate, Governments, their Departments, and Public Authorities.

(4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

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Conventions[35], the provisions of these Conventions are the result of international unification and development of the maritime laws of the world, and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject. In the absence of a general maritime code, these principles aid the courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping. "[P]rocedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities." [*S.P. Gupta* v. *Union of India*[26] (SCC p. 210, para 17)].

85. It is important to remember that the Brussels Convention on Arrest of Ships merely restricts or regulates the power of the coastal States and is not intended to confer power which they did not otherwise have as sovereign States. 'Arrest' to which the convention refers is detention of a ship to secure a maritime claim, and not seizure of a ship in execution or satisfaction of judgment.

86. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.

87. In the words of Chief Justice Marshall[28]:

> "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself ...." (*Schooner Exchange (The)* v. *M'Faddon*[28]).

88. Admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them.

89. All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. The power to arrest a foreign vessel, while in the waters

35 See the Conventions listed above

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of a coastal State, in respect of a maritime claim, wherever arising, is a demonstrable manifestation and an essential attribute of territorial sovereignty. This power is recognised by several international conventions[36]. These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognised by the generality of maritime States, and can therefore be regarded as part of our common law. The want of ratification of these conventions is apparently not because of any policy disagreement, as is clear from active and fruitful Indian participation in the formulation of rules adopted by the conventions, but perhaps because of other circumstances, such as lack of an adequate and specialised machinery for implementation of the various international conventions by co-ordinating for the purpose the Departments concerned of the Government. Such a specialised body of legal and technical experts can facilitate adoption of internationally unified rules by national legislation. It is appropriate that sufficient attention is paid to this aspect of the matter by the authorities concerned. Perhaps the Law Commission of India, endowed as it ought to be with sufficient authority, status and independence, as is the position in England, can render valuable help in this regard. Delay in the adoption of international conventions which are intended to facilitate trade hinders the economic growth of the nation.

90. The British statute assimilating Indian High Courts to the position of the English High Court in respect of admiralty jurisdiction is an enabling legislation and it is but one of the strands of jurisdiction vested in the High Court by virtue of the constitutional provisions. The jurisdiction of the High Court is governed by the Constitution and the laws, and the continuance in force of the existing laws is not a fetter but an additional source of power. Access to court for redressal of grievance being an important right of every person, it is essential that the jurisdiction of the courts is construed harmoniously and consistently with its vital function in that respect, so that absence of legislation will not jeopardise that right.

91. Admiralty jurisdiction, despite the peculiarities of its origin and growth — rooted as it is in history and nurtured by the growing demands of international trade — is nevertheless a part of the totality of jurisdiction vested in the High Court as a superior court of record, and it is not a distinct and separate jurisdiction as was once the position in England before the unification of courts. The 1890 and 1891 Acts specifically conferred admiralty jurisdiction on the Indian High Courts by reason of their being courts of unlimited jurisdiction. These Acts did not create any separate or distinct jurisdiction, but merely equated the Indian High Courts to the position of the English High Court (united and consolidated

36 See the Conventions referred to above. See also Nagendra Singh, *International Maritime Conventions, British Shipping Laws*, Vol. 4

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as that Court has been since 1875) for the exercise of admiralty powers within the jurisdiction of the former. The contrary view expressed in some of the decisions of the High Courts referred to earlier is clearly wrong.

92. Once a foreign ship is arrested in Indian waters by an order of the High Court, in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit. The arrest of the vessel while in Indian waters by an order of the High Court concerned, as defined under the Merchant Shipping Act, 1958 [Section 3(15)] attracts the jurisdiction of the competent court to proceed with the trial, as in the case of any other suit, as an action against the owner, and any decree obtained by the plaintiff is executable against any property of the owner available within jurisdiction, including the security furnished by him for release of the vessel,

93. All foriegn ships entering Indian waters are presumed to know that they fall within the jurisdiction of this country during their stay here. The vessel in question was lying in the Port of Vishakapatnam when she was arrested in respect of a cause of action relating to cargo. The sole contention of the defendants as regards jurisdiction was that no High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo because Section 6 of the Admiralty Court Act, 1861 (read with the Colonial Courts of Admiralty Act, 1890) conferring admiralty jurisdiction on Indian High Courts confined it to 'claims for damage to cargo imported'. This contention, for the reasons we have stated, has no merits. The High Court, in our view, rightly assumed jurisdiction by the arrest of the vessel while it was lying in the port of Vishakapatnam.

94. The High Court of Andhra Pradesh undoubtedly possesses jurisdiction over claims relating to inward and outward cargo. In the circumstances, the preliminary objection to the jurisdiction of the Andhra Pradesh High Court was totally devoid of merits.

95. Accordingly, the appeal arising from SLP (C) No. 10542 of 1985 has to be dismissed. In the light of our order dated August 28, 1991 allowing the Civil Appeal No. 3392 of 1991 filed by defendant 3 against the order of the High Court dismissing the petition for condonation of delay in presenting O.S.A.S.R. No. 39789 of 1988, the Transferred Case No. 27 of 1987 arising from the judgment of the learned Single Judge decreeing the plaintiff's suit and defendant 3 appeal have to be heard and disposed of together on the merits, and the right forum for the purpose will be the High Court itself. In the circumstances, the Transferred Case No. 27 of 1987 has to be returned to the High Court.

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R.M. SAHAI, J. *(concurring)*— Admiralty jurisdiction, an unfamiliar branch of jurisprudence, was the subject-matter of illuminating debate in this appeal directed against the judgment of the Andhra Pradesh High Court. But what was surprising to hear, even, in 1991 was that the admiralty jurisdiction exercised by the High Courts in the Indian Republic is still governed by the obsolete English Admiralty Courts Act, 1861 (referred hereinafter as 'the Act') applied by (English) Colonial Courts of Admiralty Act, 1890 (in brief '1890 Act') and adopted by Colonial Courts of Admiralty (India) Act, 1891 (Act XVI of 1891). Yet there appeared no escape from it, notwithstanding its unpleasant echo in ears. The shock was still greater when it transpired that this state of affairs is due to lack of legislative exercise, even, when in wake of decision of this Court in *State of Madras* v. *C.G. Menon*[37] that 'Article 372 of the Constitution cannot save this law (Fugitive Offenders Act, 1881)† because the grouping is repugnant, to the concept of a sovereign democratic republic', the Law Commission in its Fifth Report on British statutes applicable to India went into detail on scope of Article 372 of the Constitution and observed that the British statutes which were expressly applicable to India because India was a 'British possession' are still supposed to be applicable to India without any change in the context, therefore, it impressed upon the urgency as far back as 1957 to enact 'own laws on the subject-matter of those statutes where it is necessary to do so and take legislative action making it clear that these statutes are no longer applicable to India'. In pursuance of this recommendation exercise was undertaken and (The) British Statutes (Applicable to India) Repeal Act, 1960 (Act 57 of 1960) was enacted on December 26, 1960 repealing as many as 259 statutes mentioned in the Schedule. But the Admiralty jurisdiction remained untouched. In respect of Colonial Courts of Admiralty Act the recommendation of the Commission was that 'The necessary substantive provisions of the English Statute may be incorporated into our Act XVI of 1891 so as to make it the comprehensive Indian law relating to courts of admiralty'. Unfortunately nothing was done. Neither the law was made up-to-date and brought in line with international conventions on maritime law passed in 1952 etc. nor even the salient features of English law as amended by Administration of Justice Act, 1920, and 1956 were adopted. And rights and interests of citizen of the independent sovereign state continue to be governed by legislations enacted for colonies by the British Parliament. Various provisions in 1890 Act have been rendered not only anomalous but even derogatory to the sovereignty of the State. No further need be said except to express the hope that the unfortunate state of affairs shall be brought to an end at the earliest.

37 (1955) 1 SCR 280 : AIR 1954 SC 517 : 1954 Cri LJ 1337

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97. Be that as it may the intricate issue of Admiralty jurisdiction of the Andhra Pradesh High Court, a successor of High Court of Madras, to entertain a suit for arrest of a foreign ship for tort committed by the owner or master of the ship while carrying cargo outside India has to be decided on the law as it stands. Entire thrust of attack, against direction by the High Court for arrest of the foreign ship, was found on absence of any provision in 1861 Act empowering the High Court to exercise jurisdiction over any claim by the owner or consignee of India in respect of bill of lading of any goods carried out of any Indian port in any foreign ship. True Sections 5 to 8 and 10 to 11 conferring jurisdiction on High Court of Admiralty do not provide for it. Section 6 is confined to 'any claim by the owner or consignee or assignee of any Bill of Lading of any goods carried into any port in England or Wales in any ship [to be read as India by virtue of proviso to sub-section (3) of Section 2 of Colonial Courts of Admiralty Act, 1890*] for damage done to the goods or any part thereof by the Negligence or misconduct of or any breach of duty'. But this Act had no application till 1890. Before it the High Court of Madras enjoyed Admiralty jurisdiction under the Madras Supreme Court Act, then Letters Patent of 1862 and 1865. Finally it came to be governed by 1890 Act, enacted, to amend the law respecting to exercise of Admiralty jurisdiction in British possession. It was under sub-section (1) of Section 2 of this Act read with Section 2 of 1891 Act that the then Presidency High Courts, being courts of unlimited civil jurisdiction, were declared courts of Admiralty. Sub-section (2) of Section 2 of 1890 Act spelt out the jurisdiction of Admiralty courts. It reads as under:

> "(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

Each part of the sub-section is inclined towards expanding jurisdiction. It not only declared those over which the court exercise jurisdiction but it also amplified the manner and extent of exercise of jurisdiction. It was made co-extensive with the jurisdiction exercised by the High Court in England. Use of the expression, 'existing by virtue of any Statute or otherwise', widened the operative field extending the limit and authority to exercise jurisdiction beyond any existing statute, to custom, practice or in any other manner in which it could be exercised. It was recognition of wide jurisdiction exercised by the High Court of England.

98. What then was the jurisdiction that the Court of England exercised in 1890? The law of Admiralty was developed by English courts both as a

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matter of commercial expediency and due to equity and justice. Originally it was a part of common law jurisdiction, but the difficulty of territorial limitations, constraints of common law and the necessity to protect the rights and interests of its own citizens resulted in growth of maritime lien a concept distinct from common law or equitable lien as it represents a charge on maritime property of a nature unknown alike to the common law or equity. The Privy Council explained it as 'a claim or privilege upon a thing to be carried into effect by legal process'[18]. Law was shaped by exercise of discretion to what appeared just and proper in the circumstances of the case. Jurisdiction was assumed for injurious act done on high seas and the scope was extended, 'not only to British subjects but even to aliens'[38]. Maritime law has been exercised all over the world by Maritime powers. In England it was part of Municipal law but with rise of Britain as empire the law grew and it is this law, that is, 'Maritime Law that is administered by the Admiralty Court'[39]. From the Maritime law sprang the right known as Maritime lien ascribing personality to a ship for purposes of making good loss or damage done by it or its master or owner in tort or contract. In England it grew and was developed in course of which its scope was widened from damage done by a ship to claims of salvor, wages, bottomry, supply of necessaries and even to bills of lading. Its effect was to give the claimant a charge on *res* from the moment the lien arose which follows the *res* even if it changed hands. In other words a maritime lien represented a charge on the maritime property. The advantage which accrued to the maritime lienee was that he was provided with a security for his claim up to the value of the *res*. The essence of right was to identify the ship as wrongdoer and compel it by the arrest to make good the loss. Although the historical review in England dates back to the 14th Century but its statutory recognition was much later and 'maritime law came to jurisprudential maturity in the first half of the 19th Century'[40]. And the first statutory recognition of such right came in 1840 when the Admiralty Court Act of 1840 was enacted empowering the admiralty court to decide all questions as to the title or ownership of any ship or vessel or the procedure thereof remaining in the territory arising in any cause of possession, salvage, damage, wages or bottomry. By clause (6) of the Act jurisdiction was extended to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel or in the nature of towage or for necessaries supplied to any foreign ship or sea-going vessel and the payment thereof whether such ship or vessel may have been within the body of a country or upon the high seas at the time when the services were rendered or damage received or necessary furnished in respect of

38 *Hailey (The)*, LR 2 PC 193
39 *Halsbury's Laws of England*, 4th Edn., Vol. 1
40 *Maritime Liens* by D.R. Thomas

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such claims. But the most important Act was passed in 1861 which expanded power and jurisdiction of courts and held the field till it was replaced by Administration of Justice Act, 1920. The importance of the Act lay in introducing the statutory right to arrest the *res* on an action *in rem*. Section 35 of the 1861 Act provided that the jurisdiction by the High Court of Admiralty could be exercised either by proceedings *in rem* or proceedings *in personam*. "The essence of the rem in procedure is that '*res*' itself becomes, as one might say, the defendant, and ultimately the '*res*' the ship may be arrested by legal process and sold by the Court to meet the plaintiff's claim. The primary object, therefore, of the action *in rem* is to satisfy the claimant out of the *res*"[41]. If the 1840 Act was important for providing statutory basis for various types of claims then 1861 Act was a step forward in expanding the jurisdiction to claims of bill of lading. Section 6 of the Act was construed liberally so as to confer jurisdiction and the expression 'carried into any port was' was expanded to mean not only when the goods were actually carried but even if they were to be carried[42]. Further the section was interpreted as providing additional remedy for breach of contract[43]. By the Jurisdiction Act of 1873 the court of Admiralty was merged in High Court of Justice. Result was that it obtained jurisdiction over all maritime cases. Therefore what was covered by enactments could be taken cognisance of in the manner provided in the Act but there was no bar in respect of any cause of action which was otherwise cognizable and arose in Admiralty. Section 6 of 1861 Act was confined to claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales (to be read as India). But it did not debar any action or any claim by the owner or consignee or assignee of any bill of lading in respect of cargo carried out of the port. Even if there was no provision in 1861 Act, as such, the colonies could not be deprived under 1890 Act from exercising jurisdiction on those matters which were not provided by 1861 Act but could be exercised or were otherwise capable of being exercised by the High Court of England. 'The theory was that all matters arising outside the jurisdiction of common law i.e. outside the body of a country were inside the jurisdiction of Admiralty'[43]. 'That this Court had originally cognisance of all transaction civil and criminal, upon the high seas, in which its own subjects were concerned, is no subject of controversy'[44]. To urge, therefore, that the Admiralty court exercising jurisdiction under 1890 Act could not travel beyond 1861 Act would be going against

41 *Maritime Law* by Christopher Hill

42 *(The) Ironsides*, 167 ER 205
(The) St. Cloud, 167 ER 29
(The) Norway, 167 ER 347

43 Carter: *History of English Courts*

44 Lord Stowell in '*The Hercules*' 2 Dod. 371

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explicit language of the Statute. Even now, the Admiralty jurisdiction of the High Court of Justice in England is derived 'partly from Statute and partly from the inherent jurisdiction of Admiralty'[40]. Observations of Lord Diplock in *Jade (The)*[19] that Admiralty jurisdiction was statutory only have to be understood in the context they were made. By 1976 the statutory law on Admiralty had become quite comprehensive. Brother Thommen, J., has dealt with it in detail. Therefore those observations are not helpful in deciding the jurisdiction that was exercised by the High Court in England in 1890.

99. From what has been narrated above it is apparent that law of Admiralty progressed gradually from ordinary courts, to courts of Admiralty and ultimately to High Court commencing in commercial expediency, equity and justice and ending with statutory enactments covering entire field from collision on ships to cargo even. All this was existing when the 1890 Act was enacted. But the statutes of 1840 and 1861 were not exhaustive and English courts could take cognizance for various wrongs either in tort or contract. Therefore when colonial courts were conferred jurisdiction it was not restricted or confined to statutes, as the power was being conferred on High Courts which were, then and even now, not only courts of unlimited civil jurisdiction but higher courts possessed of every jurisdiction which was not expressly or impliedly conferred on other courts. The word 'otherwise' literally means in a different way. Effect of its use in 1890 Act in law, was to confer not only statutory jurisdiction possessed of by English courts but all that which was being exercised or was capable of being exercised either under custom and practice or for sake of equity and justice. In *Ironsides*[42] it was observed that Act of 1861 was passed not because the power or jurisdiction prior to it did not exist but no one ventured to exercise it. No such restriction was placed on exercise of power under 1890 Act. Rather the Act permitted exercise of it and that too to its fullest extent. This deliberate expansion of power and jurisdiction after existence of two statutes for nearly 30 years was founded on experience and necessity of arming the courts for every dispute that could arise relating to Admiralty jurisdiction, as the law on Admiralty was a growing law. Its development could not be stiffled by its very nature. It was with this intention that the Parliament used the word, 'otherwise' in 1890 Act. No word in a statute has to be construed as surplusage. Nor it can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. The two legislations of 1840 and 1861 took care of those actions which appeared to be settled till then. But they did not close the door for the growth of law. They were enacted to 'improve the Admiralty practice' as the jurisdiction which were conferred by the statutes were already being exercised. Action *in personam* or *rem* were not unknown. It was provided statutory base only. Statutes till 1920 in England were not

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creation of new rights but recognition of what was existing by practice or custom. It can thus be safely inferred that the jurisdiction to entertain a claim for tort or breach of contract by owner or master of ship while carrying cargo outside the port could be exercised or was capable of being exercised in 1890 by the High Court of England if occasion arose. The rationale of extending jurisdiction in Admiralty over cargo carried into the port has been existence of a right in owner or consignee arising out of contract or agreement entered between him and the master or owner of the ship. It was the enforcement of the right which was safeguarded by providing a remedy to arrest a ship if the goods were carried into any port. Same rationale applies to redress the owner of bill of lading if the master of the ship in breach of agreement entered into any port committed tort by acting against it in course of outward journey. Such breach would have been actionable and a suit could be filed in the court where agreement was entered. Basis of Maritime Law has been necessity to provide remedy for wrong done on high seas. Inclusion or expansion of jurisdiction was in relation to any cause which could have been cognisable under ordinary law. Bottomry, salvage, seaman wages or towage are all causes for which action could be brought in court of law but their enforcement was rendered illusory with disappearance of the person beyond territorial waters. To overcome this difficulty this jurisdiction was created making it actionable against person and finally the *res* itself. What was basic was the existence of cause of action, arising out of tort or contract in relation to the master or owner of the ship. Applying this test the cause of action arose in Indian territory and if the owner of the ship would have remained in this country a suit for breach of contract could have been filed. Therefore the owner of bill of lading was not precluded from approaching the Admiralty court for redress when the foreign ship which was guilty of violations appeared in Indian waters. On this construction the colonial courts could exercise the jurisdiction in respect of cargo going outside the port in exercise of jurisdiction under Act of 1890 not on statutes but as the High Court of England could exercise such power. Emphasis on absence of any instance in which English courts assumed jurisdiction in respect of goods carried out of English port was searching for existence of jurisdiction not in law but on precedent. Test is not whether the jurisdiction was ever exercised by English courts but whether it was capable of being exercised. If it could, then colonial courts were empowered to exercise it. Reliance was placed on *Yuri Maru*[7], a decision because of which the courts in Bombay and Calcutta got stuck, and could not see beyond 1861 Act. Distinction on facts, apart, the court was primarily concerned if the jurisdiction of colonial court expanded or diminuted by change of jurisdiction of High Court of England by different enactments passed from time to time. Incidentally it was also observed that there was conflict for long even in England on advantage of

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extending the process *in rem* and if a port of call could be benefited by existence of a power in all and sundry to arrest vessels found within its limits. This observation cannot be construed as determinative of limited jurisdiction possessed by the courts. No effort was made in the decision to adjudicate upon the impact of the expression or 'even otherwise'. Rather it turned on impossibility of automatic extension of jurisdiction of colonial court to exercise power under the English law enacted subsequently because of the use of word 'existing' in 1890 Act. Without entering into the controversy if 1980 Act was a legislation by reference or by incorporation and their consequences, on which arguments were addressed in extenso, suffice it to say that in absence of any consideration of the expression 'otherwise' this Court does not find any difficulty in construing the expression as permissive of jurisdiction. Legislations may create a right or it may recognise one founded on custom or practice. Admiralty statutes in England fell in the latter category. In such legislations the background of enactment, the necessity to codify it, the purpose sought to be achieved by it all become relevant. Admiralty jurisdiction in England was rooted in remote past. It developed and expanded with rise and growth of Britain and its recognition as a superior maritime power. Law and practice revolved round it. Right to proceed against owner of ship for wrongs done on high seas was accepted and followed. Statutes of 1840 and 1861 provided legislative base only. Viewed in the background of enactment of 1890 it would be too artificial to confine the exercise of power by the High Courts in Admiralty to what was contained in 1861 Act. Even otherwise, for deciding the jurisdiction exercised by the High Court in India founded on jurisdiction exercised by the High Court of England it is not necessary to be governed by the decision given by English courts. Law develops by pragmatic approach to problems arising under an Act and not by abdication or surrender. The 1890 Act is an unusual piece of legislation expansive in scope, wider in outlook, opening out the wings of jurisdiction rather than closing in. It's authority and power to exercise jurisdiction was linked with power exercised by the High Court in England, the width of which was not confined to statute but went deep into custom, practice, necessity, and even exigency.

100. Law of 1890 apart, can the Indian High Courts after 1950 be denied jurisdiction to arrest a foreign ship to satisfy the claim of owner of a bill of lading for cargo taken outside the country? Without entering into any comparative study of jurisdiction of High Court of England and the High Courts in our country the one basic difference that exists today is that the English courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under it Article 225 preserved the jurisdiction, including inherent jurisdiction,

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which existed on the date the Constitution came into force and Article 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but as repository of power to reach its arms to do justice. A citizen carrying on business which is a fundamental right cannot be rendered helpless on the premise that the jurisdiction of High Courts stood frozen either under statute of England or any custom or practice prevailing there or the High Court of England cannot exercise the jurisdiction. Brother T.K. Thommen, J., while dealing with right of *rem* and *in personam* has considered the justification for conferment of such right to a claimant in respect of a merchant ship travelling from port to port. Can it be successfully urged today that such a ship or its master and owner is immune from tort or breach of contract committed by him in respect of cargo taken out of port. A citizen of a colonial state may or may not but a citizen of an independent republic cannot be left high and dry. The construction of law has to be in consonance with sovereignty of a State. The apprehension that assumption of such jurisdiction would be on general attributes of sovereignty is not well founded. This coupled with expansive jurisdiction that the High Courts enjoyed in relation to Admiralty under 1890 Act preserved under Article 225 provided justification for direction to arrest the ship, for the tortious act done by master or owner of the ship in respect of goods carried outside the port even if there was no specific provision like Section 6 of the 1861 Act. Entertaining a claim arising out of breach of contract in relation to cargo taken out of any Indian port pertains to jurisdiction. It must arise out of statute. But the power to direct arrest of a ship in exercise of the jurisdiction is one relating to competency. The High Courts in India being courts of unlimited jurisdiction, repository of all judicial power under the Constitution except what is excluded are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction. Since the jurisdiction to entertain a suit on tort or contract in relation to cargo going out of the country in a ship is found to exist under the 1890 Act the High Court of Andhra Pradesh was competent to direct arrest of the foreign ship when it appeared in Indian waters. The High Court, therefore, rightly negatived the objection to issue direction to arrest the ship.

101. Necessity to add few words to the opinion of Brother Thommen, J., arose without narrating facts or extracting sections as they have been dealt in detail by him, both to impress upon the urgency of enacting up-to-date law on Admiralty and to express agreement only on scope of 1890 Act as well as the extensive jurisdiction enjoyed by High Courts after 1950.

ORDER

102. For the reasons stated by us in our separate but concurring judgments dated February 26, 1992, we dismiss the appeal arising from

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SLP (C) No. 10542 of 1985. The Transferred Case No. 27 of 1987 is returned to the Andhra Pradesh High Court to be heard and disposed of on the merits together with the 3rd defendant's appeal O.S.A.S.R. No. 39789 of 1988.

103. We make no order as to costs.

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(BEFORE B.P. JEEVAN REDDY AND N. VENKATACHALA, JJ.)

M/s KARAMCHAND PREMCHAND PVT. LTD. .. Appellant;

Versus

COMMISSIONER OF INCOME TAX, GUJARAT .. Respondent.

Civil Appeal No. 2230(NT) of 1977†, decided on February 25, 1993

Super Profits Tax Act, 1963 — Sch. II R. 1 — Provision or reserve — Amount set apart as contingent liability to taxation pursuant to notice issued under S. 23-A of Income Tax Act, 1922 in 1955-56 — Challenge to proceedings under S. 23-A allowed by High Court in May 1965 vacating the notice — In AY 1963-64 the amount so set apart by assessee claimed to be a reserve — Held, the amount was a provision, not reserve — Capital, computation of — Income Tax Act, 1922, S. 23-A

Held :

The provision made by the assessee in its books for meeting the anticipated liability of tax (under Section 23-A) was a provision and not a reserve. The assessee itself called it a provision. It did not call it a reserve nor was it set apart or appropriated as a reserve. This, however, does not mean that the description given or entries made by the assessee are conclusive. This is only to emphasise how the assessee understood the said item itself. (Para 7)

Metal Box Company of India Ltd. v. *Workmen*, AIR 1969 SC 612: (1969) 1 SCR 750: (1969) 73 ITR 53, *followed*

Vazir Sultan Tobacco Co. Ltd. v. *CIT*, (1981) 4 SCC 435: 1981 SCC (Tax) 342: (1981) 132 ITR 559, *relied on*

Appeal dismissed R-M/AI/11985/S

Advocates who appeared in this case :
A.K. Verma, Advocate for M/s JBD & Co., for the Appellant;
G.C. Sharma, Senior Advocate (E.U. Eradi and T.R. Talwar, Advocates, with him) for the Respondent.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J.— This appeal is preferred by the assessee against the judgment of the Gujarat High Court answering the question, referred at the instance of Revenue, against the assessee. The following

† From the Judgment and Order dated December 13, 1976 of the Gujarat High Court in Income Tax Reference No. 36 of 1972

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that the direction to credit the firm had in fact been carried out. As he failed to produce such evidence they disallowed the claim. At the hearing before their Lordships there was the same absence of evidence in support of these two items as there was before the High Court. In these circumstances it is plain that they cannot be allowed. The fourth item in dispute (No. 20 in the accounts) is a sum of Rs. 600 which the defendant alleges he paid on behalf of the firm, but which the plaintiff says ought not to be allowed to the defendant. The fact that the money was properly so paid was proved by the defendant. His evidence as to this was not contradicted. The High Court accordingly allowed the item to be credited to the defendant. They were clearly right in so doing. The only other question arising on the plaintiff's appeal is the question of interest. The High Court, reversing in this respect the decision of the Subordinate Judge, held that the plaintiff was entitled to be paid interest on the sum found due to him at the rate of 6 per cent. per annum from the date of the institution of the suit until realization. That interest should only run as from the date mentioned, and not from the date of dissolution of the partnership, is now conceded by the plaintiff. But he asks that the rate should be 9 per cent. per annum. His claim to this rate is based solely upon the fact that on one occasion during the abortive proceedings that took place for the first seven and a half years after the institution of the suit the defendant agreed to pay interest at such rate in order to obtain a stay of execution of a decree pending an appeal. But this fact is plainly immaterial. The rate of interest to be allowed was entirely a matter within the discretion of the Court —a discretion that in the present case seems to have been wisely exercised.

Upon the cross-appeal of the defendant there are only two questions that call for a decision. The first is as to the scope of the enquiries directed by the preliminary decree of the Subordinate Judge of 18th October 1918. It is contended by the defendant that the Subordinate Judge was right in holding that the inquiries were limited to the two matters mentioned in his order of 21st June 1928. On this point the learned Judge has been overruled by the High Court, who have held that the inquiries and accounts should cover all the transactions of the partnership. In this they were unquestionably right. In the first place the preliminary decree does not in terms direct any inquiries or accounts at all, limited or otherwise. In the next place, even if the decree is to be read as impliedly directing accounts and inquiries, their Lordships can find no reason whatsoever why they should be anything less than the accounts and inquiries that are usual in a partnership action. Finally, the decree was made at a time when, owing to the fault of the plaintiff, the suit was being treated as confined to the business carried on at Chappanwali. After the remand made by the District Judge on 20th December 1923 the scope of the accounts and inquiries was necessarily extended to cover the whole field of the partnership transactions, even if it had been limited before.

The other question raised by the cross-appeal relates to interest, the defendant contending that no interest at all should be awarded to the plaintiff. In support of this contention the defendant relies upon the decision of this board in 57 I. A. 245.[1] But that case was concerned with an ordinary suit for the dissolution and the winding up of the affairs of a going partnership. The present case is widely different. It is a suit brought nearly two years after the dissolution of a partnership against the former managing partner, who has been retaining in his hands and for his own purposes assets of the firm without accounting for them or their proceeds to his co-partner. In such a case interest is properly chargeable against the accounting defendant even though he has not acted fraudulently, as was held by this board in 42 Cal. 914.[2] In the result and for the reasons given, their Lordships are of opinion that both the appeal and the cross-appeal fail and should be dismissed. They will humbly advise His Majesty accordingly. In strictness both appeals should be dismissed with costs. But the costs occasioned by the cross-appeal must be considerably less than those occasioned by the appeal. In order therefore to avoid a double and a somewhat difficult taxation of costs with a set-off, their Lordships think that justice will best be done by ordering the plaintiff to pay one-half of the defendant's costs of the two appeals.

K.S./R.K. *Appeals dismissed.*

Solicitors for Appellant—*Hy. S. L. Polak & Co.*

Solicitors for Respondent — *T. L. Wilson & Co.*

1. ('30) 17 A.I.R. 1930 P.C. 185 : 124 I.C. 891 : 24 S. L. R. 328 : 57 I. A. 245 : 58 Cal. 208 (P. C.), Suleman v. Abdul Latif.

2. ('15) 2 A.I.R. 1915 P. C. 116 : 28 I. C. 710 : 42 Cal. 914 : 42 I. A. 91 (P.C.), Ahmed Musaji Saleji v. Hashim Ebrahim Saleji.

A. I. R. (29) 1942 Privy Council 64 @ 66

(From Lahore:

('38) 25 A. I. R. 1938 Lah. 539)

24th June 1942

LORD THANKERTON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Lala Hem Chand — Appellant

v.

Lala Pearey Lal and others — Respondents.

Privy Council Appeal No. 87 of 1939.

(a) Practice—Pleadings — Points arising on evidence led by parties but not raised in pleadings or issues — Procedure of allowing parties to adduce evidence on points is irregular and should not be allowed without amending pleadings and raising issues.

The procedure in allowing the parties to adduce evidence on points which arose on the evidence led by the parties but were not raised in the pleadings or issues is irregular and should not be allowed without amending the pleadings and raising the necessary issues. [P 66*b*,*c*]

C. P. C. —

('40) Chitaley, O. 8, R. 2 N. 1.

('41) Mulla, Page 618 Pt. (w).

(b) Ejectment — Suit for — Plaintiff can recover only on strength of his own title and not by weakness of defendant's title.

In an action for ejectment the plaintiff can recover only by the strength of his own title, and not by the weakness of that of the defendant. [P 66*f*]

(c) Adverse possession—Trust void — Trustee's possession is adverse to true owner — Trustee acquires good title by 12 years possession.

Where a trustee has been in possession for upwards of 12 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. [P 66*g*]

The property in respect of which the direction in the will creating the charitable trust is void cannot be said to have "vested in trust for a specific purpose" and therefore S. 10, Limitation Act, can have no application and the executor must be taken to have held the property adversely to the true owner and if he so holds it for the statutory period he would acquire a good title to it. The fact that the house tax receipts were issued by the Municipality in favour of the deceased testator is no proof that the executor was not holding the property adversely to the heir. [P 66*h*; P 67*a*,*b*]

Limitation Act —
('42) Chitaley, Arts. 142 and 144 N. 46.
('38) Rustomji, Page 189 Pts. 1 and 2.

(d) Hindu law—Charitable endowment — No writing is necessary to create endowment except where it is created by will in which case will must be in writing and attested by two witnesses if case is governed by S. 57, Succession Act.

Under the Hindu law the absence of a deed creating a charitable 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 S. 57, Succession Act. [P 67*b*]

Hindu law —
('40) Mulla, Page 474 Pt. (h).
('38) Mayne, Page 923 Pt. (u).

(e) Limitation Act (1908), S. 28 — Owner of property encroached upon suffering his right to be barred by limitation — Owner's title is extinguished in favour of party in possession.

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. Consequently where the executor holds the property adversely to the heir for upwards of 12 years on behalf of the charity for which it was dedicated, the title to it, acquired by prescription, becomes vested in the charity and that of the heir if he had any, becomes extinguished by operation of S. 28. [P 67*d*,*e*]

Limitation Act —
('42) Chitaley, S. 28 N. 6 Pts. 1 and 2.
('38) Rustomji, Page 516 Note "Scope of section."

C. S. Rewcastle and S. Hyam — for Appellant.

J. M. Parikh — for Respondents.

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Lahore dated 27th January 1938, which reversed a decree of the Court of the Subordinate Judge of Delhi dated 30th November 1936, in favour of the defendant—the appellant before the Board. The appeal arises out a suit instituted by the plaintiffs, on behalf of the members of the brotherhood of the Digambar Jains, for recovery of possession from the defendant of a house described as "Jain Dharmasala," 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 is whether the plaintiffs have established their title to, and right to recover possession of, the suit property from the defendant. The parties to the suit are Jains, and are 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 Dharmasala, that it was used as such and managed by him during his lifetime, that after his death in 1909 it remained under the management of his son, Ramchand, plaintiff 3, till it was handed over to the Jain Orphanage Society of Delhi, that the defendant 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 defendant traversed the allegations of the plaint, repudiated the dedication of the property as "Dharmasala," and pleaded as material facts that the house was owned and possessed "by him." He also questioned the right of the plaintiffs 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 23rd March 1892. After appointing two executors, Lala Janaki Das (mentioned in the plaint) and Munshi Ramji Das, and setting out the details of his moveable 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 :

"1. 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. 2 and 3 of the will the testator made provisions in favour of his wife, Mt. Durgi Devi, and Mt. Bhugli, widow of his deceased son. In para. 4, 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."

It may be mentioned that the testator did not carry out his intention of creating a charitable trust. About a week before his death, by a codicil dated 30th April 1892, he amended the disposition for charity of the residue made in para. 4 of the will as follows :

". . . . I now . . . . amend the said wording of para. 4 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 to 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 7th May 1892, the testator died leaving surviving him his widow Mt. Durgi, and Mt. Bhugli, the widow of his predeceased son Peari Lal, who died on 21st February 1892. On 19th November the executor Lala Janaki Das obtained probate of the wills. In 1894, while Mt. Durgi, the widow of Sri Ram, was still living Mt. Bhugli, the widow of Peari Lal, adopted Hemchand, the defen-

dant, who was then said to be seven or eight years old. The factum of adoption was at first disputed by the respondents, but it is admitted before the Board. Its validity, however, has been questioned throughout. On 3rd April 1907, Janaki Das purchased from one Badri Das, the house in suit. The sale deed states that ". . . the vendee has purchased the property with the money left by Babu Sri Ram Vakil deceased for purposes of building a Dharmasala. . ." It is common ground that the property was purchased by Lala Janaki Das out of the estate left by Babu Sri Ram. The defendant was present when the document was registered. After purchase, the house was completely renovated in 1908. The defendant stated that "he looked to the building of the house." It bears on one of its walls the inscription "Dharmasala Babu Sri Ram Vakil Jaini 1909" written in Urdu and Hindi. This was known to the defendant. Lala Janaki Das died in 1909.

It will be observed that important facts forming the basis of the case as presented to the lower Courts for decision, viz., 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 defendant claimed that he was adopted by the widow of Peari Lal—a claim disputed by the plaintiffs but important to the defendant, 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 plaintiffs contended that the suit property was dedicated as a "Dharmasala" by Janaki Das, that the title to it belonged to the Digambar Jain Brotherhood, that the defendant's adoption by Mt. Bhugli at the time when the property vested in Mt. 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 Lala Hemchand (i. e., the defendant), 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 Paharganj, is estopped from denying its validity.

On behalf of the defendant, it was contended that the provisions of the will relating to the creation of the charity are 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 "Dharmasala" was immaterial, that his adoption was valid under the Hindu law, and that he is therefore entitled to the property as Babu Ram's legal heir. It was also contended that the defendant 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 defendant, and dismissed the plaintiffs' suit, holding that the defendant is in "possession" and cannot 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 defendant was not estopped from contesting the validity of the trust. On appeal by the plaintiffs, the learned Judges of the High Court held that the adoption of the defendant was invalid under Hindu law, inasmuch as the adoptive mother, Mt. Bhugli, could not by her adoption divest Mt. Durgi of the estate that she held, and that the defendant's claim cannot be maintained for the reasons, that he was present when the property was purchased with the avowed object of building a Dharmasala, that it was with his knowledge and consent that the building was consecrated as a Dharmasala, 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 defendant 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 plaintiffs' suit was decreed.

The law is well settled that in an action for 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 12 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 12 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. Section 10, Limitation Act (Act 9 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, 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 "Dharmasala," and that Lala Janaki Das and Ramchand have been in adverse possession of it for upwards of 12 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, 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 Edn., 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 "Dharmasala." 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 defendant came into possession. The evidence shows further, that the defendant 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 "Dharmasala 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 Dharmasala 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 20 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 11 M. I. A. 345[1] at p. 361, 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." Section 28, 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 12 years on behalf of the charity 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 defendant, if he had any, has become extinguished by operation of S. 28, Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the defendant 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, 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 plaintiffs have established their title to the suit property by adverse possession for upwards of 12 years before the defendant obtained possession of it; and since the suit was brought in January, 1933, within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, 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 defendant's adoption by Mt. 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.

G.N./R.K. *Appeal dismissed.*

Solicitors for Appellant — *Barrow Rogers & Nevill.*

Solicitors for Respondents — *T. L. Wilson & Co.*

1. ('66) 11 M.I.A. 345 : 7 W.R. 21 : 1 Suther. 676: 2 Sar. 284 (P.C.), Gunga Gobindas Mundal v. The Collector of the Twenty Four Pergunnahs.

** A. I. R. (29) 1942 Privy Council 67

(From Allahabad)

15th June 1942

LORD ATKIN, LORD ROMER AND SIR MADHAVAN NAIR.

Bank of Upper India, Ltd. — Appellant

v.

Robert Hercules Skinner and others — Respondents.

Privy Council Appeal No. 45 of 1941, Allahabad Appeals Nos. 30 to 34 of 1936.

(a) Transfer of Property Act (1882), S. 54 — Though Act does not apply to Punjab document transferring immovable property of value of Rs. 100 or upwards must be registered.

Though the Transfer of Property Act does not apply to the Punjab a document intended to affect transfer of immovable property of the value of Rs. 100 or upwards must be registered. [P 68c,d]

T. P. Act —

('42) Chitaley, S. 54, N. 1 Pt. 10.

('36) Mulla, Page 276 Pt. (x).

('34) Mitra, Page 252, N. 287.

(b) Limitation Act (1908), S. 19 — Scope and applicability — Acknowledgment by transferor given after transfer of title does not bind transferee.

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Lord Thankerton.—The present appeal raises a question with regard to the division of an estate in Ceylon which carried both tea and rubber on it and which had been held jointly by a certain number of people. The action is one for partition under the Ceylon Partition Ordinance and proceeded according to the ordinary procedure beginning with an interlocutory decree fixing the shares of the parties and remitting the matter to a Commissioner to carry out the actual partition and suggest the division. A motion by the present appellants that a sale should be ordered of the whole property was rejected and the partition was ordered in its place. A report was made by the Commissioner, objections were taken to it by the present appellants, and these were disposed of by the learned District Judge. They were all disposed of and the only alteration he made in the Commissioner's report was a modification, about which there is no dispute, to provide an adequate water supply for one of the lots. The matter was then appealed to the Supreme Court who affirmed the conclusion of the District Judge without any difficulty. It is now sought to bring this matter before this Board by way of the present appeal. It appears to their Lordships that this appeal falls directly within the decision which was given in 71 I.A. 149,[1] for these reasons: The basis of the Commissioner's valuation has never been attacked in this case, but the passage founded on by Mr. Barton in the judgment of the District Judge contains the phrase "dead investment."

In their Lordships' opinion that passage shows clearly that the learned District Judge accepted the Rs. 44,000,00 as a valuation on the basis of the factory being for the time a dead investment owing to the tea restrictions. Their Lordships in any case, in the absence of an attack on the basis of the valuation, which would raise a question of principle, are bound to assume that the valuer, valuing at the time when the tea restrictions were on, took those into account and took their effect into account in fixing his valuation. The only other question Mr. Barton raised was with regard to the more convenient allocation, as it may be called, that it was sought to obtain before the District Judge, because it was said that the lots which the parties would have wished to have allotted would be more valuable. That is an ordinary matter which arises in every distribution of assets among partners. It appears to their Lordships that there is no ground for distinction between the present case and a case of ordinary dissolution of partnership, and distribution of assets and accounting, as was the case in 71 I. A. 149.[1] Accordingly, their Lordships are bound to come to the conclusion that the subject of the present appeal is not a proper subject for their Lordships' Board to consider, and they will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondents' cost.

D.S./D.H. *Appeal dismissed.*

Solicitors for Appellant — *Peake & Co.*
Solicitors for Respondent —
Lee and Pembertons.

1. ('44) 31 A. I. R. 1944 P. C. 87 : 71 I. A. 149 : I.L.R. (1945) Kar. P. C. 110: 216 I.C. 178 (P.C.).

[Case No. 23.]

A. I. R. (33) 1946 Privy Council 59

(From Allahabad)

12th December 1945

LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT

Jagdish Narain

v.

Nawab Said Ahmed Khan.

Privy Council Appeal No. 72 of 1944; Allahabad Appeal No. 21 of 1941.

(a) Limitation Act (1908), Art. 144—Starting point of limitation — Grant — Each heir of grantee to hold for life—On death of heir, next heir to take as such heir and not as predecessor's heir—Limitation starts against heir when his title accrues on previous heir's death.

Where a grant is made enjoyable in perpetuity generation after generation for the maintenance and help of the heirs of the grantee and each heir is to hold for life only and on the death of an heir the next heir of the grantee is to take as such heir and not as heir of his predecessor, the limitation would start to run against an heir from the date when his title accrues on the death of the previous heir. [P 60 C 1, 2]

Limitation Act —
('42) Chitaley, Arts. 142 and 144, N. 90.

(b) Pleadings—Suit in ejectment—Defendant need not plead defects in plaintiff's title — Denial of title in written statement is sufficient — Defect being disclosed, defendant can avail himself of same.

Where a plaintiff sues in ejectment, he can succeed on the strength of his own title. There is no obligation upon the defendant to plead possible defects in the plaintiff's title which might manifest themselves when the title is disclosed. It is sufficient that in the written statement the defendant denies the plaintiff's title, and under this plea he can avail himself of any defect which such title discloses. [P 61 C 1, 2]

C. P. C. —
('44) Chitaley, O. 8, R. 3, N. 1.
('41) Mulla. Page 618. Note "Deal specifically

(c) Evidence—Burden of proof—Inference—Suit in ejectment — Plaintiff unable to prove title through lapse of time—Lapse of time not due to default of defendant but due to default of plaintiff — Inference in favour of plaintiff's title cannot be drawn.

Under a perpetual grant of lands made in favour of the heirs of *A*, each heir was to hold for life only and on the death of an heir the next heir of *A* was to take as such heir and not as heir of his predecessor. *M* was great niece of *A*. In a suit for ejectment by the plaintiffs who were the heirs of *M* it was alleged by them in support of their title that on *A's* death in 1842 *M* as *A's* heir entered into possession of his estate. The allegation was disputed by the defendants who were the successors of auction-purchasers of the property sold in execution of a mortgage decree passed against *M*. The evidence produced by the plaintiffs did not prove that *M* was an heir of *A*. It was argued that at such a distance of time reasonable inferences should be drawn in favour of the plaintiffs :

Held that though lapse of time might have prejudiced the chances of the plaintiffs in proving their case, it might well also have prejudiced the defendants in resisting the claim, and the lapse of time was certainly not due to any default on the part of the defendants or their predecessors. The appellants were not so free from criticism. The son of *M* 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 who were his sons themselves did nothing until the expiration of nearly 12 years from the date when their alleged title accrued. There was, therefore, nothing in the circumstances of the case which would justify drawing any inference which might relieve the plaintiffs of any part of the burden of proving their title. [P 62 C 2; P 63 C 1]

Sir Thomas Strangman and S. P. Khambatta — for Appellants.

C. S. Rewcastle and Robert Ritson — for Respondents.

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 Saraya 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.

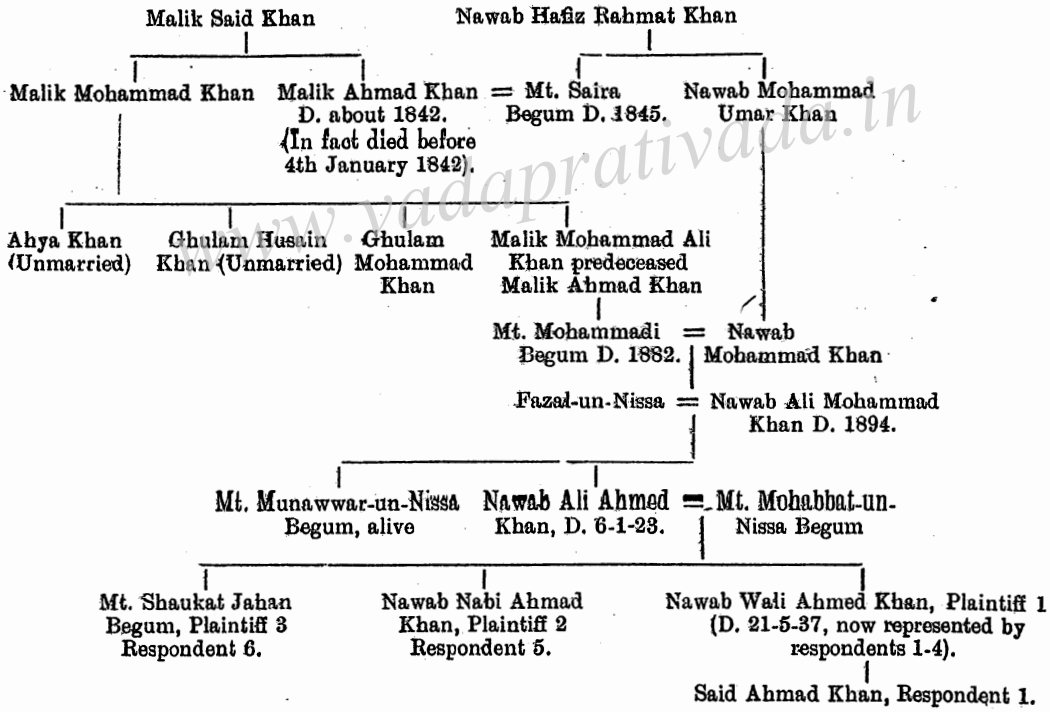
In appeal the High Court agreed with all the findings of the lower Court except with regard to the heirship of Mohammadi Begum. The Court held that Sayara Begum, as widow of Ahmad Khan, was one of his heirs according to Muhammadan law and inherited one-fourth of his property, and that it was not proved 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 ac-

cording 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 Ahmad 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.

V.R./D.H. *Appeal allowed.*

Solicitors for Appellants — *T. L. Wilson & Co.*

Solicitors for Respondents — *Douglas Grant & Dold.*

[Case No. 24.]

A. I. R. (33) 1946 Privy Council 68

(From Ceylon)

19th December 1945

VISCOUNT SIMON, LORD THANKERTON AND SIR JOHN BEAUMONT

E. L. Ebrahim Lebbe Marikar — *Appellant*

v.

Austin De Mel Ltd. — *Respondent.*

Privy Council Appeal No. 8 of 1945.

(a) Principal and Agent—Colombo market—Rubber coupon contracts — Broker — Buyer wrongfully refusing to accept delivery—Broker has right to recover damages — Contract Act (1872), S. 230.

Under the usage in Colombo Market relating to Rubber coupon contracts, the broker's note never discloses the name of the other party to the contract, each party is entitled to look to the broker for performance of the contract; and as far as the buyer is concerned the broker is liable to tender and deliver the coupons irrespective of whether the seller has tendered or not. Where in a suit a broker claimed in reconvention to recover damages against the buyer for breach of a contract of purchase of coupons and the District Judge had dismissed the claim on the ground that as the broker entered into the contract with the buyer as an agent he could not sue upon it.

Held that under the agreed usage of the market the broker was liable to deliver to the buyer the coupons sold whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery was accepted. In the event of the buyer accepting delivery and refusing payment it is plain that the broker must have a right to enforce the liability. It followed logically from this position that if the buyer wrongfully refuses to accept delivery the broker is the person to recover damages for the breach of the contract. The contract imposed upon the broker obligations far more onerous than would normally rest upon an agent. The broker in making payment to the seller and delivery to the buyer was required to act as a principal and these obligations conferred corresponding rights. There was no obligation in law to parties entering into a contract of this nature and the broker was not to be deprived of his rights because they would not have arisen under a normal contract of agency.

[P 65 C 1, 2]

(b) Contract Act (1872), S. 30 — Colombo market—Rubber coupon contracts—Party entitled to delivery—Contract is not wagering.

Where under a contract for purchase of rubber coupons the buyer was entitled to delivery of coupons purchased and formal tender of coupons purchased was in fact offered to him :

Held that the contract was not a wagering contract. [P 64 C 2]

F. A. Sellers and A. J. Hodson — for Appellant.

W. N. Mcnair and A. A. Mocatta — for Respondent.

Sir John Beaumont. — This is an appeal from a judgment and decree of the