IN THE SUPR.EMECOURT O'FINDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 ,OF 2010

IN TH·E MATTER OF: -

M. Siddiq (D) Thr. Lrs. — Appellant

VERSUS

Mahant Suresh Das &Ors. etc. etc. — Respondents

AND
OTHER CONNECTED CIVIL APPEALS

PRELIMINARY SUBMISSION ON CASES

BY

DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCA1-E-ON-RECORD: EJAZ MAQBOOL

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J. C.* 1921 July 5.

VIDYA VARUTHI THIRTHA — APPELLANT ;

AND

BALUSAMI AYYAR AND OTHERS — RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Religious Endowment—Math—Relation of Heads and Managers of Religious Institutions to Property—Alienation by Head of Math—"Trustee"—Indian Limitation Act (IX. of 1908), *sch. I., arts.* 134, 144.

The endowments of a Hindu math are not "conveyed in trust," nor is the head of the math a "trustee" with regard to them, save as to specific property proved to have been vested in him for a specific object.

Consequently, art. 134 of Sch. I. of the Indian Limitation Act, 1908, which contains the expressions above quoted, does not apply where the head of a math has granted a permanent lease of part of its property not proved to be vested in him subject to a specific trust.

Semble, the same rule applies to the endowments of Mahommedan religious institutions, and to alienations made by the saijadanishin or mutawalli,

Ram Parkash Das v. Anand Das (1916) L. R. 43 I. A. 73 explained.

Kailasam Pillai v. *Nataraja Thambiran* (1909) I. L. R. 33 M. 265 (F. B.) and *Muthusamier v. Sreemethanithi* (1913) I. L. R. 38 M. 356 approved.

Behari Lall v. Muhammad Muttaki (1898) I. L. R. 20 A. 482, and *Dattagiri* v. *Dattatraya* (1902) I. L. R. 27 B. 363, disapproved,

Nilmony Singh v. Jagabandhu Roy (1896) I. L. R. 23 C. 536 commented on,

Judgment of the High Court reversed.

Except for unavoidable necessity, the head of a math cannot create any interest in the math property to endure beyond his life. A lessee, however, has not adverse possession under art. 144 of the schedule above named until the death of the head who granted the lease. If the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him, and there is no adverse possession until his death.

APPEAL (No. 48 of 1919) from a judgment and decree of the High Court (October 19, 1916) reversing a decree of the temporary Subordinate Judge of Ramnad.

The suit was instituted in 1913 by the present respondents for possession of land in Madura forming part of the endowments of a math situated in Mysore State. The defendants were the present appellant, the head of the math (referred to as the pandara sannadhi or matathipathi), certain lessees

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW, and MR. AMEER ALI.

from. him, who were in possession, and others. The plaintiffs claimed under a permanent lease granted to them in 1891 by a former head of the math. They also claimed that they had acquired a good title under the Indian Limitation Act; they relied on arts. 134 and 144 of the Schedule and s, 28. (1)

The facts are stated at the beginning of the judgment of the Judioial Committee.

Both Courts in India held that, the lease of .1891 was not made for necessity, arid that the land in suit was part of the general endowment of the math, not being subject to any speoinc trust. The Bubordinate Judge dismissed the suit. He held that the head of the math was not a "trustee" of its endowed property, and that consequently art. 134 of Soh. I: did not apply; hewas.also of opinion that there had not been vadverse possession so as. to bring art. 144 into operation: The High Court allowed an appeal. A decree was made declaring that the first plaintiff was a permanent lessee of the land in suit. and for possession and mesne profits, The judgment was delivered by Burn J. (Sudasiva Ayya» J. agreeing), The learned. judge was of opinion that expressions in the judgment of the Board in *Ram Parkash Das v. Anand Das* (2) constrained the Court to hold that the head of the math was a trustee of the properties, and that consequently art. 134 applied. The appeal to the HighCourt is reported at I, L, R, 40 M. 745,

1921. Feb. 18, 21. *Clauson K.C.* and *Ke'nworthy Brouin* for the appellant. Both Courts in India found that the permanent lease was not made for necessity, and that the property in suit was not subject to' any specific trust, but formed part of the general endowment of the math. Art, 134

(1) Indian Limitation Act" 1908, Soh. I., art. 134, provides that for a suit "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred' by the trustee or mortgagee for a valuable consideration," the period of limitation shall be 12 years from "the date of the transfer."

By s, 28: "At the determination of the period hereby limited to any person for instltut.ing a suit for possession of any property, his right to such . property shall be extdnguished."

(2) (1916) L. R. 43 1. A. 73, 76, 90.

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does 110t apply. The head of a math is not a "trustee" of its general endowments: *Kailasam Pillai* v, *Nataraja Thambirom;* (1) The Board gave no decision to the oo;ntrary.in *R,am Parkash Das* v. *Anand Das.* (2) The expressions in the judgment upon which the High Court based its decision were intended to convey merely that the head of a math was in a fiduciary position with regard to its property, not that, he was a "trustee" *in* the full sense in which that word is used in English law. The terms of art. 134 show that the word is there used in the latter sense; and s. 10 of the Actmakes that clear. The case in the oourse of which the judgment of the Full Bench in *Kailasam. Pillai* v. *Naiaraqa Thambiran* (1) was rendered, came before the Board on appeal in *Nataraja Tluimbiram* v, *Kailasam Pillai.* (3) Although the decision of the Full Bench was not approved in terms, the decree based upon that decision was affirmed. The respondents acquired no title under art. 144 by adverse possession. When the head of a math grants a permanent lease there is no adverse possession during his life: *1J1uihusamie:* v. *Sreemethanithi.* (4) Consent to, the lessee's possession by the succeeding head must be referred to a new lease; consequently there was no adverse possession during the successor's lifetime.

De Gl'uyther K.C. and *Dube* for the respondents. The land in suit was part of an inam for religious and charitable purposes, as appears from the Inam Register. It was land of which the head was "trustee" within the meaning of .art. 134. Every High Court, with the exception of that at Madras, has held that art. 134 applies to land so held: *Douaqiri* v, *Dauatraqo.* (5); *Behari Lall,* v. *M'uhoanmad Muttaki* (6); *Nilmony Singh v. Jaqabaoulhni Roy* (7);' *Rameslnoar J.11all·a* v. *Jiu Thakur.* (8) The decision of the Madras Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran* (1) d.id not relate to art. 134. It was an affirmanc'e on .consideration

(1) I., L. R. ,33 M. 265.
(2) (1916) L. R. 43 1. R,. 73, 76, 90.
(3) (1920) L. R,. 48 1. A. 1.
(4) I. L. R. 38 M. 356.
(5) 1. L,. R. 27 B. 363.
(6) I. L. R·. 20 A. 482.
(7) I. L; R. 23 C. 536.
(8) I. L. ·R. 43 C. 34.

of *Vidyapurna v. Vidyanidhi.* (1) In art. 134 the Indian Legislature used. the words "trust" and "trustee," not in a technical sense, but to cover cases in which a person is charged with the application of property in a particular manner; the Religious Endowment Act (XX. of 1863), s: 14, uses "trustee" in relation to the head of a math. If, however, art. 134 applies only to' a transfer by a "trustee" 'in the teohnical sense in which the word is used. in English law, and if the dist.incbion drawn in *Kailasarn. Pillai'« Case* (2) is correct" then the property in suit was held, on a specific. trust. 'I'he evidence shows that the property was granted for the support of the titular deity; the title was confirmed under r. 3, 01. 1, of the Inam Rules (S. O. Bd. of Rev., 1859), Further, the respondents acquired a good title under art. 144. It is settled law that the holder of a permanent lease has adverse possession; Mitra's Law of Limitation, pp. 160, 161, and cases there referred to. Under s. 14 of Act XX. of 1863 prooeedings could have been taken both in the life of, the grantor and after to set aside the alienation.

Clauson K.C. in reply. Art. 144 was not relied all in the High Court; the case of the appellants being not adverse possession, but that the appellant had recognized the tenancy and was estopped.

July 5. The judgment of their Lordships was delivered by

MR. AMEER ALI. The suit that has given rise to this appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an olel math situated within the Mysore State. The origin, development, and raison d'être of these maths have .been discussed in a number of cases decided in the Madras High Court to some of which their Lordships propose to refer in the course of this judgment. In their. general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear .different designations in respect of the rights and incidents attached to the office; the difference

(1) (1904) I, L. R. 27 M. 435. (2) 1. L. R. 33 M. 265,

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arises from the customs and usages of each institutiqn. The superior of this particular math has been called in these proceedings matathipathi and sometimes pandara sannadhi, which their Lordships understand connote the same idea of headship. At the time this action was brought, the 26th defendant held the office of matathipathe. He has eince died and the present appellant is the head of the institution. In 1891 one Srinivasa was the matathipathi and he on March 17, of that year granted, to the 2nd plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit rent of Rs.24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by orie Samudra, who held the office until 1906. On his death the now deceased defendant No. 26 became the head. In 1902 the 2nd plaintiff sub-leased the lands to the 1st and 21d defendants for a period of tell years.

Since *1905* the math has been under the management of the Mysore State under a power of attorney, executed at first by the matathipathe Samudra and afterwards by his successor, in favour of the Dewan and his successors in office. About the same time the 2nd plaintiff conjointly with his son (the 3rd plaintiff) assigned their right and interest in the lands in suit to the 1st plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was, Dilly in 1908 that the representative of the Dewan acting under the power granted by the matathipathe became aware of the transaction of 1891 under which the plaintiffs claim title. The sublease created in 1902 by the 2nd plaintiff in favour of the 1st and 2nd defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Dewan. They are now in possession of the lands in suit under this lease. The plaintiffs are and were at the time they brought their suit on March 5, 1913, in the Court of the Subordinate Judge of Madura, admittedly out of possession. The present action is for declaration of title and for ejectment and possession, principally directed against the matathipathi as the head of the math and the 1st and 2nd defendants lessees holding possessions under him. The

other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants.

The plaintiffs base their title on two grounds: First, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors; and secondly, that even if the lease was not valid they had acquired a title under the Indian Limitation Act.

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under art. 134 of Sch. I. of the Indian Limitation Act (IX. of 1908) they have acquired a good title against the math. The mathathipathi controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the math; he further denied that he and his predecessors were "trustees" of the math or that the 2nd plaintiff or his assignee had acquired any right to the math lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues.

The Subordinate Judge, after giving the substance of the 2nd plaintiff's evidence and of the other witnesses, formulates the position which the pleader took up. "He contends," says the learned judge, "that the plaint property is trust property set apart for the worship of the titular deity of the math, that the head of the math is a trustee merely, and that the permanent lease to 2nd plaintiff is an alienation of math property and that 26th defendant at this distance of time could possibly have no right to such property. The alienation being ab initio void, the 26th defendant had no right to plaint property as he succeeded only in 1906 and 1st plaintiff had perfected his title by adverse possession for over twelve years."

The Subordinate Judge negatived that contention; he held upon the admissions of the 2nd plaintiff that the property in suit was "ordinary math property" and was not set apart on any specific trust; that the head of the math was not a

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"bare trustee," as it) was admitted that the income was at his absolute disposal and that "none had a right to question him about it." He found also that the 2nd plaintiff took the lease with full knowledge of the character of the endowment and had learnt on inquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the 26th defendant as the plaintiffs contended, the Subordinate Judge held: "In fact the Ist plaintiff never paid money as rent and the 26th defendant or his agent never neoepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these defendants are not estopped from denying plaintiff's title. I find this issue against plaintiffs.' He accordingly dismissed the suit save and except in respect of a money claim against the Ist and 2nd defendants,

The plaintiffs appealed to the High Court of Madras, which reversed the trial judge's order and decreed the claim. The learned judges do not negative the finding of the first Court that the 2nd plaintiff took the lease with notice. But they considered that the matter in dispute fell within art. 134 referred to above. They summed up their conclusion in the following words: "that the lessor intended to grant.. and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of art. 134 have been complied with."

The findings of the learned judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They cleal first with, the question of justifiable necessity, which they decide against the plaintiffs. They say "there is no doubt that the head of a math Cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent, for all tinle." And then add: "'There is no allegation, much less proof, of any such necessity. The first contention must be rejected." They then proceed to discuss the nature of the endowment in question and the position of its head.. -Theirfinding on this point is important;

they say as follows: "In connection with the second point a question arises as to the nature of the endowment and the position of the head of the math in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, i.e., for the worship of Gopalakrishnaswami, who is described by defendants' 1st witness as the 'titular deity of the math.' The evidence does not support this contention and it has been found against in the lower Court. A statement made by a local agent of the math during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the inam as given at the close of the inquiry is that it was granted 'for the support of Vyasaraya matam' (Exhibit L). Compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the math, I think the grant must be held to have been made for the general purposes of the math."

They thus concur with the first Court that there was no "specific trust" which was the foundation of the plaintiff's case. But after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in *Iiam Parlcasli Das v. Anancl Das (1)* had crystallized the law on the subject, anddefinitely declared the mahant to be a "trustee." It is to be observed that in that case the decision related to the office of mahant but in the course of their judgment their Lordships' conceived it desirable to indicate inter alia what upon the evidence of the usages and customs applicable to the institution with which they were dealing, and similar instat.utions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense, as in previous decisions of the Board, by way of compendious expression to convey a general conception of those obligations. They

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

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did not attempt to define the term or to hold that the word in its specific sense is' applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedhari Doss* v. *Nundkissore Doss* (1) : " The only law as to these mahants and their functions and duties is to be found in custom and' practice, which is to. be proved. by testimony.' Generally speaking, however, the duties .and obligations resting on the superior indicated in *Rami Parkash. Das* v. *Anand Das* (2) do not seem to vary. In this particular institution' the position of the matathipathe in relation to the math was clearly established by testimony and concurrently found by both Courts. But ,the learned judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa who granted the permanent lease: was a "trustee," his act fell, under art. 134. To this article their Lordships *will* presently refer.. Before doing so, however, they consider it necessary to observe that there, are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well..recognized rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Lndian, has affirmed time after time the absolute enjoyment of their Iaws and customs so far as' they are not in conflict 'with the statutory laws, by Hindus and Mahommedans. It would, in their Lordships' opinion, be a serious inroadinto their rights if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak. in pari materia, The vice of this method of construction by analogy is well illus.. trated in. the case of *Vidyapurna v.. Vidyanfidhi* (3), where a mahants position was attempted to be explained by com.. paring it with that of a bishop and of a beneficed clergyman in Englandunder .the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case,

(1) (1867) II Moo. I. A. 405, 428. (2) L. R. 43 I. A. 73.
(3) I. L. R. 27 M. 435.

which arose also in the Madras High Court, of *Kailasam Pillai* v, *Nataraja Thambiran*. (1) To this judgment their Lordships. will have t.o refer further later on.

It is also to be remembered that 'a " trust " in. the sense in which the expression' is used in English law, is unknown in the Hindu system, pure and simple (J. G. Ghose" " Hindu Law," p. 276), Hindu piety found expression in gifts to idols and images conseerated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious. in the Hindu social and religious system ; to brahmans, goswamis, sanyasis, etc. When the gift was to a holy person, it carried with it in terms.or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a " juristic entity.t'vested with the capacity. of receiving gifts a1l<1 holding property. Religious institutions, known under different names, are regarded as possessing the same " juristic " capacity, and gifts are made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of math were founded. under spiritual teachers of recognized sanctity. 'These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally' governed by custom and usage. When. the gift is directly to an idol, or a tempie, the seisin to complete the gift is necessarily effected' by human agency., Called by whatever name, he is only the, manager and custodian of the idol or the institution. In almost ev.ery case 11e is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on. usage and custom. In no case was bhe property conveyed ito or vested in him, nor is 11e a " trustee " in the English sense of tho term, although in ,view of the obligations and duties resting on him, he is answerable as atrustee in the g,eneral sense Ior mal-administration,

(1) I. L. R. 33 M. 265.

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The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Mahommedan influence has been predominant, such as Upper India and the Carnatic, the expression wakf is used to express dedication.

But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of 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 is used as implies wakf, or the tenor of the document shows, as in the case of *Jewan Doss Sahu* v. *Shah Kubeeruddin* (1) that a dedwatlon to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. In *Jeioan Doss Sahu's Case* (1) the Judicial Committee call him, "procurator." That case related to a khankah, a Mahommedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. The head of these khankhas, which exist in large numbers in India, is called a sajjadanishin. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a largerinterest in bhe usufruct than an ordinary mutawalli, But neither the sajjadanishin nor the mutawalli has any right ill: the property belonging to the wakf; the property is not vested in him and he is not a "trustee" in tho technical sense.

It was in view of this fundamental difference between the juridical conceptions on which the English law relating to trusts is based and those which Iorrn the foundations of the Hindu and the Mahommedan systems that the Indian Legislature in enacting the Iridian 'I'rusts Act (II. of 1882)

(1) (1840) 2 Moo. 1. A. 390.

deliberately exempted from its scope the rules of law applicable to wakf and Hindu religious endowments. Sect. 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down, "but nothing herein contained affects the rules of Mahommedan law as to wakf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, ... Sect. 3 of the Act gives a definition of the word 'trust" in terms familiar to English lawyers. It says: "A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee"; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property, or 'trust-money"; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the "instrument of trust.'"

In this connection it may be observed that in the case of *Muhammad Rustam Ali* v. *Mushtaq Husain*. (1) the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document: "It is argued," said the noble lord, "that the "trustee-nama" must have dealt with an interest, in immovable property, for otherwise the trustees could have no right to maintain the suit; and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the

(1) (1920) L. R. 47 I. A. 224.

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assumption that the trustees of the wakf-nama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The wakf-nama itself does not purport to assign property to trustees.n

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the. British Government had assumed control of all the public endowments and benefactions, Hindu and Mahommedan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Gover11ment considered it expedient to divest itself of the charge and control of these institutions, and to place them under uhe management of their own respective creeds. With this object, Act XX. of 1863 was enacted; a system of Committees was devised to which were transferred the powers vested in Government for the appointment of "<managers, trustees and superintendents"; rules were enacted to ensure proper management and, 'to empower the superior court in the district ,to take cognizance of allegations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

Art. 134 of Soh. I. to the Indian Limitation Act (IX. of 1908) is in these terrns : "To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," the period prescribed for the institution of the suit is twelve years "from the date of trsnster." In the old Act, XV. of 1877, the words were "'purchased from the

trustee or mortgagee.' The 'alteration was made with the object of including permanent leases in transactions of the character contemplated in the article.

Art. 134 is, as pointed out in *Abhiram Gosuiami's Case (I),* controlled by s. 10 of the Limitation Act, which runs thus: "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal represents-t.ives 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." The Iariguage of s. 10 gives the clue to the meaning and applica-bility of art. 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu. Law nor in the Mahommedan system is any property "conveyed" to a shebait or 'a mutawalli, in the case of a dedication. Nor is any property vested in. him; whatever property he holds for the idol or the institution he holds as rnanager with certain beneficial interests regulated by custom and usage. Under the Mahornrnedan Law, the moment a wakf is created all rights of property pass out of the wakif, and vest in God Alrhighty. The curator, whether called mutawalli or sajja.. danishin, . or by any other name, is merely a manager. He is certainly not a "trustee" as understood in the English system.

In *Sammamilu: Pandara* v, *Sellaqrpa ()het.ti* (2) ,the position of the superior in relation to the properties of the math was laid down in terms which have an important bearing on the present case. The learned judges say there: "The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its manegement nor for the expe:ndi-t.ure of the incor.ae, provided he does not apply it to any

(1) (1909) L. R. ,36 1. A. 148. (2) (1879) I. L. R. 2 M. 175.

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purpose other than what may fairly be regarded as in furtherance of the objectaof theInstibution. Acting for the whole institution he may contract debts for purposes Qonnected. with his mattam, anddebts so contracted might be recovered from the mattam property and would devolve as a liability 011 his successor to the extent of the assets received by him.'

'The origin and nature of these maths were again considered at great length .iii a case which arose iii the same Court in 1886. In that case *(Giyana Sambandha* v. *Kandasami (1))* the learned judges pronounced that the head of the institution held the mattam under his charge, and its endowment iii trust for the m-aintenance of the math, for his own support, for that of his disciples, and for the performance of religious and other charities in connection therewith according to usage. An almost identical question came up for consideration iii 1904 in *Vidyapurna v, Vidyanidhi* (2) already' referred to. In that case the learned judges, after an' elaborate examination '0£ English institutions which' they conceived to be analogous to Hindu .maths, came to the'. conclusion that whilstadharmakarta of, a temple who has specific duties 'to perform might be regardedas a .trustee, the superior of 'a . , math is not a trustee but a "life-tenant."

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in the case of *Kailaeam Pillai* v. *Ntitaraja Thambiran.* (3) The learned judges before whom the point arose considered that the view taken in *,Vidyapurna* v. *Vidya11idhi* (2) was in conflict with that propounded in the' two earlier cases (4) and referred the question to a Full Bench.

.'.. ' The reference was in these terms : "Does tho head of a math hold the properties constituting its endowment as a life-tenant or as a trustee ? "

The officiating Chief Justice expressed his opinion in the following terms: "I think, then; that it cannot: be predicated of the head ofa math, as such, that he holds the properties

(1) (1887) I. L. R. 10 M. 375.
(2) I. L. R-. 27 M. 435.
(3) 1. L. R. 33 M. 265.
(4) 1. L. R. 2 M. 175; I. L. R. 10 M. 375.

constituting its endowments as a life-tenant or as a trustee. 'i'he incidents attaching to the properties depend in each case UpOll the conditions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of .the institution in respect thereto." Wallis J. substantially agreed in this view. Sankaran Nair J. pointed out that, ill the case of these maths ; ." Any surplus that, remains in the hands of the pandara sannadhi, he is. expected to utilise for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to anyone and he is ,11ot bound .'to .utilise the surplus. He may leave it to accumulate." And he further ,added ; "It is also true in my opinion that he is under a legal obligation to maintain the math, to support' the disciples and. to perform certain ecromonlcs which are indispensable. That will be orily a .charge on the income in his hands and does not show that the surplus is 110t at his disposal." In the result, he was of opinion "that in the absence of any evidence. to the contrary, the pandara sannadhi (the superior) as such is not a trustee. He is not also a life-tenant for the reasons already stated." All three judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded as a "trustee" with regard to that property; but that in the absence of any such evidence the superior was 11.0t a trustee in respect of any part of the endowment.

The point carne up for discussion again in a concrete form in 1913 in *Muthuswamier v. Sreemethanithi* (1), where the exact point for decision was the question of limitation. .The facts which gave rise to the litigation were almost identical with the present esse before their Lordships, with this .difference, that the suit there was brought by the head of the 'math to recover possession of the leased properties. Miller J. stated thus the question for determination : "The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded

(1) I. L. R. 38 M. 3560

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for the appellants that the lease is in excess of the powers of the matathipathi, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swarniar in 1890."

The Iearned ijudgos held in substance that there was no specific trust, that the' properties were given or endowed generally for the performance of the worship of the deities in the math and other attendant duties and for the support of the superior and his disciples; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term' of. of.fice; but neither the original alienation nor the subsequent adoption would create a bar' by adverse possession.

These cases deal exclusively with the' position 'of the superior of a math in relation to its endowment. But there are some others respecting the powers of the managers of religious' institut.icns generally. In *Mahomed* v. *Gcnapat;* (1) a lease was granted by the dharmakarta of a temple;' and the suit to recover ,the leased lands" was brought by his successor in office. The defence was limitation, running from the date of alienation. Shephard J. (Mut.tusami Ayyar-J. concurring) held as follows: " In the present case, though the plaintiff may in point of time have 'suoceecledthe dharmakarta who made the alienation, he does not derive his title from that dharmakarta and is,therefore, 110t boundby hisacts, Subject to the law of Iimitation, the successive holders of an office, enjoying for life the property attached to it, are at Iiberty to question the dispositions made by their predecessors ' *(Papaya* v. *Ramana* (2) ; *Jamal Saheb* v, *Murgaya Swami* (3) ; *Modho Kooery* v, *Tekait Ran: Oh/umder Singh* (4)}, and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only'the successor became entitled to poeeeeelon. Accordingly, Raman Pujari having died so recently as 1885,

(1) (1889) I. L. R. 13 M. 277.
(2) (1883) 1. r, R. 7 M. 85.
(3) (1885) I. L. R. 10 B. 34.
(4) (1882) 1. L. R·. 9 C. 411.

the plaintiff's suit cannot be barred by limitation." That was followed in *Sathianama Bharati v. Saravanabagi A1n1nal.(l)* In that case the superior is called the "jnanager."

In *Chockalingam Pillai* v. *Mayandi Cheiiia«* (2) it was conceded tha,t "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time 'between the alienation and the challenge of its validity, coupled with other circumstances, the learned judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu, and Mahommedan pious institutions it would primal facie follow that an alienation by a manager or superior by whatever name called cannot be treated as the actofa "jrustee" to whom property has been "conveyed in trust" and who by 'virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law, Of course, a Hindu or a Mahommedan may "convey in trust" a, specific property to a particular individual for a specific and definite purpose, .and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But therespondente rely on three decisions of the Iridian Courts in support of their contention that persons holding properties generally for Hindu and Mahommedan religious 'purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Daiiaqiriv. Dattatraya. (.3)* The facts of ·that case were peculiar. TIle math 'there was an old one and the dedication was recognized and conlirrned by the Mahratta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the math; the governance went by succession to the disciples of the garu (the spiritual preceptor or head). III 1871 the village was divided between two disciples" Shivgiri and Shankargiri, in equal moieties, and each held his half separately

(1) (1894) I. L. R. 18 M, 266. (2) (1896) I. L. R. 19 M. 485.
(3) 1. L. R. 27 B. 363.

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from the Odl81. In the same year one of them, Shankargiri, sold the lands in dispute to the defendant. In 1897 Shankargiri obtained a sanad from Government under Act II. of 1863 declaring him to be the absolute owner of his share. He died in August 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to elienate them as they were dedicated property. The defence was first that the sanad had altered the character of the property, and secondly that the suit was barred. The lower appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's counsel on second appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property." The learned judges of the High Court refrained from deciding that point; and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say, "on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the math and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the math in relation to its property under the Hindu law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words: "We have then here a suit to recover possession of immovable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration." "Conveyed in trust" is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. The learned judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in the case of *St. Mary Maqdalen, Oxford v. Attorneu-General.* (1) With

(1) (1857) 6 H. L. C. 189.

respect to it they say as follows: "In further support of this conclusion we would also refer to the already cited case of *St. Mary Magdalen, Oxford* VI *Attorney-General* (1), . for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. Wc propose to refer to that case in scree detail" as it probably is not within the reach of most mofussil Courts in this Presidency." They set out the provisions. of 88.. 2, 24 and 25 of Will, IV. 0. 27, and then add "the section (s, 25), .'it will be seen, corresponds more or less with our arts. 134 and 144 and s. 10 of the Limitation Act." Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Mahommedan law was overlooked, and the case was decided on analogies drawn from English law inapplicable in the main to Hindu and Mahommedan institutions. That case .can hardly be treated as authority in the decision of the present controversy.

The case of *Narayan* v. *Shri Ramchandra* (2) only followed the view expressed in *Dattagiri* v. *Dctttatraya.* (3) But the facts, when examined, show a marked difference in the legal position .of the parties in the two cases. The mulgeni lease under which 'the defendant 'claimed title was granted in 1845, and the suit to set it aside was .brought somewhere in 1.899. Repeated attelnpts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably, withdrawn. There was thus clear acquiescence on the part of successive lnanagers in the validity of the transaction. The case fell within t.he principle of *Chockalingam Pillai's Case* (4), and might, 'well have been decided without disturbance of Hindu Law or usage.

The second decision relied upon in support of the respondents' contention is the case of *Behari Lall* v. *Muhammad Mutta,ki* (5), which related to a Mahornmedan shrine. The

(1) (1857) 6 H. L. C. 189,
(2) (1903) I. L. R. 27 B. 373.
(3) 1. L. R. 27 B. 363.
(4) 1. L. R. 19 M. 485.
(5) I. L. R. 20 A. 482.

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origin and history of these shrines ordurgahs, as they are called, is described 'compendiously in the judgment in *Piran Bibi* v. *Abdul Karim*. (1): "The sajjadanishin has certain spiritual functions to perform. He is not only a mutwali, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in himis supposed to continue the spiritual line (silsilla). As is well known, these durgahs are the tombs of celebrated dervishes, who in their Iifetime were regarded as saints. Some ofthese men had established khankahs where they lived and their disciples congregated. Many of them never rose to the importance of a khankah, and when ,they died their mausolea became shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation..... The preceptor is called the pir, the disciple the murid. On the death of the pir 'his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making murids, of imparting to them spiritual knowledge, is one of the functions which the sajjadanishin performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. 'The head of the institution, like that, of a khankah, is called a sajjadanishin. The governance (towliat) of the endowment is in his hands; he is a mutawalli, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is wakf :' tied up in the ownership of God.' " The appointment of the sajjadanishin is regulated by usage and practice. This is referred to in the same judgment: "Upon the death of the last incumbent, generally on the day of what is called the SIUDI or tej a ceremony (performed 011 the third day after his decease), the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, instal a competent person on the guddi; generally the person O'hOS811 is the son of the deceased or somebody nominated by him, forhis nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to cemmunieate to the disciples. 'In 'some

(1)(1891) 1. L. R,. 19 C. 203, 220, 222.

instances the nomina.tion takes the 'shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The duties in connection with the "shrine," apart from giving spiritual instruction, consist in the due observance Qf the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet and the pcrformsnoe of other rites and ceremonialsprescribed either by the religious law or by usage and practice. Ordinarily speaking, the sajjadanishin has a larger right in. the surplus income than a mutawa.Ili; for so long as he does not spend it in wicked living or in objects wholly alien to .his office, he, like the mahant of a Hindu math, has full power of disposition over it.

In *Behari Lall* v. *Muhammad Muttaki* (1), .the .plaintiff as sajjadanishin sued to set aside certain mortgages executed by his predecessor in office, and dated his cause of action from, the t.ime he was appointed as sajjadanishin, The learned judges, on a misconception of the rules of the Mahommedan law and of the judgment of their Lordships in *Jeuxui Doss Sahoo* v, *Shai: Kubeeruddeen* (2), held that the sajjadanashin was a "trustee." One judge held tha.t the suit was barred either under art. 134 or art. 144; the two others held that art. 134 was applicable as the mortgages were 'created by a "trustee." Their Lordships have to differ from that conclusion. In their opinion this ease 'vas not, in view of the considerations set forth above, correctly decided, .

As regards the third case, *Nilmony Singh v. Jagabandhu Roy* (3), the suit was brought by the plaintiff as the shebait of a Hindu idol to set aside a dar-mukarrari pobtah, executed in respect of certain of the dnbottar lands by two ladies who acted as sheba.its during his minority. .He alleged that he became entitled to sue for possession of the alienated lands on his a.ppointrnent to the office of shebait by a decree of the Court. The material defence was t.hat the claim was barred.

(1) I. L. R. 20 A. 482. (2) 2 Moo. I. A. 390.
(3) 1. L. R. 23 C. 536.

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It should be observed that the dar-mukarrari was created in 1857 .and the suit was brought after 1,888. In the judgment of the High Court the words shebait and trustee are usedas synonymous and convertible terms; the expression is always "shebait or trustee." 'Probably, the, fact that. the. shebait has duties and obligations in connection with the dedication, influenced the employment of the word "jrustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the 'learned judge did not regard the shebait as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of art. 134 to the plaintiff's claim. It is quite clear, however, that the legal position of a shebait is quite different from that of a trustee to whom specific property is "conveyed" all a specific trust. In *Prosunmo Kwmari Debya* v. *Golab Ohand Baboo* (1), where the question. for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E..Smith, in delivering the judgment of the Board, scrupulously a/voided the use of the confusing word "trustee." Dealing with the powers of the shebait, he said as Iollows: "But notwithstanding that property devoted to religious IJurposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the shebait of property dedicated to the worship of an idol, in the capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile Iitigious attacks and other like objects. The power, however, to incur such debts must be measuredby the existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous. to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce L.J. . . . .. It is only in an ideal sense that property can be said to belong to an idol; the possession and management of it must, in

(1) (1875) L. R. 2 I.· A. 145, 151.

the nature of things, be entrusted to .somepersones shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to 'do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and mainbain them.'

The identical question relating to the powers and position of a shebait was again before the Board in *Abhiram Gosuximi:« Case* (1) already referred to. With regard' to the powers of the sheba.it, their Lordships say as Iollows : "The second question is whether, this being so, the mahant had power to gra.rit a mukarrari pottah of the mauza, It is well settled law that the power of the mahant to alienate debottarpro. perty is, like the power of the manager for an infant heir;": limited to cases of unavoidable necessity: *Prosunno Kumari Debua* v. *Golab Chomd,* (2) In the case of *Konurur Doorqomaih. Roy v. Ra,m, Chunder Sen* (3) a mukarrari pottah of debottar lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Maharanee Shibessouree Debia* v. *Mothooranatb Acharjo* (4), that apart from such necessity 'to create anew and fixed rent for all time, though adequate at the time, in lieu of giving the endowment tha benefit of an augmentation of a va.ria.ble rent from time to time, would be a breach iof duty : .in -the mahant. There is 'no allegation that there were any special circumstances of necessity in this oase to justiiy the grant, of the pottah of 1860, which on the most favourable construction enured only. for the lifetime of .the. grantor, Prananda, who died in 1891, or of the pottah of 1896, which, at best" could only be deemed operative during the lifetime of Raghubananda, who died in 1900."

(1) L. n, 36'1, A. 148, 165.
(2) L. R. 2 1. A. 145.
(3) (1876) L. R. 4 I. A. 52.
(4) (1869) 13 Moo. 1. A. 270, 275.

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The question came up again for consideration by the Board in the case of *Palaniappa Ghetty v, Deivasikanony Pandara.* (1) The suit was instituted by the head of a math to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the math, and had been granted by his predecessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution ; that contention was overruled, and the decision proceeded on the basis that the shebait was only a manager. Lord Atkinson, delivering the judgment of the Board, further added: "Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent" however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have, if, the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased." In that case the leased lands were situated in the street of a village; here they are in the town of Madura.

Reverting then to the judgment in *Nilmony Singh's Case (2),* their Lordships think that the .expression "trustee" was loosely and, speaking :with respect, wrongly applied to the shebait in order to bring, the ,case HIlder art. 134. It is to be observed that in none of the three cases was there any examinat.ion of the laws and usagesgoverning the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior .is proved, beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the .defendanf No. 26 for the, general purposes of the inst.itutdon. Considerable stress was laid on behalf of the respondents on the entry in the Inam Register that the dedication was for a specific purpose-

(1) (1917) L. R. 44 I. A. 147, 155, 156. (2) I. L. R. 23 C. 536.

namely, the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of .investigatdng trtles to. hold lands revenue-free as belonging to valid endowments. The gifts were made long. before the Inam proceedings by the Hindu kings or chiefs who then. held the country. The purposes of the dedication must .therefore be gathered from established usage and practice, and that has been found by the Courts in India, Again, "valuable consideration" formsthe essence of both s. 10 of the Limitation Act and of art. 134 of Sch. I. Even, if this were a specific trust, which it is 110t, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

In. the Courts below the plaintiffs rested their claim mainly, if not entirely, 011 art. 134. Before the Board an alternative argument has been advanced. It is contended tha,t the second plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under art. 144. That article declares that for a suit "for possession of immoveable proper·ty or any 'interest therein not hereby (i.e., by the schedule) otherwise specially provided for" the period of limita.tion is twelve years from the date when the possession of the defendant .became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let·int.o possession by mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well settled law of Jndiu (apart from the quest.ion of necessity which does not here arise) a mahant is incompetent to create any interest in respect of the math property to endure beyond his life. With regard to mahant No. 2, he was vested with a power similarly limited. He permitted t.hc plaintiff to continue in possession and received the rent during his life. The receipt of rent was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predeesssor's life, and can, there-Iore, only be properlv referable to a 'new tenancy created by

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himself. It was within his power to continue the tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

There is one other point which deserves notice. The administration of the second mahant lasted until 1906. In 1905, however, the math went under the management of the Dewan of the Mysore State, under a power of attorney granted by the mahant and his successor, who may conveniently be designated as mahant No. 3. Certain persons to whom the second plaintiff had sub-leased the lands for ten years thereupon obtained from the Dewan during the currency of their term a lease for seventeen years. It is a direct lease from the Dewan as holder of a power of attorney from mahant No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Dewan and mahant No. 3, and to upset the act of administration of mahant No. 3, on the ground of rights acquired adversely to the math by lapse of time during the incumbency of mahant No. 2.

For the foregoing reasons their Lordships are of opinion that neither art. 134 nor art. 144 applies to this case; that the plaintiffs have acquired no title under either of those articles: that the judgment and decree of the High Court of Madras must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the appellate Court.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*
Solicitor for respondents: *H. S. L. Polak.*

THE MOSQUE KNOWN AS MASJID SHAHID GANJ AND OTHERS . . . APPELLANTS.

AND

SHIROMANI GURDWARA PARBANDHAR COMMITTEE, AMRITSAR, AND ANOTHER . . . . . RESPONDENTS.

J. C.* 1934 May 2.

ON APPEAL FROM THE HIGH COURT AT LAHORE.

Limitation-s-Property made waqffor purposes of mosque-Adverse possession by Sikhs-s-Claim [or declaration of right to worship in mosque-s-Ap-plioability of period of limitation-s-Suits agaias! Muslim. institutions as artificial persons incompetent-Res judicata-s-: Indian Limitation Act (IX. of 1908), *s.* 28; *art. I44-Sikk Gurd.. uiaras Act (Punjab Act VIII. 0/* 1925), *s.* 37.

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 site and building, Where, therefore, property which had originally consisted of a mosque and adjacent land, dedicated in A.D. 1722, lrad been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than twelve years, the right of the mutawali to possession for the purposes of the waqf came to an end under art. I44 of the First Schedule to the Limitation Act, Igo8, and the title derived under the dedication from the settlor or wakif became extinct under s. 28 of that Act.

Abdur Rahim v. *Narayar; Das Aurora* (1922) L. R. 50 I. A. 84, referred to.

The individual character of the right to go to a mosque for worship mattered nothing when, the land was no longer waqf, and was no ground for holding that a person born. long after the property had become irrecoverable could enforce partly or wholly the ancient dedication.

Suits cannot competently be brought by or against Muslim instrtutions as artificial persons in the British IudianCourls.

Shankar Das v. *Said Ahmad* (r884) No. 153 P. R.; *finda Ram* v. *Husain Bakhsh* (1914) No. 59 P. R.; and *Ma,ula Bukhsh v. Hafis-ud-dn»* A. I. R. (1926) Lah. 372, referred to.

Held, further, that the suit. brought in 1935 by a number of persons claiming (inter alia) a declaration that the suit property was a mosque in which they and all followers of Islam had a right to worship. and an injunction to restrain any interference.

* *Present :* 'LORD THANKERTQN) LORD RUSSELL OF KILLOWEN, SIR GEORGE RANKIN, LORD JUSTICE GODOARD, and MR. M, R. JAYAKAR,

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, 1940

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with their so doing, was concluded on the general principle of res judicata by a decision ina suit brought in, 1855 by a person claiming as mutawali torecover the property for the purposes of the waqf.: and also under s. 37 of the Sikh Gurdwaras Act, 1925, by the decision of the Sikh Gurdwaras ,Tribunal rejecting a petition "on behalf of the Mohammedans' claiming that tbe land and property were dedicated" for a mosque, and did not belong to the Sikh gurdwara, There mere circumstance that the plaintiffs in the present suit of 1935 had not chosen to seek recovery of the land in dispute, but asked for relief in the forms of declaration and injunction, did not avail to enable them to litigate again the claim made by the person. as mutawali in 1855, and the ground of the decision in that suit did not affect the question of res judicata.

Decree of the High Court affirmed:';

APPEAL '(No. 9I of I938) from a decree of the High Court (January 26, I938) which had affirmed a decree of the' District Judge, Lahore (May 25,' 1936).

A 'structure which had been built as a mosque in Lahore was dedicated in A.D. 1722, but from about. I76z the building and adjacent land had 'been in the occupation and possession of the Sikhs. 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 a Sikh shrine (gurdwara), and the mosque building was used by the custodians of the Sikh institution. In I927, by notification made pursuant to the Sikh Gurdwaras Act (Punjab Act VIII. of 1925), the old mosque building and land adjacent thereto were included as belonging to the Sikh gurdwara. Litigation was brought before the Sikh Gurdwaras Tribunal in I928 "on "behalf of the Mohammedans," who claimed that the land and property were-dedicated for a mosque and did not belong to the gurdwara. . The Tribunal held that the claim failed by reason of adverse possession and previous decisions, ·and in the result the property and building .were given into ,the custody' of the defendants, and on July "7, I935, the building was suddenly demolished .by or with the connivance of its Sikh eustedinns under the influence of communal ill-feeling.

The suit oift of which the present appeal arose was brought by eighteen plaintiffs, the first being the mosque itself, in the sense of the site and building, suing by a next friend, and the

, other plaintiffs, including minors and women, were persons who claimed that they had' a right to' worship in the mosque. The su.it was brought against the Shirornani Gurdwara Parbandhak Committee and the Committee of Management *for* the notified Sikh gurdwaras at Lahore, .who were in possession of the disputed property, and was for (inter alia) a declaration that the buildingwas a mosque in which ,the plaintiffs and all followers of Islam had a, right to worship there, and a mandatory injunction to reconstruct the building.

The facts appear fully from the judgment of the Judicial Committee.

The District Judge dismissed the suit, and his decision was affirmed on appeal to the High Court (Young C.J. and Bhide J., Din Mohammad J. dissenting).

1940. April 4, 5, 8 and 9. *L. P. E. Pugh K.C.* and *J. M. Pringle* for the appellants. ' 'The question is': ,Can the appellants maintain a right toworship in a particularmosque and on the site of that mosque, and in a new mosque on the same site, if they can get it erected; is that suit hit ,by the .Limitation Act? It is conceded that it cannot be argued that Mahomedan Iaw is entirely outside the Limitation Act. 'The appellants' case may be put briefly thus: s. 28 of the Limitation Act has 110 application, because it 'only relates to a suit for possession ; the appellants' have not brought a suit for possession, and are not obliged to do so, and therefore they are not affected by s. 28. Their bare right of suit as individual Mahornedans continues so long as the. mosque is there, and is not affected by their disuser or their father:s or grandfather's disuse; their right is not inconsistent with the-decision that the mosque now belongs to somebody else. It is conceded that if a mosque be pulled down and a 'secular building erected in its place, that would attract the provisions of adverse possession, A masjid or mosque is a juristic person owned by no one, perpetual) inalienable, irrevocably dedicated) and 'has a sanctity and existence which can never be destroyed, even if it falls into ruins, andis therefore not subject to any law of limitation based upon adverse possession. [Reference was made to *Vidya Varutbi Thirtha* v.

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Balusami Ayyar (1); *PramaihaNatb Mullick* v. *Pradyumna Kumar Mullick* (2); and *Hukum Chand* v. *Maharaj Bahadur Singh.* (3)] *Kanhaiya Lal* v. *Hamid Ali* (4) makes it clear that there cannot be res judicata in respect of sacred property unless the juristic person is represented. *Kumaravelu Chettiar* VI *Ramaswami Ayyar* (5) shows that unless the procedure Of the Code is followed and the suit is made a representative one it cannot bind anybody but the actual parties. 'The orders of the criminal court and the civil court against Nur Ahmad (who instituted the proceedings of 1855 as mutawali) in his personal capacity are not governed by the principles of res judicata against the appellants, nor is the decision of the Sikh Gurdwaras Tribunal of any effect against them in a: non-representative suit. On the question once a mosque always a mosque, see *Court of Wards* v. *Ilahi Bakhsh* (6); *Ballabh. Vas* v. *Nur Mohammad* (7); and *Chidambaranatha Thambiran* v. *Nallasiua Mudaliar.* (8) In the present case, whatever the right that the Gurdwara may have in the property" it is subject to the right of people to worship in the mosque, and by destroying that mosque the Sikhs cannot take away that right; this is not a suit about a right or interest in immovable property, and therefore it does not come within art. 144 of the Limitation Act.

J. *M. Pringle* followed, With regard to the question of the title to the site of what was, until 1935, a mosque" it has been held that where property is waqf circumstances can exist in which that property ceases to be waqf, but there has been no case where that has been applied to a property that is ear-marked with the insignia of its dedication. This is property which -prcolaimsiteelf to be the property of God; a mosque is a building of a very distinctive character, it is jlist like'a church, the analogy is complete, and this differentiates it from other cases of waqfs, There is no evidence of exclusion, but

(1) (1924) L. R. 48 I. A. 302, 310-12.
(2) (1925) L. R. 52 I. A. 245, 250.
(3) (1933) L. R. 60 I. A. 313, 321-23.
(4) (1933) L. R. 60 I. A. 263.
(5) (1933) L. R. 60 I. A. 278, 285, 291.
(6) (1912) L. R. 40 I. A. 18.
(7) (1935) 40 C. W. N. 449.
(8) (1917) I. L. R. 41 Mad. 124.

only of mere non-user, and such rnere non:user does not carry as against the worshippers any loss of t.heir rights. The argument is that the House being God's House preserves God's possession of the site. [Reference was made to Ameer Ali's Mahommedan Law, znd ed., vol, i., p. 3IO.j With regard to the Sikh Gurdwaras Act of 1925, it is submitted that s. 30 clearly contemplates the possibility of the institution of a suit in certain circumstances. In the present case the appellants are not caught by the bar in s. 30 (1). As to the effect of the litigation of r855, in order to find that it binds the institution it must be established that Nur Ahmad' was qualified to represent the waqf ; it has not been. proved that he was competent to do so.

Ii. U. Willink K.C. and *Wallach* for the respondents were not called upon to argue.

May 2. The judgment of their Lordships 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 ss the place from which the imam leads the prayers, . Its dedication is no longer in dispute, having beenestablished as of the year A.H. 1I34, or A.D. 1722, by the production and proof of a deed of d.edication 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 an10ng the appurtenancies of the mosque, and gives the total area of 'the dedicated property as three kanals and fifteen rnarlas : 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 A.D. I762 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

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"Sardars" in 1762 wasthe commencement of Sikh power in this part of India.. Sikh rule continued under Ranjit Singh, who in I799 established himself by force of arms as the local. ruler... It ended only in 1849. ten years after the death of Ranjir Bingh, 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 (hutto 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.i.which in ,I:7z2 had been 'dedicated to the purposes of a mosque, carne 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 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 BhaiTaru Singh had on this spot suffered for his 'religion at the hands of Muslim rulers, and that many .others, including women and children, hadbeenexecuted here. Thus communal feelingshave long been in a state' of tensionas between Muslims and 'Sikhs with 'respect to this *masjid sbahid ganj*. Itshistory after 1760 is summarized 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 right.s"; 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 18S3)." , 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 this .mosque, but. hostile .to the *waqf* itself and all interests thereunder.. On the otherhand, 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 appearanceof amosque,

In r849, 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 *gwrdurara* 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 r8so by one Nur Ahmad 'claiming to. be mutawali, and proceedings in the Settlement department, brought byihim 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 June 25, 1855, yet another suit by Nu.r Ahmad was brought in the Court of the Deputy Commissioner, Lahore, . against the .Sikhs 'in.' possessioniof the' property: it was dismissed 'by that officer on' November 14, r855, by the Commissioner on April 9, 1856, 'and, on further appeal, by the Judicial Commissioner on June 17" I856.

In 1925 the Sikh GurdwarasAct (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 December 22, 1927, by a Government notification, the old mosque 'building and land adjacant thereto were: included 'as belonging to the Sikh *gurdwara* .rr Shahid Ganj Bhai Taru

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"Singh." Seventeen claims were made by various petitioners to have rights therein. One, dated March 8, 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 March 16, 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 January 20, 1930, that the mahants' possession had been held on account of the *gwrdsuara*, and that the Anjumari'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 October 19, 1934. In the result the property and building were given into the custody of the defendants, and on the night of July 7, 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 October 30, 1935, in the Court of the District Judge, Lahore, against the Shiromani Gurdwara Parbandhak Committee, and the Committee of Management for the notified Sikh gurdwara sat 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. 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 May 25, 1936, and an appeal to the High Court was dismissed on

January 26, 1938, by Young C.J. and Bhid,e]., Din Mohammad J. diss.enting.'

By the Punjab Laws Act, 1872, the Mahornedan 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 Lirnitation Act, 1908, applies though Iimitation is not an original principle of Mahomedan law. The length of time which had elapsed since the property claimed had 'been 'Iost to Mu1ims, and the repeated fat'u,re"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 difficultlesrthesuit was brought by' eighteen.' plaintiffs, 0'£' which 'the' first was the mosque' itself, suing bya next friend-s-not thewaqf.-or institution or charity in some abstract sense, but the. rnesque . in the sense of the site and building. The-declaration sought was "that plaintiff No. I was and is the site of a waqi 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 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, tha.t limitation cannot be applied to it, that it is not property but an owner of property. A second', feature. of.the suit. as .framedis 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 Sulairnan]. to the' contrary (*Aziz Bane* v. *Muhammad*

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Ibrahim Husain,(I) was cited to' him, but he wrongly considered thats. 49 of the Evidence Act wasapplicable 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. *'Mootioo Ramalinga Sathupathy*..(2) No great harm, as it happened, wasdone 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 Hinduor a Muslim in a British Indian'! Court should be put to the expense of .proving by expert witness.es the legal 'principles applicable to his case, and it would introduce great confusion into the practice of the Courts if decisio.ns 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 tg, everyone, unless it be'to the statutor Codes, e. " Contrac ct, ransfer of Property Act But the Muslim law is under .Iegislative enactments applied by" British Indian Courts to certain classes'of rnatters and to certain classes of people as part of the law of the land which the Courts adlninister as being within their ow·n knowledge and' competence.ec.The: system of "expert advisers" (*muftis*, *maulavis* or, in the case of Hindu law, *pandits*) .had!' its day, but 11as 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 (3): "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 howsoever "learned they'may be. It would be dangerOtlS to delegate. "their duty to witnesses produced by either party.. Foreign "law, on .the other'· hand, is "a question of fact vlith which

(I) (I,gZS) I.. L..R..47 A, 823, 835" '(3) I. L. R. 47 A. 835·
(2) (1868) 12 Moo. I. A. 397, 436–439.

"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 immovable property is: In 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, authorizing the British Indian Courts to uproat 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 Central Gold Mining Co., Ld,* 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 recognized 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 Mahomedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognized 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 Ranjit Singh took great

(1) [1905] 2 K. B. 391.

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interest in the *gurdwara* and continued endowments made to it by the Bhanji Sardars, as was held by Hilton J. (January 20, 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 as 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 immovables 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 (2): "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 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 art. 134 of the 'Limitation Act did not apply to a' waqf the claim to recover possession of waqf property was governed either by art. 142 or, art. 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.

(1) (1922) L. R. 50 I. A. 84. (2) Ibid. 90.

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. Insome 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-e-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 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 razed 'to the ground or loses the appearance which reveals its original purpose.

The argument that the land and, buildings of a mosque ate 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 rnutawali, 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 Coutts in the case of this very, building: The .learned District Judge) in the course of his able and careful judgment,

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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 con-"sidered as a juristic person. It was actually so held in *Jinda* "*Ram* v, *Husain Bakhsb* (r) and later in *Maule Buhhsh. v, "Hafiz-ud-Din.* (2)'

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 recognize 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 Begam* v. *Amir M'uhammad Khan* (3) per Mahmood J.) any more than they apply the Mahomedan cnminal law or the ancient Mahomedill rulss of evidence. At the same time, the procedure of the Courts in applying Hindu or Mahornedan 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 recognizes 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 (Jagadindra Nath Roy* v. *Hemanta 'Kurnari Debi.(4)* Very considerable difficulties attend these doctrines-s-in particular as regards the distinction, if any, proper to be made between the deity 'and the image (cf. *Bhupati Nau. Smrititirtha v. Ram Lal Mnitra* (5); Gopalchandra 'Sarkar. Sastri's Hindu Law, 7th ed., pp. 865 et seq.). But there has never been any doubt that the property

(r) (1914) No. 59 P. R.
(2) AIL R. (1926) Lah. 372.
(3) (1885) 1. L. R. ? A. 822, 841- 842.
(4) (1904) L. R. 31 I. A. 203.
(5) (1910) 1. L. R. 37 C. 128, 153.

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

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 s. 37 of the Sikh Gurdwaras Act, 1925, by the decision of the Tribunal (January 20, 1930) rejecting the petition of the Anjuman Islarnia. 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.'

Sect. 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 incon- "sistent 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 Islarnia. Unless, therefore, the case can be brought within the opening words of s. 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 cl. (ii.) of s. 30, which states the circumstances under which a suit shall be tried notwithstanding that

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the claim was not 'put forward before the Tribunal. Sect. 37 assumes that a civilcourt 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 orderor decree shall riot be made if the effect of it would be inconsistent with any decision of a Tribunal. The. words of exception with which s. 37 opens aredoubtless accounted for by the provisions of s. 34 authorizing 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.

Solicitors for appellants: *Peake & Co*.

Solicitors for respondents: *Charles Russell & Co.*

(46)

J. C- 1894 ov. 23, 27; Dec. 15.

ABUL FATA MAHOMED ISHAK AND OTHERS. PLAINTIFFS;

AND

RUSSOMOY DHUR CHOWDHRY AND OTHERS. DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law-Wakj-Perpetual Family Settlement—Illusory Gift to the Poor.

Held, that under Mahomedanlaw a perpetual family settlement expressly made as wakf is not legal merely because there is an ultimate but illusory gift to the poor.

Meer Mahomed Israil Ehas: v. *Sashti Churn Ghose* (1) and *Bikani Mia* v, *Shuk Lal Poddar* (2) overruled.

ApPEAL from a decree of the High Oourt (Feb. 24, 1891), reversing a decree of the Subordinate Judge of *Sylhet* (April 18, 1889), and dismissing the Appellants' suit with costs.

The facts of the case and the deed of wakfnama are sufficieritly set forth in their Lordships' judgment.

The Subordinate Judge held, in reference to the deed and its construction, as follows :--

(1.) That it had been satisfactorily proved that the first and second Respondents were brothers, and were joint owners, and were in possession of almost all the properties in the Ist, 2nd, and 3rd Schedules in equal shares, That, while se owning and possessing the said property, they had made their" shares and interests" therein wakf, and bad relinquished their rights thereto under the registered wakfnama of the 21st of December, 1868.

(2.) That they had appointed 'themselves mutwalis, and had taken possession of the properties and of the documents of title

* *Present*:—LORD WATSON, LORD HOBROUSE, LORD SHAND, and SIR ROMILLY COUCH.

(1) Ind. L. R. 19 Calc, 412. (2) Ind. L. R. 20 Calc. 116.

relating thereto, and had jointly administered the' appropriated properties by receiving the profits thereof, "and by making charity, end by establishing a madrassa, and by., giving' allowance to the beneficiaries,' and had inserted their names as mutwalis in the collection papers, and had otherwisagiven publicity to the said' appropriation.

(3.) Tbatthey had, in 'execution, of powers ·given by the wakfnama, exehanged the properties forming part of the wakf and specified in Schedule 4 for the properties specified in: Schedule 5, .and he held that such exchange was a proper transaction, and ought not tobe questioned' or set aside.

(4,) That the first Respondent bad, some four to'six yearsafter execution of the wakfnama, become involved in debt and had begun to waste the wakf property, and had induced the second Respondent to come to a partition with him in respect of part of the property, and had, in collusion with. certain of the other Respondents who were well aware of the wakf, charged and alienated the wakf properties and injured the estate, but that at the time of the execution of the wakf deed there was .in fact no indebtedness, or at all events no such indebtedness as in any way iuvalidated ior prejudicially affected the appropriation.

(5.) That the, first and second Respondents had, while in, easy .circumstances, .made a wakf of their properties for religious and charitable purposes, in goodfaith for the purpose of dedicating the property to the service of God, so that the profits might be applied towards the maintenance of themselves and their descendants from generationto generation, and might ultimately be appropriated to the maintenance of the poor' and needy of *Sylhet,* and that besides suoh maintenance, religious acts might be performed, and .that in fact acts of religious merit and of charity had been performed with the income' of the said wakf properties.

(6.) That from the wakfnama it appeared that the appropriators had directed the ultimate application of the income of the properties .to objects not liable to become' extinct, that the appropriation hadibeen at once completed, that there was nO provision in, the deed for a sale of the property and the expenditure of its proceeds on the appropriators' necessities, that

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the ultimate object of the wakf was the benefit of the poor aud needy, that the eppropriation was in perpetuity, and that the wakifs or appropriators, having executed the deed, at once transferred the properties to themselves as znutwalis, relinquishing their own personal rights in the same, and that therefore the wakf was validaccording to Mahomedan law on the authority of a decision of the High Oourt: *Jagatmoni Chowdhrani* v. *Romjani Bibee* (1).

He accordingly directed that the wakf should be declared a good and valid wakf, that the first Respondent should be removed from his office of mutwali for breach of trust, that the second Respondent should be appointed sole mutwali, and that, all the wakf property should be made over to him as such mutwali.

As to the specific properties, he held that the property in Schedules 1, 2, and 3 were all wakf properties, except a portion which had been purchased after the wakf deed with moneys not belonging to the wakf, and a further portion which the firstand second Respondents had inherited iefter the wakf; and he directed that possession of all the wakf properties should be made over to or confirmed to the second Respondent as sole mutwali, allmortgages, transfers, leases, or sales in execution or attachments of the properties declared to be wakf being declared void and of no effect, and being set aside.

The High Oourt (*Tottenham* snd *Trevelyan* JJ.) reversed this decision, balding that the deed in question could not be sustained as a valid wakfnama, but was only a pretended dedication of the property> the real object of the persons executing the same being to enable them to secure the property dealt with thereby for their own use, and to protect it for ever from their own creditors and from the creditors of their descendants; andto enable them to repudiate alienations in respect of which they had reeeived full consideration.

'I'hey based their judgment upon the authority of *Sheil: Mahomed Ahsanulla Chowdhry* v. *Amar Chand Kundu* (2); upon *Abdool Ganne Kasa?n Hussen Miya Bahimaiula* (3), which was followed in *Mahomed Hamidulla Khan* v, *Lotful Huq* (4) and

(1) Ind. L. R. 10 Calc. 533.
(2) Law Rep. 17 Ind. Ap, 28.
(3) 10 Bomb. H. 0, 7.
(4) Ind. L..R. 6 Calc. 744.

Fatima Bibiv. Ariff Ismailji Bham (1); and upon a decision by the *Madras* High Oourt in *Poiln: Kuui:», Avathala Kutti* (2); and concluded : –

"We have the authority of the Privy Council in *Ahsanulla Chowdhry* v. *Amar Chand Kundu* (3) for refusing to recognise as a valid deed of wakf an instrument which uses a particular form of words as aveil to cover arrangements for the aggrandizement of the family and to make their property inalienable.

"Precisely suchviu .our judgment, is the deed before us; and notwithstanding the fact that, for a few years after its execution, the owners of the property dealt ,with it nominally as mutwalis, it is certain that they never really intended to give up their proprietary right in it; and before very long they abandoned eventhe semblance of mere trusteeship. We cannot believe that the authors of Mahomedan law intended that, under cover of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their' own use, protect it for ever' for their own and their descendants' creditors, and repudiate alienations in, respect of which they have received full consideration."

Branson, for the Appellants, contended that the case in Law Rep. 17 Ind. Ap. 28, did not support the judgment of the 'High Oourt. In that case the Judicial Committee expressly stated that they were not called on by the facts "to decide whether a gift of property to charitable uses, which is only to take effect after the failure of all-the grantors' descendants, is an illusory gift-a point on whichthere have been conflicting decisions .in *Indio:"* , They also state that "they have not been referred to nor can they find any authority shewing that according to Mahomedan 'law a' gift, is good as wakf .unless' there is a substantial dedication of the property to charitable, uses at some period of time or other." In that' case there was 'no ultimate gift to the poor as. here. So, also, in the later case of *Abdul Gafur* v. *Nizamudin* (4), there was no ultimate gift to the poor: Reference was made to the Eedaya, vol, ii., bk. xv., On

(1) 9 O. L. R. 66.
(2) Ind. L. R. 13 Madras, 66.
(3) Law Rep. 17 Ind. Ap. 28.
(4) Law Rep. 19 Ind. Ap. 170.

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Wakf, P: 334; *Baillie's* Mahomedan Law, 2nd ed., bk. ix., p. 557, *et seq.*

Again, the case ill 10 Bomb, H. O. 7, has been expresaly dissented from in two later cases decided by the same Court, namely, *Fatma Bibi v. Advocate-General of Bombay* (1), and *Amrutlal Kalidae v. Shaik Hussein* (2); and is opposed to the authority of *Doe v. Abdollah Barber* (3), decided by the Supreme Court of *Calcutta:*

Further, the case in Ind. L. R. 13 Madras, 66, is distinguishable as being that of an attempt to create an impossibility, namely, a conditional wakf, for it is provided by the deed in question in that case, that if any child or children of the appropriator attained majority the property was to be theirs, and was only to be considered wakf if none of the appropriator's children attained majority. Under the Mahomedan law an appropriation of property, as in this case, to charitable uses, with a direction that the objects of such charity shall in the first instance be the appropriators, their family and descendants, and on their failure the general body of the poor, is a good and valid appropriation.

The decision in this case, which is reported, in Ind. L. R. 18 Calc. 399, has been followed by a Full Bench decision in Ind. L, R. 20 Calc, 116, also unfavourable to the Appellant. It was submitted that the arguments of *Ameer Ali* J. in that case established that such a wakfnama as the present is a good and valid wakfnamah according to Mahomedan law.

It was contended that the expression "charitable purposes" is not used by Mahomedan lawyers in the same restricted sense in which it is used in English Courts, and that according to the Fatawa Alamgiri (see *Baillie's* Digest, 2nd ed. p.5,9'5), a Maliomedan may make a wakf in favour of himself and his descendants with an ultimate trust for the poor, or in favour of the poor reserving the usufruct to himself and his family so long as they exist. A wakf is simply a permanent benefaction for the good of God's creatures; so long as the dedication is permanent there is a free choice as to the beneficiaries; the descendants of the settlor being preferable objects of his bounty

(1) Ind. L. R. 6 Bomb. 42. (2) Ind. L. R. 11 Bomb. 492.
(3) Fulton, 345.

to the general body of the poor. That was the view of the old Mahomedan authorities, and it appears to have been acted on in early cases by the Indian Courts, as shewn by the cases cited by *Ameer Ali* J. in Ind. L. R. 20 Calc. 148, *et seq.* Itwas' contended that Dot until the Mabomedan law officers 'ceased in 1864 to be consulted by the Law Oourts was the doctrine laid down that a wakf on thsmembsrs of one's family was invalid. ' After 1864 the cases were somewhat difficult to reconcile, and did 'not follow such a uniform course as would establish the principle contended for on the other side. It must be remembered that there is no trace' of any distinction in Mabomedan law books between a' wakf for one's family and a wakf for any other purpose. In this case the wakfnama is only in part for the wakif's family and descendants, and such an endowment cannot be held to be invalid without imposing disabilities upon Mahomedans which would conflict with theirreligious customs. Reference was also made to *Mee?· Mahorned Israil Khan v, Sashti Churn Ghose* (1);' *Jagatmoni Chowdhro,ni v, Romjani Bibee* (2); *Luchmiput Singh '». A'mir AZu1n* (3); *Idahomed. Hamidulla I{han v, Lotful Huq* (4); *Wahid Ali* v. *Ashruff Hossain* (5). Also to *Nizamudin Gclam* v. *Abdul Gafur* (6), and to *Phaie Saheb Bibi* v. *Damodar Premj (7).*

Doyne, for the first six Respondents, contended that when the provisions 'of the wakfnama were examined it .appearedthat there "was no real intention to benefit the poor. The scheme was one of perpetual settlement in favour of the descendants of the dedicators in male and female lines. ,The only clause in favour of the poor was that, in the absence of any descendants, the; estate .should be' held "for the benefit of the poor and beggars and widows and orphans 'of *Sylhet."* With ,the exceptiouof those words, there was no reference to them in the deed, nor was any duty imposed .on present or future mutwalis of' relieving their necessities. After the execution of the deed, the first and second Defendants continued to manage their estate just as before. The

(1) Ind. L. R. 19 Calc. 412.
(2) Ind. L. R. 10 Calc. 533.'
(3) Ind. L. R. 9 Calc. 176.
(4) Ind. L. R. 6 Calc. 744.
(5) Ind. L. R. 8 Calc. 732.
(6) Ind. L. R. 13 Bomb. 264.
(7) Ind.,t. R. 3 Bomb. 84.

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first Defendant admitted that be acted all along" in contravention of the wakf." The High Court rightly hsld that the deed was not at any time valid as a religious or charitable appropriation under Mahomedan law, and that it, was not intended bytbe grantors to be so. It was colorable and was executed obviously to take effect as a family settlement, the object being to make the property of the settlers inalienable for all time, It was contended that the judgment in *Sheik Mahomed Ahsanulla Chowdhy* v. *Amar Chand Kundu* (1) was in point and decisive, and that the question in this oese was not really opeubecauss their Lordships in the case cited did not think it necessary to decide as to there having been an illusory gift. Reference was made to *Macnaghten's* Precedents of Mahomedan Law, p. 69, c.10.

Branson, replied..

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The JUdgment of their Lordships was delivered by

IJORD HOBHOUSE :—

The object of this suit is to establish as avalid wakfnama a settlement of property effected by deed. dated the 21st of December, 1868. The settlers were *two* brothers called *Abdur Iialimasi* and *Abdool Kadir,* Mahcmedan gentlemen belonging to the Hanifa sect of the Sunnis. The Plaintiffs, now Appellants, are sons of *Abdur Rahman,* to whom interests are given by the settlement.: The Defendants, a hundred and more in number, are the settlors themselves, and persons claiming interests in portions of the settled property by virtue 'of transactions with *Abdur Rahman* subsequently to the date of the settlement, Some of these claimants are Respondents to the present appeal.

The Subordinate Judge of *Sylhet* held that the settlement was valid as a wakfnama, and gave the Plaintiffs a decree on that footing. On appeal the High Court took a different view, and dismissed the suit. The great mass of the record relates to subordinate disputes—what parcels of property fall within the settlement, and what inferences are to be drawn from the way in

(1) LawRep, 17 Ind Ap. 28.

which the settlors dealt with the property after the settlement. But the only question argued here has been the nature of the settlement itself; for in the view taken by their Lordships all others are immaterial.

The settlement begins thus: "Committing ourselves to the mercy and kindness of the Great God, and relying upon the bounty of Providence for the perpetuation of the names of our forefathers and for the preservation of our properties, we .... have made this permanent wakf according to our Mahomedan law." Then they describe the property conveyed by them. The objects are :—

"For the benefit of our children, the children of our children, and the members and relatives of our family and their descendants in male and female lines, and, in their absence, for the benefit of the poor and beggars and widows and orphans of *Sylhet*, on valid conditions and true declarations hereinafter set forth below. We, two brothers, have for our lifetime taken upon ourselves the management and supervision of the same in the capacity of matwalis, and taken out the wakf properties from our ownership and enjoyment in a private capacity, and we have put them in our possession and under our control in our capacity as matwalis."

Then are stated various incidents and duties attaching to the office of matwali, amongst which occur the following :—

"In order to maintain the name and prestige of our family, we, the matwalis, will make reasonable and suitable expenses according to our means and position in life. We *will* at our own choice and discretion fix allowances for the support and maintenance of the persons intended to be benefited by this wakf, who are now living or who may be born afterwards, and we will pay the same to them every month, and also the expenses for their festive and mourning ceremonies, when required.

"It will be competent for us the matwalis and our successor matwalis to enhance or reduce the allowances of the persons for whose benefit the wakf is made, who are now *living*, or who may hereafter be born, in consideration of course of their position and circumstances and the state of the income of the wakf properties.

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It will be competent for us the present matwalis and the matwalis who will be appointed after us, to use the wakf properties as security and to grant putni, dur-putni and permanent and temporary ijara settlements in respect of them, and with the money to be received as salami for the aforesaid settlements to purchase some other properties, and to exchange any of the lands of this wakf with some other lands, and to include the lands so acquired by purchase or in exchange in the wakf, and to spend the profit of the same towards the expenses of the wakf, and to keep the surplus profit in stock in the tehbil, and to try always to increase the wakf properties and the amount in cash. Whatever properties may be acquired by us the matwalis and our successor matwalis after execution of this document, shall be included in this wakf. We the matwalis and the matwalis who will be appointed in our place hereafter shall have no power to make gift of any property in favour of relatives or strangers.'

It is provided that future matwalis shall always be chosen from the male issue of the settlers, or if they fail, from their relatives. Provisions are made to prevent any of the persons for whose benefit the wakf is made from claiming anything as of right, and from calling for accounts, and from alienating his interest or subjecting it to attachment. And towards the end of the deed its object is again stated :—

"The object of this wakf of properties is that the properties may be protected against all risks, the name and the prestige of the family maintained, and the profits of these properties appropriated towards the maintenance of the name and prestige of the family, the support of the persons for whose benefit the wakf is made, and religious purposes, &c."

Such is the instrument which is propounded as a wakfnama. The *motives* stated are, regard for the family name, and preservation of the property in the family. Every specific trust is for some member of the family. The family is to be aggrandized by accumulations of surpluses, and apparently by absorption into the settlement of after-acquired properties; and no person is to have any right of calling the managers to account.' These possessions are to be secured for ever for the enjoyment of the family, so far as the settlers could accomplish such a result, by

provieions that nobody's share shall be alienated, or be attached for his debts. There is no reference to religion unless it be the invocation of the Deity to perpetuate the family name and to preserve their property, and the casual mention of unspecified religious purposes, &c., at the end of the sentence last quoted. There is a gift to the poor and to widows and orphans, but they are to take nothing, not even surplus income, until the total extinction of the blood of the settlors, whether lineal or collateral.

It seems that in the High Court the learned Advocate-General contended for the Plaintiffs that a gift to the donors' descendants without any mention of the poor might be supported as a wakf; and even that the Mahomedan law intends that perpetual family settlements may be made in the name of religious trusts. In the case of *Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) this Board said: "They have not been referred to, nor can they find, any authority shewing that, according to Mahomedan law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other." The Board proceeded to affirm the decision of the High Court of *Calcutta*, who held that a small part of the property had been well devoted to charity, but that as to the bulk of it, the settlement was, notwithstanding some expressions importing a wakf, in substance nothing but a family settlement in perpetuity, and as such contrary to Mahomedan law, The principle of this decision has been quoted and approved in a subsequent case: *Abdul Gafur v; Nizamudin* (2). This is a sufficient answer to the arguments used in the High Court.

Their Lordships, however, cannot now say that they have not been referred to any authority for the contrary opinion; for Mr. *Branson* has cited to them two cases in which there are very elaborate judgments delivered in the *Calcutta* High Court by the learned Judge Mr. *Ameer Ali*. Those judgments are in accordance with the opinion expressed by him in his *Tagore* Lectures, and if their Lordships have rightly apprehended them, they do go the whole length of the Advocate-General's argument. One is in the case of *Meer Mahomed Isreal Khan, v, Sashti Churn*

(1) Law Rep. 17 Ind. Ap. at p. 37. (2) Law Rep. 19 Ind. Ap, 170,

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Ghose (1), where there were some immediate gifts to the poor, and the gift was upheld, and DO further appeal was presented. The other case is that of *Bikani Miav. Shuk Lal Poddar* (2), where there was no gift to the poor till after the failure of the settlor's family. It was heard by a Full Bench of five Judges, who decided that the deed was invalid, *Ameer Ali* J. disseutiug.

The opinion of that learned Mahomedan lawyer is founded; as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance, he quotes a precept of the Prophet *Maho1net* himself, to the effect that "A pious offering to one's family, to provide against their getting into want, is more pious .than giving alms to beggars. The most excellent ofsadakah is that which a man bestow's upon his family." And by' way of precedent he refers to the gift of a house' in walrf or sadakah, 'of which the revenues we're to be received by the descendants of the donor *Arkan (3),* His other old authorities are of the some kind,

As regards precedents, their Lordships ought to know a 'great deal more in 'detail about them before judging whether they would be applicable. at all; They hear of the bare gift, and its maintenance, but nothing about the circumstances of the property —except that in the case cited the house seems to bave been' regarded with special reverence or of the family, or of the donor. As regards precepts which are held up as the fundamental principles of Mahomedan law, their Lordships are' not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by tho general law of *Islam,* at least as known in. *India,* simple gifts by a private person to remote unborn generations of'.'desoendante, successions, that is of inalienable life interests, are forbidden; and whether it! is 'to be taken that the very same dispositions, which are illegal when' made by ordinary words ,of gift, become legal if only the settlor says-that they are made as a wakf, in the name of God} or for the sake of the poor. To those questions no answer was given or attempted, nor caa their Lordalnps see any. It is trus that tha dnnor'a

(1) Ind. L. R. 19 Calc. 412. (2) Ind. L. R. 20 Calc. 116.
(3) Ind. L. n 20 Calc,140.

absolute interest in the property .ia curtailed and becomes a life interest; that is to say, the wakfnama makes himtake as mutwali or manager. But he is in that' positiou for life; he may spend the income at his will, and no one is to call him to accouut, That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the jamily, and indeed is necessary for the imIDediate accomplishment of such' a design.

Among the very elaborate arguments and judgments reported in *Bikani Mia's Case* (1), some doubts are expressed whether cases of this kind are governedby Mahomedan law; and it is suggested that the decision in *Ahsanulla Chowdhry's Case* (2) displaced the Mahomedan law in favour of English law. Olearly the Mahomedan law ought to govern a purely Mahomedan disposition 0f property. Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan law, as known and administered in *India*; but they cannot 'find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application.' 'They may, for aught 'their Lordships know, have bad their, effect-in moulding the law and practice of wakf, as the, learned Judge says they have. But it-would be doing wrong te the great lawgiver to suppose that he is thereby commending gifts for which the donor exercises -no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulationa of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment, of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words.

Mr. *Branson* indeed did not contend for such sweeping conclusions, though, as in duty bound, he submitted' the arguments which lead up to them. But he argued that where, as in this case, there is an ultimate gift for the poor, a perpetual family settlement expressly made as wakf is legal. He had a right to

(1) Ind. L. R. 20 Calc. 116. (2) Law Rep. 17 Ind. Ap. 28.

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argue that point as not being covered by the decision in *Ahsanulla Chowdhry's Case* (1). This Board expressly left it open,' because they found that contradictory views had been taken in *India,* and they did not desire to enter into that controversy in a case: where the facts did not raise it. The facts of this case do raise it.

Having 'examinedthe .authorities cited, their Lordships find a ,grea·t preponderance against the-contentions of the Appellants, , Some authorities go so far as to hold that for a valid wakf'the property should be solely dedicate.d to pious uses. On that point, however,' this Board in *Ahsanulla Chowdhry's Case (1)* adopted the opinion of *Kemp* J., to the effect-that provisions for the family out of the grantor's property may be consistent with the gift of it as wakf. In favour of the view now urged for the Appellants there is the judicial opinion of *Ameer Ali* J. in *Bikoni Mia's Case* (2), dissenting from the rest of the Court; "a *dictum* of Sir *Raymond West* in-the. *Bombay* High Oourt in the case of *Faima Bibi* v, *Advocate-General of Bombay* (3), and a decision of *Farran* J. in the same Court in the case of *Amrutlal Kalidas* v, *Shaik Husain* (4). The weight of *Ameer Ali,* J.'s opinion on this subordinate point is somewhat lessened by his. support of the gift under consideration on the very broad grounds: which their Lordships have cousidered to be untenable. "The : *dictum* of Sir *B. West* is mentioned in *Ahsanulla' Chowdhry's . Case.* (1). *Farran* J. had before him a case very closely re-sembling the present one. He described the settlement as "A perpetuity of the worst and most pernicious kind, and would be invalid on that ground 'unless it can be supported as. a wakf-nama" (5); and he thought that the authority of the Hedaya is against it; but. he adopted the principle stated by Sir *R. West,* which he treated as a decision, and he supportedrthe gift on the strength of the ultimate trust for the poor.

Their Lordships cannot assent to these conclusions. They make words of more regard than things, and form more than ·substance. In their judgment the *Calcutia* .High Court have in

(1) Law Rep. 17 Ind. Ap. 28.
(2), Ind. ,L. R. 20 Calc. 116.
(3) Ind. L. R. 6 Bomb. 53.
(4) Ind.iL. R. 11 Bomb. 492.
(5) Ind. L, R. 11 Bomb. at p. 497.

this case rightly decided that there is no substantial, gift to the poor. A gift may be illusory whether from its small amount or from its uncertainty and remoteness. If a man were tosettlea crete of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally ilhisory to make a provision for the poor under which they are not entitled to receive a rupee till after the to.tal extinction of a family; possibly not for hundreds of years; possibly not until the' property had vanished away under the wasting agencies of litigation or mal-feasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain *in* a high position. 'I'heir Lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant toserve for the aggrandizement of a family.

They will humbly advise Her Majesty to dismiss this appeal with costs,

Solicitors for Appellants : *Pemberton & Garth.*

Solicitors for Respondents: *Sanderson, Holland, & Adkin.*

SIR SETH HUKUMI CHAND AND OTHERS (PLAINTIFFS) . . . } APPELLANTS ;

AND

MAHARAJ BAHADUR SINGH AND OTHERS, (DEFENDANTS) . . } RESPONDENTS.

J. 0.*
1933
May 12.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Jains—Rights of Worship—Parasnath Hill—Works executed by Swetambaris—Suit by Digambaris—Limitation—Suit for Declaration—Continuing Wrong—Specific Relief Act (1. *of* 1877), *s.* 56—*Indian Limitation Act, (XI. of* 1908), s. 23; *Sch.* 1., *art.* 120.

Parasnath Hill, which is regarded as sacred by both the Swetambari and the Digambari sects of the Jain community, is not debattar property of the Jain deities installed thereon, but the property of the Swetambaria by purchase in 1918' from the zamindar with whose ancestors it was permanently settled. The Swetambaris in erecting on the hill buildings for the accommodation of temple servants and dharmasalas for the use of pilgrims, and in putting sentries and night watchmen thereon, have not unlawfully interfered with the rights of worship of the Digambaris. But alterations made by the Swetambaris in the character of the charans in certain shrines was an interference with those rights. A suit for a declaration brought by Digambaris more than six years after the alterations was not barred as to that matter by art, 120 of the Indian Limitation Act, 1908, because the alterations were a continuing wrong within s. 23 of that Act; the plaintiffs had not, by acquiescence or otherwise, disentitled themselves under s. 56 of the .Specific Relief Act, 1877;' to the relief prayed.

Decree of the High Court varied.

APPEAL (No. 121 of 1930) from a decree ofthe High Court (August 8, 1928), which' modified a decree of the Su.bordinate Judge of 'Ranchi (May 26, 1924).

The 'appellants, representing the Digambari sect of the Jain community, instrtuted a suit against, the respondents, representing the 'Swetambari sect of ,that' community, alleging that various acts done or threatened to be done by the Swetambaris on Parasnatli Hill were an unlawful interference with the rights of worship of the Digambaris.

* *Present:* LORD THANKERTON, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

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The trial judge made certain declarations and granted injunctions prayed for; upon appeal the High Court (Ross and Wort JJ.) set aside certain of the declarations, and corresponding injunctions, but otherwise affirmed the judgment.

The facts of the case, and the grounds of the judgments in the HighCourt appear from the judgment of the Judicial Committee.

1933. March 10, 13, 14. *De Gruyther* SO, *Hyam* and *Chcmvpat Rai Jain* for the appellants.

Dunne X.O. and *Wallach* for the respondents.

May 12. The judgment of their Lordships was delivered by SIR JOHN WALLIS. This case is the result of further disputes between the two sects of Jain as to their rights of worship on Parasnath Hill. As so much, turns on the beliefs .110W entertained by the whole Jain community with reference to the sacred character of this hill, their Lordships will begin by oiting the opening paragraphs of the judgment delivered by Lord Phillimore "a few years .ago in *Maharaj Bahadur Si'ngh v. Hukum Ohand* (1), in which, this' subject is most felicitously dealt with.

,(The Jains recognize 24 highly saintly personages-e-men who have attained salvation or nirvana, who are called tirthankars (finders of the ford, across the river of death). These four and twenty are counted in many respects as higher than the gods or some of the gods in the Hindu pantheon. Twenty of them are believed to have attained nirvana in the present cycle of the world's .history upon the Hill Parasnath in the district of Hazaribagh in Bengal, with the result that the hill is held in reverence by Jains. The hill itself has some remarkable natural featuree, and rises into several peaks. Twenty spots apparently marked out by natural features, are believed to be places from which the 20 tirthankars quitted earth; and at each of these spots, a footprint of the saint is worshipped, There is a small

(1) (1925) 24 All. L. J. 100 (P. C.).

enclosure covered with a cupola, which at the present moment is made of white marble. These spots have been set apart from remote antiquity. The four remaining tirthankars quitted earth in other parts of India. In respect of them conventional spots have been since the year 1868 set apart and treated *in* a similar way. Upon the hill there are also a shrine to a lesser saint called Gautama Swami, an important temple in one of the highest parts of the mountain called Jalmandil, certain platforms set apart for religious contemplation, and two dharrnasalas or rest-houses for pilgrims, The hill. is much frequented by pilgrims, who take the 24 shrines or toriks in regular order, worshipping at each. According to the tenets of the Digambara, this worship must be performed fasting, and the whole hill is so sacred that from the moment they set foot on it, they must abstain from any office of nature, even spitting.

These practices ,are observed on their pilgrimages by the Swetambaris as well.ibut the Digambaris in the present case go much further and take up the position that- any course of action inconsistent with their due observance, such as the regular and continuous employment of human beings on the hill or the building thereon of dwellings for them, necessarily involves a, sacrilegious pollution and desecration of the sacred hill which they have a right to restrain. These are matters for the Jains themselves, and the Civil Courts are only concerned with them in so far as they are relevant to questions of civil right such as an alleged interference withthe plaintiffs' rights of worship on the hill, and in that case the issue must be, not whether the acts complained of are in accordance with orthodoxy or with previous practice, but whether they do in fact interfere with the plaintiffs' rights of worship.

In 1918 the Swetambaris, who have all along been in management of the shrines, acquired by purchase. the proprietary rights of the Raja of Palgunj in .the hill, and in 1920, not long before the institution of the preserit suit, they availed themselves of the greater freedom of action *so* acquired by posting sentries and night watchmen on the *top* of the hill and by beginning to erect dwellings there for them and

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for the pujaris and other temple servants in daily employment on the hill, and also dharmasalas or rest-houses for the accommodation of the pilgrims. They also proposed to erect a gate at the top of the winding pilgrim way which, starting from the village of Madhuban at the foot of the hill, provides a six mile ascent to the hill top. This gate the Digambaris alleged was intended to obstruct the Digambaris' access to the hill. These are some of the acts complained of in the present suit, which is a representative one instituted on behalf of the Digambaris against the Swetambaris pursuant to Order 1., r. 8, of the Code of Civil Procedure, and their Lordships will dispose of them in the first instance.

In paras. 5 and 9 of the plaint the plaintiffs alleged that the entire hill and every stone of it is held sacred and is an object of adoration and worship for both sects of the Jain community, and that on account of its special sanctity no building for human habitation can be erected on it, and the very idea of such a thing is considered sacrilegious.

The first defendant, in para. 10 of his written statement, did not admit that the Digambaris regarded every part and parcel of the hill as sacred, and denied that they had any rights in the hill, except as thereinafter stated. The ideas of sanctity conveyed in the plaint were highly exaggerated, and the Jain tenets were not opposed to buildings for human habitation on the hill, nor were they regarded as sacrilegious, provided that they were not unconnected with religious purposes. The Subordinate Judge at Ranchi, to which Court the case had been transferred from Hazaribagh, acting mainly on the large body of oral evidence as to the sanctity attached by Jains to the hill, held that it was the endowed or debattar property of the Jain deities thereon, and that the plaintiff Digambaris were entitled to see that the hill their most sacred tirth was kept immaculate and not defiled or desecrated; and he accordingly granted an injunction, with corresponding declarations, restraining the defendants from posting sentries and night watchmen on the hill or proceeding with the building of the proposed dwellings and dharmasalas,

and also from erecting the gate which he found was intended to obstruct the Digambaris' access to the hill.

On appeal to the High Court, both the learned judges, in separate but concurring judgments, reversed this part of the lower Court's decree, holding that the *bill* was not the debattar property of the Jain deities thereon, but was the property of the Raja of Palgunj, whose title, it is now finally settled by the recent decision of this Board, passed to the Swetambaris by the sale deed of March 9, 1918. They further held that the acts complained of were not shown to have interfered with the Digambaris' rights of worship of the twenty-one ancient shrines as confirmed to them by the judgment of the Board delivered by Lord Phillimore in the case already mentioned, and that the proposed gate was not shown to be intended to obstruct their access to the hill.

As regards the question of the hill being debattar property, as pointed out in the High Court judgments, it cannot be said that this issue was very clearly raised in the pleadings, but it has been dealt with by both the lower Courts on all available evidence, and, in their Lordships' opinion, it is desirable that it should now be finally decided, so as not to give occasion for further litigation between the two sects. Their Lordships will therefore proceed to consider it.

The Jain shrines on Parasnath Hill are undoubtedly of great antiquity, but very little is known of their past history or as to the time when the now prevailing views as to the sanctity of the whole hill first obtained acceptance. The early work referred to in the argument for the appellants merely extols the superior efficiency of the abishekam or ablution ceremony when performed at the shrines as compared with the same ceremony when performed in ordinary temples. From the 16th to the 18th century, the Jagat Seths, a wealthy and powerful family of bankers at Murshidabad, who belonged to the Swetambari sect, appear to have maintained the shrines, but on the cession to the East India Company in 1765 they removed to Calcutta.

At the decennial settlement in 1790, and afterwards at the permanent settlement, the hill was included in the zamindari

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of the Raja of Palgunj, which raises a legal presumption that it was his property. During the greater part of last century, the Raja of Palgunj, failing anyone better qualified, bore the expenses of the shrines, and recouped himself by taking a share of the pilgrims' offerings.

The hill itself is twenty-five square miles in extent, and rises to a height of nearly 4500 feet at top of the highest peak, According to the report of Lieut. Beadle, who visited it in 1846, it was covered, except at the very top, by forest trees and by dense jungle infested by wild beasts and was uninhabited by man, the few Santhal hamlets on the lower ranges being apparently overlooked. Since the coming of the British Raj, he said the number of pilgrims had been increasing annually. They were mostly of a wealthier class as compared with the Hindu pilgrims to Jagannath, but owing to the construction of the Grand Trunk Road, which passes underneath the hill at a distance of 200 miles from Calcutta, he thought it bade fair to become a very popular shrine. The advent of the railway, and the construction of sixteen miles of metalled road from the nearest railway station to Madhuban, now make access easy, and pilgrims visit the hill in thousands every year. Otherwise the conditions are not much altered. In 1861, a military sanatorium was opened near the top of the hill, not far from some of the shrines, on a site acquired from the Raja; but was discontinued four years later. A dak bungalow and a branch of the Dublin Mission now occupy the site. In 1876 the Raja granted a permanent lease of 2000 acres more than half-way up the hill, and abutting on the pilgrim's way, to an English planter named Boddam, who opened a tea plantation there, and there is now another plantation in the same neighbourhood. At the beginning of this century, the Swetambaris began the construction of a large white marble temple over the Parasnarh shrine at the top of the highest peak. The Digambaris were strongly opposed to this as affecting the unique and most impressive characteristics of the place, and so it is said to have been the beginning of the quarrel between the two sects about the hill.

Their Lordships will now refer as briefly as possible to the evidence which shows, in their opinion, that the Raja's title, which has now passed to the Swetambaris, is unassailable. In the first place, the fact that the Jains are not shown to have taken any objection to, the military sanatorium-and the tea .plantation, both of which, in the light of the evidence in this case, must have been most distasteful to them, tells strongly against their present claim. In a suit filed by the Raja in 1867 against a member of the Swetambari sect} to establish his title to the hill and a share of the offerings, the lower Court found that he was the proprietor of the. whole hill except the shrines themselves, but the decree was reversed by the High Court on the ground that the plaintiff had not established any.cause of action against the defendant. In 1872, these disputes were settled by an ekranama between the Raja and the Swetambari sect by which he rundertook among other things to grant them land, stones, and timber for any new shrines. This stipulation involved a clear admission of the Raja's title to the hill.

In 1888, in oonsequence of the action of the lessee of the' tea plantation in starting a lard factory which involved the slaughtering of pigs, a thing peculiarly offensive to the Jain religion, the Swetambaris filed a suit against the Raja and the lessee alleging that they were trespassers" and also that 'the lessee's action: was a breach of' one of the Raja's covenants in the'ekranama, of which the: lessee had notice ' when he entered .into the lease. In the plaint they claim title under an alleged ancient grant from the Emperor at Delhi which has always been rejected whenever put forward, but the case of debattar now set up was distinctly raised by' additional issues as to whether the hill was dedicated to the religious purposes of the .Iain religion: and as such vested *in*, and the property of, the Jain community. These claims of title were examined and rejected in elaborate judgments by the lower Court and the High Court, which held that the property was in the Raja, but that the acts complained of were a breach of an implied restrictive covenant-by the Raja *in* the ekranarna of which the lessee had notice.

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In 1900, the Digambaris are found joining with the Raja in successfully suing the Swetambaris for removing certain stairs which they had erected under licence from the Raja. In that suit the Swetambaris *merely* denied that the hill was the exclusive 'property of the Raja, and alleged that the plaintiffs had no right to interfere with the pilgrim way, but it was held that the defendants were not entitled to remove the stairs which had become annexed to the soil and were vested in the Raja as owner.

In 1903 the Digambaris filed another suit about the new temple, which however was discontinued. In the plaint it was admitted rthat the hill was the property of the Raja, subject to the .Iains' rights of worship,

For the last twenty years the "two sects have been engaged in a struggle to acquire the Raja's title for their own .seot which has now been finally determined' by the judgment of the Board in favour of theSwetambaris,

The Subordinate Judge has discounted much of this evidence on the ground that one or other sect was not a party to the' particular suit, but it is not a question of res judicata, but of repeated admissions and of the successful assertion of the Raja's title whenever challenged. Nor is there, in their Lordships' opinion, any foundation for the further suggestion that the Jains were not in a position to assert their rights. They are a wealthy community and must have incurred enormous costs in the litigation already mentioned, and in the twenty years' further litigation arising out of their efforts to acquire the Raja's title, whereas in 1903 the .Raja was driven to seek relief under the Chota Nagpur Encumbered Estates .Act, largely' owing to the. heavy expenses he had already incurred in litigation with them about the hill.

The Subordinate Judge has based his finding that the whole hill 'is the debattar property of the Jain deities on the belief in its. sanctity now entertained by both sects. 'As observed by Ross J., that evidence' undoubtedly. est,abl.ishes beyon.d a dOllbt that in the belief of the ,Jain community a spiritual guality in some way attaches to the, hill, but· this .is a matter of faith arid cannot in itself determine the physical ownership

of the hill. On this part of the case their Lordships agree with the learned judges of the High Court that the hill was not the debattar property of the Jain deities but the property of the Raja.

On this basis, the learned judges rightly proceeded to consider whether the acts complained of interfered with the Digamburis' rights of worship on the hill. Now eating and drinking) spitting and the offices of nature, and many 'other things which are unseemly and irreverent acts in a place of worship, are naturally and properly *prohibited* in the ancient "Ashatana of Jain temples"; but, as observed by Ross ,J., those rules can *Gilly* be applied by analogy to a vast expanse liko Parasnath Hill, and must be subject to reasonable modifioationsin practice, and this is what is shown by the evidence to have happened.

No serious objection seems to have been taken to the military sanatorium while it existed, or to the plantations with their ooaly lines lower down, though they involved a complete disregard of these rules, Further, writing in 1846, Lieut. Beadle says that a religious meeting or mela was held on the hill every year for a fortnight in January, and that shopkeepers ascended with grain and, other provisions for the") wants of the worshippers, and there is evidence that a Hindu mela is still held on the hill every year.

In a suit in 1910 it was proved that by immemorial custom' the primitive and backward Santhals in the neighbourhood are entitled to hold a hunt on" the hill enjoined on them by their religion on one particular day in the year. Eightto sixteen thousand Sarrthals take part in the hunt, working round the hill and across the pilgrim 'way, and the day ends with sacrifices to their gods and their annual caste 'meeting.

None of these things, however distasteful, appear to have interfered with the Jains' worship on the hill,

The objection to the erection of buildings on the hill seems to have been put forward prominently for the first *time* by the Digambari pundits in opposition to the erection of the Parasnath ternple. According to their teaching, as deposed to by some of the witnesses, it isan act of ashatana to build

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a temple 'on the' sacred hill, and it is also an act of ashatana to pull it "down or to. leave ivstanding, in the latter case because it involves the daily presence of pujaris on the hill to worship the images ill the' temple. Even: so, it was 'not attempted to stop the building on this ground in the suit filed in 1903 and afterwards discontinued,

Coming now to the acts complained of, owing to the increase in the number of pilgrims, pujaris and other temple servants have for some time been employed in daily attendance on the hill without objection *being* taken. Whether spending the night there was allowed or tolerated is a matter of controversy. AU that is now proposed is' to erect dwellings for them on the top of the hill instead of requiring them to make the long ascent and descent every day; to build dharmasalas or rest.houses for pilgrims, and to station sentries and night watchmen on the hill. Their Lordships agree 'with the learned judges that it is 'not proved that any of .these acts will interfere with the Digambaris' rights of worship. As lto the proposed gateway, the Courts cannot assume that it will be used to obstruct the Digambaris' rights of access to the hill; if it should be, they will have their remedy. For these reasons their Lordships are of opinion that as to this part of the case the appeal fails.

The remaining question as to the alterations in three of the shrines may be dealt with more briefly, as both the lower 'Courts are in substantial agreement about the' facts and have orJy differed on the question of Iimitation. The charans in the old shrines were impressions of the footprints of the saints, each bearing a lotus mark. The Swetamb,aris, who prefer to worship the feet themselves, ·have evolved another form .of c4aran, not very easy to describe accurately in the absenoe of models or photographs, which shows: toe nails,· and must be taken to be a representation of part of the foot. This the Digambaris refuse to worship as being a repl'esenta,tion Qf a detached part of the human body. Both the lower Courts have held that the action of the Swetambari in placing .charans of the description in three of the shrines is a wrong of which the Digambaris elre 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 art. 120, but he also held that it could not be barred under that article as it was a continuing wrong, as to which, under s. 23 of the Indian Limitation Act, a fresh period begins to run at every moment of the day on which the wrong continues. The High Court, on the other hand, were of opinion that it was not a continuing wrong and that the claim was barred under art. 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. This question is covered by the decision of this Board in *Rajroop Koer v. Abul Hossein* (1), a case of diverting an artificial watercourse and cutting off the water supply of the plaintiff's lower lying lands.

The fact that there *is* no period of limitation in suits arising out of continuing wrongs, except as regards actions for compensation which are governed by art. 36, does not however conclude the question, because under the law of India declarations and Injunctions are discretionary forms of specific relief, and under s. 56 of the Specific Relief Act, 1877, the Court may refuse to grant an injunction if the plaintiff by acquiescence or other conduct has disentitled himself to such relief. No such case, however, was made in the lower Courts" and no sufficient cause has been shown for refusing to grant, the reliefs prayed for as to this part of the case,'

Lastly, it is not disputed that, *in* so far as it strikes out, declaration 4 in the Subordinate Judge's decree and the direction as to the form of charun to be placed in two other shrines, the High Court's decree is not in accordance with their judgment: " ."',',' . " .

In the result their Lordships' will humbly advise His Majesty that this appeal ought to be allowed *in* part, and the decree of the High Court varied : *(a)* by deleting therefrom the directions which strike out MOID the decree of the Subordinate

(1) (1880) L. R. 7 I. A. 240.

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Judge (1.) declaration 4, and (2.) his direction requiring the defendants to remove .frorn the tanks of Padam Prabhu, Sri Abhinandan Natbji and Dharam Nath the new charans placed by. them therein and to put in these three tonks, as well as the tanks of Sri Subudhinath and *Sri* Chandra Prabhu, footprints as' had originally been there; ancl *(b)* by setting aside the direction as. to costs. In other respects the decree of the High Court ought to be affirmed. As regards costs, their Lordships think that justioe will be done by ordering': the appellants to pay two-thirds of the respondents' costs incurred in both Courts below and two-thirds of their costs of this appeal. For this purpose the direction as to costs 'of the Subordinate .Judge should also be set aside, and any costs already paid under the orders of the Courts below will have to be adjusted to bring about the result arrived at.

Solicitors for appellants: *Barrow, Rogers & Nevill.*
Solicitors for respondents: *fly. S. L. Polak & Co.*

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18. In view of the discussion made above, the appeal is allowed with costs and the impugned judgment dated 23-7-2002 of the High Court is set aside. The writ petition preferred by D.P. SRTC against the decision of the competent authority and connected writ petitions shall be heard afresh by the High Court in the light of the direction issued by this Court in the case of *Gajraj Singh*[5] after impleading all such parties who have been granted relief by the competent authority.

Civil Appeals Nos. 6342-43, 6344-45, 6347-48, *6350-51,* 6353-54, 8575 *of 2002 and* 4196 *of 2003*

19. In view of the decision in Civil Appeal No. 6341 of 2002 *(U.P. SRTC* v. *State of LT.P'),* the appeals are allowed and the impugned judgment dated 23-7-2002 of the High Court is set aside.

Civil Appeal No. 5258 *of 2003*

20. The appellants were granted permits on 11-2·1991 after the High Court had held on 16-3-1990 that the Scheme had lapsed. In view of our finding that the Scheme had not lapsed, the appellants are not entitled to renewal of their permits. The appeal is accordingly dismissed.

Civil Appeal No, 7679 *of 2004 @ SLP (Civil) No.* 21557 *of 2002 and Civil Appeal No.* 7681 *0/2004 [@ SLP (Civil) No. 19034 of 2003]*

21. Leave granted.

21.1. In view of the decision in' Civil Appeal No. 6341 of 2002, the appeals are allowed and the impugned judgment dated 23-7-2002 of the High Court is set aside.

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(BEfORE D,M. DHARMADHIKARI AND H.K. SEMA, JJ.)

THAYARAMMAL (DEAD) BY LR. Appellam:

Versus

KANAKAMMALAND OTHERS Respondents.

Civil Appeals No. 6060 of 1999t with No. 6061 of 1999,
decided on December 6, 2004

A, Hindu Law - Religious and Charitable Endowments - T.N. Hindu Religious and Charitable Endowments Act, 1959 (22 of 1959) - SSe 6(5) and (17) - Property dedicated for use as *Dharmachatram* (resting place for travellers and pilgrims) — Nature of - Held, was a' "charitable endowment" - Such dedication is neither a "gift" nor a "trust" - Hence, rightly held by the High Court that it could not be claimed by the plaintiff as a trustee or defendant as owner - However, High Court erred in directing that the Administrator General under the Admministrators General Act, 1963 (45 of 1963) and the Official Trustee under the Official Trustees Act, 1913 (2 of 1.913) should take over the said property for administration

t From the JUdgment and Order dated 3-12-1998 of the Madras High Court in SA No. 93 of .1985

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. . — The said two Acts (Act 45 'of 1963 and Act 2 of 1913) not applicable to the instant case - Suit property being a charitable endowment directed to be taken control of by the State Government and the Commisstoner under the TIN. Hindu Religious and Charitable Endowments Act, 1959 a

B, Hindu Law - Religious and Charitable Endowments -- Generally - Held, a dedication by a Hindu for religious or charitable purposes is neither a "gift" nor a "trust" in the strict legal sense - Religious endowment does not create title in respect of the property dedicated in anybody's favour - Transfer of Property Act, 1882, S. 122 - Trusts Act, 1882, S. 3 b

The contents of the scone inscl'iplion on the outer wall of the property in question lndlcated that the said property was dedicated by its owner for being used by the general public as a *Dharmachatram* l.e, a *"choultry'* of South India where travellers and pilgrims can take shelter and be provided with refreshment,

The plaintiffs claimed *(i)* that they were in occupation of a part of the dedicated property described in Schedule lA' of' the plaint in the capacity as c trustees, and (*ii*) that a portion of the said property Inentioned in Schedule 'B' had been wrongly encroached upon by the defendants who were liable to be evicted and injuncted from entering into the possession of any part of the dedicated property,

On the other hand, the defendants contended that they had acquired title to the portion of property in their possession on the basis of purchase made by them d in court sale which was conducted in the course of execution of a compromise decree reached in respect of the sun property between parties to that sult.

The trial court and the first appellate court held that the compromise decree was collusive and the property being a public trust, the defendants could claim no ownership to the properly on the basis of the alleged purchase of the same in court sale.

The defendants preferred a second appeal to the High Court. The High Court e carne to the, conclusion that the property in question was dedicated for public use. Notrusrees were appointed by the owner of the property who dedicated the same as *Dharmachatram*. The High Court, therefore, held that the defendants could not acquire any title to Schedule 'B' property on the basis of court sale. The plaintiffs also could not claim any right to the property in their assumed status of a tIllsree. Thus, the High Court modified the decree granted by. the courts below and directed that as the property belonged to a public trust with no scheme provided for its management through appointed trustees, the Administrator General under the Administrators General Act, 1963 (45 of 1963) and the Official Trustee of Madras under the Official Trustees Act, 1913 (2 of 1913) should adminlster the suit properties as properties of the public trust. Aggrieved by the said judgment, both the plaintiffs and defendants approached the Supreme Court by way of the present two cross-appeals. 9

Dismissing both the appeals and modifying the judgment of the High Court, the Supreme Court

field:

The contents of the stone inscription clearly indicate that the owner has dedicated the property for use as *"Dharmachatram"* meaning a resting place for the travellers and pilgrims visiting the Thyagaraja Teznple. Such a dedication in h the strict legal sense is neither a "gift' as understood in the Transfer of Property

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Act which requires an acceptance by the donee of the property donated *nor* is it a "trust". (Para 15)

a Sen, A.C.: *B.K. Mukherjea on Hindu Law of Religious and Charitable Trusts*, 5th Edn., pp. 15, 16, 26, 102 and 103, *relied on*

The High Court was right in coming to the conclusion that the suit property which was a dedication for charitable purposes cannot be claimed by the *plaintiff* as a *trustee* or the *defendant* as *owner*. However, it failed to make a distinction between a "trust" in strict legal sense and a "religious or charitable endowment" as understood in customary Hindu law. It is because of its failure to see this distinction that it committed an error in directing that the Administrator General in accordance with the provisions of the Administrators General Act, 1963 (45 of 1963) and the Official Trustee under the Official Trustees Act, 1913 (2 of 1913) should take over the property for administration. Recourse to Act 45 of 1963 and Act 2 of 1913 was not warranted when the State enactment viz. the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 expressly governs the

c subject-matter in dispute. (Paras 17 and 18)

Hence, the judgment of the High Court is upheld with the modification that instead of the Administrator General under Act 45 of 1963 or the Official Trustee under Act 2 of 1913, the suit property which is a "charitable endowment" shall be taken in control for administration, management and maintenance by the State Government and the Commissioner by invoking their powers under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. (Para 23)

d [Ed.: *See also* V.K. Varadachari's *Hindu Religious and Charitable Endowments*, 4th Edn., 2005, Chap. VI on "Charitable Endowments", p. 347.]

C. Hindu Law - Religious and Charitable Endowments - Generally -- Property dedicated for religious or charitable purpose for which the owner of the property or the donor has indicated no administrator or manager - Effect - Held, the property becomes *res nullius* i.e. property

e belonging to nobody - Such a property vests in the property itself as a juristic person (Para 16)

Sen, A.C.: *B.K. Mukherjea on Hindu Law of Religious and Charitable Trusts*, 5th Edn., p. 35, *relied on*

Manohar Ganesh Tambekar v. Lakhmiram Govindram, ILR (1888) 12 Born 247; *Krishna Singh v. Mathura Ahir*, AIR 1972 All 273 ; 1972 All LJ 155, *approved*

D. Trusts Act, 1882 — Applicability - Held, applicable only to private trusts and not to public trusts (Para 15)

W-P-MJZ/30909/C

Advocates who appeared in this case:

M.N. Rao, Senior Advocate (Y. Ramesh, Ms Sasmita Tripathy and Y. Rajagopal Rao, Advocates, with him) for the Appellant in CA No. 6060 of 1999 and the Respondent in CA No. 6061 of 1999;

9 Santosh Paul, Sandeep Chhabra, Rajeev Sharma, Ms Shree Devi and M.J. Paul, Advocates, for the Respondent in CA No. 6060 of 1999 and the Appellant in CA No. 6061 of 1999..

Chronological list of cases cited *on pages)*

1. AIR 1972 All 273 : 1972 All LJ 155, *Krishna Singh v. Mathura Ahir* *463g*
2. ILR (1888) 12 Born 247, *Manohar Ganesh Tambekar v. Lakhmiram Govindram* *463ej*

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The Judgment of the Court was delivered by

D,M. DHARMADHIKARI, J,- These two cross-appeals have been filed as both the' plaintiffs and defendants feel aggrieved by the judgment of the learned Single Judge of the High Court of Madras passed in second appeal wherebv decree granted lly the two courts below has been modified with directions to the Administrator General under the Administrators General Act 45 of 1963 and the Official Trustee of Madras under the Official Trustees Act 2 of 1913 (hereinafter referred to as Act 45 of 1963 and Act 2 of 1913) to administer the suitproperties as properties of the public trust.

2. The facts relevant to the institution.of the suit leading to the present two cross-appeals are as under:

The properties in suit described in Schedules *'A'* and *'B'* are admiuedly properties dedicated for being used by the. public as. Dhannachatram, The document .of dedication is in. the nature of a stone inscription on the front wall of the property. The property has been deiicaed' as .a Dharmashauam meaning a "choultry" of South India where uavellers and pilgrims can take shelter and be provided with refreshment, The stoneinscription is of.the year, 1805 and has a presumptive evidentiary value urrderthe 'Evidence Act. The inscription is in Tamil and the contents of it have been .explained to us in which the dedicator has clearly described himself as the owner of the property which he dedicated. to the general public as a resringplace. There is no trustee mentioned therein and the witness to the dedication is no hUl1lan being but *Lord Thyagaraja Himself.* The inscription translated into English reads as under:

> "Srinlvas Sagapram 6729. Kaliyuga Karthan 4905. Panchegam Vattage Dharpitham, 57 years of Ralthase, 3rd day. Ippasi *MarlS* (Tanl!l) Wednesday. TQdaYl at Chennai Towa belongs to Tadhaval community, Pachaiyarnmal, wife of Toralrallur Sadayappa Pillai, dedicated this property as Dharmachatram, which being boundaries in east side sixteen-pillar Mandapam, South side Nallena Mudaliar Chatram, west side Kammal Chatram, north side Nada Veethi and being 73 feet length towards south and north, 31 feet width, towards west to east. This Dharmachatrarn along with all the appurtenant rights can be used till the last days of Moon and Sun. No one can sell or mortgage this chatram. Thyagaraia Swamiyal and Vaduvudaiyarnmal are witnesses.' Any person who w.ould create any encumbrance by selling or purchasing would incur a curse like the one, to be incurred by a person who would slaughter a cow on the banks of I-Ioly Ganga in Kasi,"

3. The case of the plaintiffs was that 'they are in occupation' of a part of the dedicated property described in Schedule 'A' of the plaint in the capacity as trusrees. It is further pleaded that a portion of the said property mentioned in Schedule 'B'has been wrongly encroached upon by the defendants who are liable to be evicted and injuncted from entering into the possession of any pan of the dedicated property.

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4. The suit was contested by the defendants pleading inter alia that they have acquired tlne to the portion ofproperty in theirpossession onthe basis of purchase made by them incourt sale which was conducted inthecourse of execution of, a compromise decree reached in respect of the .suit property between parties to that suit.

5. The trial court and the first appellate court. partly decreed the suit. There is' a concurred finding recorded by them that the C0111pr0111ise decree was collusive and the property being of a public trust, the defendant can clalm no ownership to the property on the basis of the alleged purchase of the same in court. sale.

6. The defendants preferred a second appeal to the High Court. The High Court carne to the conclusion on the basis of the contents of the stone inscription on the outer' wall of the property that it was dedicated for public use. No trustees' were appointed by the owner of the property who dedicated the property as Dharmachatra. The High Court, therefore, held that the defendant could not' acquire any title to Schedule 'B' property on the basisof court sale. The plaintiffs also cannot claim any nght to the property in his assumed status of a trustee.

7. The High Court on the above findings and conclusions modifled the decree granted by the courts below and directed that as the property belongs to a public trust with no scheme provided for its management through appointed trustees, the Administrator General under Act 45 of 1963 and the Official Trustees Act, 1913 should take over the management of the trust.

8. The operative part of the judgment of the High Court in second appeal with the directions contained therein needs verbatim reproduction as the counsel appearing in these two cross-appeals have assailed them in favour of their parties:

> "In the result the second appeal is allowed in part. The judgment and decree of both the courts below in the suit OS No. 21 of 1975 on the file of Ilud Additional Subordinate Judge's Court at Chengalpattu dated 29-11-1977 and in the first appeal in AS No. 272 of 1978 on the file of the District Court at Chengalpattu dated 20-12-]983 are modified, and the suit in as No. 21 of 1975 on the file of IInd Additional Subordinate, Judge's Court at Chengalpauu is decreed declaring that the suit property consisting of Plaints A and B schedule properties are 'Dharrnachatram' and it is a public trust, and the Administrator General and Official Trustee of Madras is directed to take delivery of possession of the suit properly consisting of Plaints A and B schedule properties through the process of court before the Subordinate Judge's Court at Chengalpattu, and the Administrator General and Official Trustee of Madras is directed to administer the suit property as a public trust property in accordance with the provisions of the Aumtnlsunors General Act 45 of 1963 and the Official Trustees Act 2 of 1913. In other respects the suit claim of 'the respondent-plaintiffs for the: reliefs of possession and permanent

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injunction and also for damages for use and occupation is dismissed. In the circumstances of the case each party is directed to bear their own costs throughout.

The Registry is directed to send a copy of *this* judgment and decree in' the second appeal in' SA ,No. 93 of 1985 immediately to the Adrnlnistrator General and Official Trustee at Madras and to the Subordinate Judge's Court at Chengalpattu,"

9. The principal submission of the learned counsel appealing in these appeals representing legal representative of the deceased plaintiff, is that the High Court wrongly held that the property dedicated was a "trust". According to the learned counsel it was a "charitable endowment" to which the provisions of Act 45 of 1963 and Act 2 of 1913 were not attracted. It is submitted that the property described as Dharmachatrarn is covered by definition of the words "charitable endowments" in Section 6(5) of [he Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter shortly referred to as "the State Act").

10. It is subrniued that the endowment is not registered. The family members of the plaintiffs since generations have been occupying a portion.of the suit property and putting it to use for providing shelter and refreshment to travellers and pilgrims. It is argued that the l-ligh Court ought not to have disturbed the concurrent findings of the subordinate courts and modified the decree in second appeal.

11. On the other side, as respondents and appellants in the cross-appeal, lcamed counsel argues that the contents of the stone inscription do not amount in law to creation of any trust and the plaintiffs, therefore, can claim no status of a trustee, It is contended that the defendants having purchased the property in a court auction and been placed in possession have better title than theplaintiffs who are mere imposters with a bogus claim as trustees. It "is, therefore, prayed that the judgment of the High Court should be set aside and the suit of the plaintiff should bedismissed in toto.

12. After hearing learned counsel appearing for the parties and perusing the relevant record of thecase, the main question which according to us needs decision is as to the nature of the property and whether the stone inscriprlon on the outer wall of the property indicates creation of a "trust" or a "charitable endowment".

13. In the contents of the stone inscription affixed on the property in dispute, it is described as "Dharmachatrarn". In Hinduism, right from the Vedic period, there were institutions like *sarais* and Dharmachatra which are resting places. A hymn addressed to the *Marui* (winds) *(Rigveda Ashtka,* Ch, IV) speaks of refreshments "being ready at the resting places on the road". This hymn indicates the existence Of accommodation for the use of travellers.

14. Dharmachatram is "choultry" Of South India meaning a place where pilgrims or travellers may find rest and other provisions. I-lindus in India

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consider the establishment of temples, mutts and other foundations of religious institutions or excavation and consecration of tanks, wells and other
a reservoirs of water, planting of shady trees for the benefit of travellers, establishment of choultries, sarais or almshouses and dharamshalas for the benefit of mendicants and wayfarers and pilgrims as pious deeds which would bring heavenly bliss. and happiness to a .Hindu. The PROPATHA of the' Vedas is the same thing as *chuntry* or *sarai* and sometimes it is described as "PRATISHREYAGRAH". (See *E,K. Mukherjea on Hindu Law of Religious and*
b *Charitable Trusts,* 5th Edn. by A.C. Sen, pp. 15, 16 and 26.)

. 15. The contents of the stone inscription clearly indicate that the owner has dedicated the property for use as "Dharamchatra" meaning a resting place for the travellers and pilgrims visiting the Thyagaraja Temple, Such a dedicauon in *the* strict legal sense is neither a "gift" as understood in' the Transfer of Property Act which requires an acceptance by the donee of the'
e property donated *nor* is it a "trust". The Indian Trusts Act as clear by its preamble and contents is applicable only to private trusts and not to public trusts. A dedication by a Hindu for religious.or charitable purposes lsneither a "gift" nor a "trust" in the strict legal sense. (See *B.K, Mukherjea on Hindu Law of Religious and Charitable Trusts,* Sth Edn. by A.C. Sen, pp, 102-03.)

d 16. A religious endowment does not create title in respect of the property dedicated in anybody's favour. A property' dedicated for religious or charitable purpose' for which the owner of the property or the donor has indicated no administrator or manager becomes *res nullius* which the learned author in the book (supra) explains as property belonging to nobody. Such a propertydedicared for general public use is itself raised to the category of a
e juristic person. Learned author at p. 35 of his commentary explains howsuch a property vests in the property itself as a juristic person. In *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[1] it is held that; (ILR. p. 263)

> "The Hindu law, like the. Roman law and those derived from it, recognises; not only corporate bodies with rights of property vested in . the corporation apart from its individual members, but also the juridical persons or subjects *calledloundations."* (emphasis supplied)

The religious institutions like mutts and other establishments obviously answer to the description of *foundations* in Roman law. The idea is the same, namely, when property is dedicated for a particular purpose, the property itself upon which the purpose is impressed, is raised to the category of a juristic person so that the property which is dedicated would vest in the
9 person so created. And so it has been held in *Krishna Singh* v. *Mathura Ahir*[2] that a mull is under the Hindu law a juristic person in the same manner as a temple where an idol is installed.

17. The learned Judge of the High Court was right in corning to the conclusion that [he property *in* suit which was a dedication for charitable

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1 ILR (1888) 12 Born 247
2 AIR 1972A1l273; 1972All U 155

purposes cannot be claimed by the *plaintiff* as a *trustee* or the *defendant* as *owner*. Having thus C0111e to the conclusion, the High Court failed to make a distinction between a "trust" in strict legal sense and a "religious or charitable endowment" as understood in customary Hindu law. It is because of its failure to see this distinction that it committed an error in directing that the Administrator General in accordance with the provisions of the Administrators General Act 45 of 1963 and an Official Trustee under the Official Trustees Act 2 of 1913 should take over the property for administration.

18. We have looked into the provisions of the two Acts, Act 45 of 1963 and Act 2 of 1913 and we find that recourse to them was not warranted when the State enactment viz, the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 expressly governs the subject-matter in dispute.

19. Section 10 of the Official Trustees Act from its contents shows that it is applicable only in relation to a property subject to a trust for which there is no trustee available within the local limits of the jurisdiction of the High Court. It is only in such cases that the High Court can appoint an Official Trustee to take over the property for management. Such is not the case here.

20. Similarly the High Court can appoint an Administrator General under the Administrators General Act of 1963 only in case there is none to whom letters of administration in exercise of its powers of grant of probate and letters of administration under the Indian Succession Act can be granted. The Act of 1963 can have no application to a charitable endowment to which the provisions of the State Act are directly applicable.

21. Sections 6(5) and 6(17) of the State Act define "charitable endowment" and "religious endowment" respectively to include amongst other religious institutions and charitable institutions, *"choultries"* endowed for the benefit of the public. The definition clauses read as under:

> "6. (5) 'charitable endowment' means all property given or endowed for the benefit of, or used as of righ; by, the Hindu or the Jain community or any section thereof, for the support or maintenance of ob.lects of utility to the said communlty or section, such as rest houses, *choultries*, patasalas, schools and colleges, houses for feeding the poor and institutions for the advancement of education, medical relief and public health or other objects of a like nature; and includes the institution concerned;
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> * * *
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> (17) 'religious endowment' or 'endowment' means all property belonging to or given or endowed for the support of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service-holder or other elnployee of a religious instltution." (emphasis supplied)

22. The Commissioner appointed under Section 9 of the State Act and other authorities under him like Joint, Deputy and Assistant Cornruissioner as

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his delegates have been conferred with ample powers under Chapter III particularly, Sections 23 and 24 to take necessary steps for maintenance and management of all "religious endowments' within the State to which the provisions of the State Act are applicable. The, State Government is empowered under Section. 3 of the State Acr to extend. the provisions Of the ACIIO "religious endowrnenrs".

23. For the reasons aforesaid both the appeals, are dismissed and the judgment of the High Court is upheld with the modification that instead of the Administrator General under Act 45 of 1963 or Official Trustee under Act 2 of 1913, the suit property which is a "charitable endowment" shall be taken in control for administration, management and maintenance by the State Governmenr and the Commissioner by invoking their powers under the Tamil Nudu tIindu Religious and Charitable Endowments Act, 1959.

24. Copies of this judgment be sent to the State Government of Tamil Nadu and the Commissioner for, Hindu Religious and Charitable, Endowments in the State of Tamil Nadu for taking necessary actions as' required in law for proper maintenance and administration of the property in suit.

(2005) 1 Supreme Court Cases 465

(BEFORE S:N. yARIAVA, DR. AR. LAKSHMANAN AND S.n. KAPADIA, IT.)

ICHALKARANJI MACHINE CENTRE (P) LTD. Appellant;

Versus

COLLECTOR OF CENTRAL EXCISE, PUNE . Respondent.

Civil Appeal No. 2431 of 1999[t], decided on December 10, 2004

A, Excise - Llmitation — Misdeclaratiou - Extended limitation period under S. Ii-A(1) proviso of Central Excise Act - Applicability - lVIlJ)DVAT Scheme - Misutilisarion of, for thc benefit of sister concern - AY 1988-89 — Exemption notification in respect of SSI unit providing for partial exemption for those taking MODVAT credit and total exemption up to a specified limit for others with the stipulation that concession would not be available where MODVAT credit: was not availed or was not admissible — Assessee SST manufacturing components of machinery falling under Sub-Heading 9024,90, Central Excise Tariff Act, 1985 and gearboxes and gearbox covers falling under Sub-Heading 8483.00 and using iron and steel products falling under Sub-Headings 7209, 7203 and 7204.20 as inputs - Assessee opting for M()DVAT sdICITIC in 1986-87 and continuing to avail MODVAT facility in 1987.88 - In 1988-89, without: opting out of lVI()DVAT Scheme, the assessee clearing its final products at concessional rate of duty without entitlement to do so as in respect of cast iron and castings MODVAT

t From the Judgment and Order dated 17-9-1998 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in PO No. E/1863 of 1998-B1 in A. No. E/829 of 1992-B1. : (2002) 148 ELT 527

PRIVY COUNCIL.

J. C.
1921

GOKAL OHAND-*Appellant*

versus

HUKAM CHAND NATH MAL (A FIRM) AND OTHERS-*Respondents.*

Privy Council Appeal No. 122 of 1919,

(Chief Court Appeal No. 1253 of 1912.]

Hindu Law—Joint Family Property - Mitakshara—Indian Civil Servant—Gains Of Science—Special Training—Detriment to Partition—Onus of Proof.

The appellant, who held a salaried appointment in the Indian Civil Service, was an unseparated member of a joint Hindu family governed by the *Mitakshara*. The family carried on a joint ancestral business as money-lenders in the course of which they gave *hundis* to the respondents in respect of a debt. The appellant was not privy to the business. The respondents sued upon the *hundis* making the appellant a defendant. It appeared that the appellant had passed by examination into the Indian Civil Service after seven years' special educational training in England; no evidence was given as to the source of the funds used for that training.

Held (1) that the appellant's official salary was partible property of the joint family, since it resulted from a special educational training, and the appellant had not discharged the onus, which was upon him, of proving that that training was not at the expense of the joint family; (2) that the appellant was liable upon the *hundis* to the extent of his share in the joint family property, including his official earnings, and that questions which might arise with regard to property not partible on any ground, and also as to statutory rules restricting the alienability of an official's emoluments should be dealt with in execution proceedings.

In considering whether gains are partible there is no valid distinction between a direct use of the joint family funds and a use which qualified the member to make the gains by his own efforts.

Judgment of the Chief Court, affirmed (1).

*Present:—Viscount Cave, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

(1) Printed in P. R. 1917 at page 286.

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GOKAL CHAND v. HUKAM CHAND-NATH MAL.

. *Appeal by special leave from a judgment anti derree of tlie Chief Court of the Punjab (May* 19; 1916) *offirming, subject to a ixiriution, a dtcree oj the District Judge, Ferozepore,*

'Tlie suit wns instituted by the respondent firm ill the OOLIrt of the District Judge, Ferozapore, against the present appellant and his four .hrothers, the sons of Joti Mal, deceased, to recover the stun of Rs. 7,200 upon foul' *htnidie* given to tue respondent firm by the firm Nagar Mal.Jot Mal in respect of a balance due OD. account between tbc two firms. The defendants, in: cluding the appellant, were members of a joint Hindu family which carried on under the style of the respondent firm au ancestral money-lending business in respect of which the *hundis* had been given.

The appellant by his written statement pleaded that he had no personal knowledge of the *humdis,* or anything in connection with them : that he had never participated in the business of the family, and that even if the claim 'was proved there could be no personal decree against him. The respondents by a replication to the appellant's etatement pleaded that his want of knowledge did not affect the respondent's rights, and that he was a member of a joint Il.iudu family with his father and brothers, and was personally liable.

'Tlie only issue material to the appeal was as fellows : –

"Are Mr. Gopal Chand .vud Lala Amar Nntb not necessary parties, and personally or in their property liable for the *hundis.*"

The defendant Arnar Nuth, who was a pleader, had raised a defence siurilar in the appellant's,

It appeared tbat the appellant in his youth spent seven years in England for the purpose of a spseial eduentioual training for the Indian Civil Service into which he had passed by examination ; that he held therein the' post of a Joint Magistrate and was iu receipt of a substantial salary.

'The District Judge rejected certain defences "raised on the form of the *hundis* and en-an alleged absence of presentation, and held that all the defendants were personally liable.

'The present appellant and Amar Nath appealed to the Chief Oourt. 'The learned Judges who heard the

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GOKAL CHAND v. HUKAM CHAND-NATH MAL.

appeal held that the present appellant and Amar Nath were liable Dot personally but to the. extent of th,oir respective shares in the joint family estate. They differed, however, ou the question whether the separate earnings of the then appelleuts formed part of that estate ; leRossiguol, J. was of opinion that they did, and Shah Din, J. that they did not, This difference of opinion arose from the circumstance that there was no evidence to show whether or not the ed ueationa! training of tho appellants had heen at tbe expense of the joiut family,

The following question was therefore referred to. Rattigan, J., under section 98 of the Civil Procedure Code, 1908:—

"In a case where a member of a joint Hindu family has received a special training to qualify himself for a profession, or for the service of the State, is there an initial presumption, in the absence of any evidence on the point, tnat be. received his training at tbe expense of the. joint family property. or .shcukl: that fact be alleged and proved like any other fact in the case, and be toullll in the negnrive if no evidence were given on either side,".

The opinion of Rattigan,J'., co.incldng with that of leRossignol, J., the appeal was dismissed by the Division Bench, and a decree passed declaring as follows:-

"That the appellants are liable on the *hundis* in suit tothe extent of their shares in the joint family property, aud that the separate properbj of the appellant Gokal Chnnd shall be held to be joint family property liablefor the satisfaction of the decree. This decree sball be against tho defcnduts' suares ill the joint family property, which shall be rlccmed to include Gokal Chand's separate property (1)"

The Ohiei Court rejected an application by the present appellant and Amar Nath for leave to appeal, but special" leave was granted by the Judicial Committee, Amar Nath, however, did not appear at the hearing.

1920, November 19, 20. *De Gruyther*, K. C. and *0' Gorma»* for the appellant This case depends upon the effect of the words "without detriment to the father's estate" used jn the *Mitakshara* in ch. 1 s. 4

(1) Printed as Nt'. 10 P, R. 1917.

(1) (8) inco01Dlenting npon tho earlier texts, The various relevaut texts are conveniently set out in Shama Oharau's "Vivashta Chandrika," vol. 2, pp. 226 to 232. The decision of the Board in *Methosan. Ramrakhiomal* v. *Rewachand Ramrakhio mal* (1) establishes that nn appllcatlon of the joint family funds to giving a member a geueral education does not render the subsequent gaius of the member partible property. The educatiou which the appellant recei ved was a, general cue, and wus not of the nature of a special training. But a contrary view *is* not conclusive on this appeal, as it must also be shown that the gaius resulted. directly from the expenditure. That is the true test: *Chalakondu Alasami v, Chalakonda Ratnoctuiun*» (2). The appellant's official position and salary did not result directly from his' education, but from his own industry. Had he failec1 to pass into the Civil Service, he would probably have followed a commercial career and his gains would then not have been partible. There is no "detriment to the father's estate" within tbe meaning of the *Mitokshara* except where part of the corpus of the family property is used to enable a member to make gains, *e.g.*, where family funds are ndvnoced to a member who is a medica) man to ena'rlc him to establish a Inboratory, Great inconvenience would arise from holding that a salary of this kiur: became part of the joi.nt iumily property.

. . , .Reference was also made to the fo.llowing: *Dunookdharee Lall v. Gunput Lall* (3), *Durvasula Gungadarudu* v. *Durvasula Narasammah* (4), *Boolagam* -v, *Swarnam* (5), *Lakshman Mayaram .v. -lainnatai* (6J *Krishnaji Maluule*» *v.' Moro Mahadev* (7), *Lachmin Kuar v. Debi Prosad* (8), *Durga Dat .Joshi* v. *Ganesh Doi Joshi* (9), anrl Ghcse's "Bindu Law," page 520.

The respondents did not appear.

(1) (1917) I. L. R 45 Ca. 666: L. R. 45 I, A. 41.
(2) (1864) 2 Mad. H. C. 56, 130, 70.
(3) (1868) 10 Suth. W. R. 192.
(4) (1872) 7 Mad. H. C. 47.
(5) (1881) I. L. R. 4 Mad. 330.
(6) (1882) I. L. R. 6 Bom. 225.
(7) (1883) I. L. R. 15 Bom. 32.
(8) (1897) I. L. R. 20 All. 485.
(9) (1910) I. L. R. 32 All. 305.

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The judgment of their Lordships was delivered by-'

LORD SUMNER :—This was a suit brought to recover the principal amount of four *hundis*, to which five perscns were made defendants, The plaintiffs were successfulin both Courts. below, and.theii; Lordships' Board gave special leave to .appeal ·to *two* of the deteudauts, but one only, Mr. Gokal Ohaud, now appears,

Sundry points connected with th(j validity of the *hundis* and their presentation were pleaded by some of the defendants, but not by the appellant. It has been held in the Courts below that as a matter of practice be was not entitled to avai1 himself on appeal of points which had not been raised by him helow, Before their Lordships this decision was but Iaiutly contested, and they sec no reason to doubt or to review it.

'The real issue in the appeal is one of Soiile importance. Joti Mal and his sons. of whom the appellant isone, constituted a joint Hindu family governedby the *Mitakshara* law, which carried on a joint ancestral business as money-lenders under the style of Nagar Mal. Joti Mal at Fcrozepore, and the *hundis* in question were given by this firm in tbe way of its business for debts due to the plaintiffs, who were near relatives. In the conduct of tlris business the appellant took uo part. Eo' was not privy to tbe debts incurred. In his youth he was for seven years absent from India for the' purpose of being specially trained in England for the Indian Civil Service. He succeeded in entering that service and, returning to India, was posted to the Cen-' tral Provinces. At the commencement of the suit be was Joint Magistrate at Sitapur and in receipt of the' substantial emoluments cf that office, but he has never severed himself from the j<)int family of which he became a member at bis birth.

Iu a joint Hindu family, suoh as this, the rule Is-that tbe acquisitions of tbe members are joint pro-' perty and partible, that is to say, liable to be shared-with ,the other members of the family, and impartibility is the exception.

One of therecognised exceptious is property aoquired by the possesaiou of special "-scieuce" or "learning.'!"

Where, as often happens, this is acquired outside the family and has to be paid for in one form or another at the expense of the family, it is described by the accepted writers as acquired "to the detriment of the family property." In that case it is regarded as a family investment, and the emoluments, which its possesser is thus enabled to obtain, are joint property of the family as fruits of the investment thus made in the person of one of its more gifted members. Of the exact meaning of "science" in the original text it is not now necessary to speak, nor need anything be said of the cases of science imparted within the family, or of science obtained by the pupil either by his own exertions or from educational benefactions, or in any other way not detrimental to the family funds.

The question, what is "science" in this connection must be instrinsically one of fact, though the area of discussion has been steadily narrowed by typical decisions, conclusive of numerous cases. The whole doctrine is not without anomalies. If the test is the returns obtained from the family investments, how far are these emoluments the result of the science-specialising in education at the expense of the family funds and how far are they the rewards of the learner's brains and industry and good fortune? Many a learned man makes nothing and many a sciolist gets on in his profession by pertinacity and mother wit. Again, if the specialist education is deemed to be the stock from which success and income to the end of the learner's life, yet it is unquestioned that the individual can sever from the family at will on the footing of bringing his accumulations into hotchpot as part of the family property and without capitalising future earnings or being under future liability as to what he may make thereafter.

The distinction between acquisitions made by a co-parcener solely by his own exertions and those which have involved the use of the patrimony is as old as the laws of Manu. The text of the *Mitakshara* gives as an instance of impartible acquisition that which has been gained by "science" or learning. Difficulties in apply-

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ing this simple distinction are supposed to begin when Vijnaneswara makes the comment on this illustration, that "without detriment to the father's estate" must be implied throughout the passage, so that the gains of this kind, which are impartible, are not gains of science as such, but gains of science made without any detriment to the father's estate and acquired by the co-parcener's exertions independently of parrimcnial help. Succeeding commentators developed this point. Not always in terms that can be completely reconciled, but the rule itself is simple and logical; though difficulties arise, as with so many rules, in the application. If the substance of the distinction is between acquisitions which have and acquisitions which have not involved the use of the patrimony and therefore such detriment to it as use of it or expenditure out of it involves, there is no logical reason for making any further distinction between gains made by science and gains made by labouring on the patrimony or by laying out the family funds and reaping the fruits of the outlay, nor for distinguishing cases where the learning employed is a specialised and cases where it is a mere ordinary education. The connection between the outlay and its fruits may be more difficult to trace; for a distinction can be made between the use of family funds in acquiring gain and the use of family funds to qualify a member of the family to acquire gain by his own efforts. It may be said to be direct in the one case and remote in the other, but if risk of or detriment to family property is the point in both cases, there appears to be no such merit in a "science," recognised by the sages of the Hindu law, as would warrant the exclusion of gains of science as such from the category of partible acquisitions.

Whatever doubt might once have existed, when the Hindu law was to be gathered from text writers only, has been removed by a series of decisions, and it is now clear that personal earnings and acquisitions may remain partible throughout the unseparated member's life, if he was originally equipped for the calling or career, in which the gains were made, by a special training at the expense of the patrimony. It has been so held in

the case of a Prime Minister (*Luximon Row's* case (1)), a dancing girl (*Chalakonda's* case (2)), and a pleader (3) and (4), but *secus* of an astrologer (5). The like distinction is found in the case of a Karkun (6), and an army contractor (7). The grounds on which in the three last-mentioned cases, however, the gains were held to be impartible serve to define the rule still further. In neue of them was it held that the occupation in itself was such that the gains of science could not be said to apply to it. Impartibility rested in every case on the slightness or the peculiar character of the education by which the science was acquired. Thus in the first-mentioned case the gains were really due to the astrologers native talent for that profession. In his early youth its rudiments had been instilled into him by his father, an astrologer likewise, but without expense to the family or anybody else, for the casting of horoscopes seems to be a profession in which the equipment is slender and a gift for inspiring confidence is the main thing. It was not, however, suggested that, if the special training had been similar to the skill in 'song' and dance, which enhanced the attractions of a *nautch* girl,' the gains of the astrologer would not equally have been partible gains. As a prosecution, astrology enjoyed no immunity. Still more striking is *Lakshman Mayaram's* case (8) where the family member was actually a Subordinate Judge. At the family expense he had received a slight elementary education of an entirely non-professional character. His law he had picked up for himself. His salary was held impartible, not because a judge stands outside the rule or because a knowledge of law in the nineteenth century is not within the term 'learning' as used in the eleventh', but because in these matters a self-taught man has the best of it. For gains are impartible which are not the result, directly or indirectly, of anything but his own exertions.

The present case is the first in which such an official position as that of the appellant has come into question, but, except for its higher respectability, there

(1) (1881) 2 Knapp 60.
(2) (1884) 2 Mad. H. v. 56.
(3) (1872) 7 Mad. H. C. 47.
(4) (1869) 6 Bora. H. C. A. C. J. I.
(5) (1910) I. L. R. 32 All. 805.
(6) (1890) I. L. R. 15 Bom. 82.
(7) (1897) I. L. R. 20 All. 485.
(8) (1882) I. L. R. 6 Bom. 225.

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does not seem to be auy ground on which as au ocoupation it can be taken out of the rule. which the earlier cases establish. Mr. J. D. Mayne's well-known work on Hindu law has throughout all its editions contained the statement in section 283 that a post in the 'Ooveaunt., ed Civil Seriecof India is a post to which the rule would apply, nnrl this never seems (o have attracted comment. still less to have aroused dissent, among the many judgments which have dealt with this subject. In the case of *Metharam Ramrakhiomal* v. *Reioocli ind Ramrakhiomal* (1) the judgrneut under appeal actually acquiesced iu his view, if it did not adopt it and this passage is recited in the judgment of their Lordships' Board, without dissent or oommuat. It is true that an Indian civil servant is not always what is commonly called a scientific man, but his is certainly a special and in many cases au eminently learned prci'essicu.

As no distinction in principle can be found be.. tween Mr, Gokal Chand's official posirioc and .the decided cases, it remains ouly to cansidel' two questions raised on his behalf. The first, whether iu his pruti.. cular case there is either proof or presumption Of the requisite detr-iment to .the patrimony ; the second, whether, if so, that detriment is not so remote that the appellant's official salary should be regarded as being wholly acquired by his own personality, integrity aad learning and therefore as beiug impartible.

The appellant was not called at the trial nor was any evidence given as to his education and early life, but there is no question bere of an ordinary education, which must be the stspping.stone to tho acquisition of any learning, such as might be given in a mission (I, I" *Rl'* 6, Born. 225), or a Government school (*Metharam Ramraktviooia!* v. *Rewachand Ramrakhiomal, supra* (1) still Iess of a mere provision of "food and npparel." Neither hns any question been raised of au equitable distribution of the acquisitious between the separate and the family estates. Admittedly Mr. Gokal Chand spent seven years in England acquiring that comprehensive and costly education which qualified him to pass with success into this Service. Tho family to which he belongs is a family of hereditary money-lenders, and the'

(1) (1917) 1.1;, R. 45 Cal. eee L. R. 45 1. A. 41.

ordinary education, whicb all its male members would naturally and appropriately eujoy, may be taken to be one of considerahle exteut and to include varied attaiumeuts ; but there can be no doubt that, alike in the subjects of study, the proficiency to be attained, and the mentality whioh is formed as the result of it, Mr. Gokal Chunds education must have been very different from that of other members of his family. Mr. Gokal Chaud's education was, above all, a specialsed education.

Among the unsepnrnted members of a joint ITindu family possessed of ancestral property by means of which the science, whose gains are in question might itself have been acquired (*Bai Moucha* v. *Norotnn.das Kashidas* (1)) the preSU111pticn, even in the case of such special gains, is that the acquisitious of all mumbers are partible, until the contrarj' is proved. This was first decided ill *Luaimoii Row's case* (2). Observations have since been made on the slender evidence which connected Luxiuiou's position as Prime Minister to the Peishwa with the joint family property, either through his education or ctherwise, but the rule there laid down as to tbe presumption, though for a time not always acquiesced in, is now unquestionable and binds their Lordships. It is true that a distinction may be drawn between a presumption in favour of partibility, which is a legal attribute of the gains in question, and a presumption ill favour of detriment to the patrimony inrolrsd *in* sequtnng the speeinlissd learning, thg use of which has produeed the gain, which is a question of fact ; but, in their Lordships' opinion, if it is in general incumbentupon the joint family member to prove that; his case is an exception to the prevailing rule of partibility, it is also incumbent upon him to prove the particular facts, which are needed to establish the exception. For this there is the authority of the decision in 7 Madras High Court Rep. 47 and in 10 Sutherland's Weekly Reporter 122. It must accordingly betaken thai tbe wbolo burden of proof was on Mr. Goka1 Chand, If he desired to give evidence to show that his specialised education in England was obtained by the "presents of a friend," the charitable 'be'nefaotions or the

(1) (1889) eBom. H. 0. A. C. 1.1 (2) (1841) 2 Knapp 80.

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educationnl foundations of strangers, or by his own self-taught efforts, thle should have been done by him at the trinl. If, as their Lordships hold, his official position cannot be taken out of the area of partibility, it must now be presumed in the absence of evidence to the', contrary that his gains, not being in their nature incapable of being family acquisitions, are partible,

Then can it be said that the gains, whicb are pattible, are such as result only directly from the use of joint family funds, and that emoluruents, which are the ccnsideration for the personal services of an official selected for his special personal qualifications, result remotely only and too remotely from any family outlay P, Not only is no authority fcrthoomtng for the first part of this contention, but the contrary has been continuously assumed in all the cases which turn on ' gains of science." The point of. all of them is. that persons qualified for earning money by specialised education, enjoyed to the detrimen t of family, funds, become, as it were, a continuing investment for the family benefit. No decision attempts to distinguish betweenthe personal and the family elements in the ultimate gains ; it would probably be impracticable to (10 so, Tbere is equally little ground for contending that partibility depends on *oouco proximo,* or is uegatived by the iutervention of the personal element of the individual co-parcener's character. It is true that in the very Iearued judgment of Mr. Oollett in *Chalakonda's oose* (1) be expresses the view, that logically the rule should have regard to the use of family property in acquiring the partible gains themselves "during and for the purposes of the acquisition," and Dot to its use in acquiring the science bymeans of which they are gained, and be cites .Sir T. Strange's opinion that in -order to make the gains in question partible the -common fund must have been directly instrumental in procuring them. There is also an allusion in *Laketinui« Mayaram* v. *Jamnabai* (2) to "the branch of science 'whioh is the Immediate source of the gains,' " a passage, however, intended to distinguish between elementary and specialised education, and'not between

(1) (1864) 2 Mad. H. C. 55, 70. (2) (1882) I. L. R. 6 Bom. 226, 243.

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Ohand's an ancient rule, which had its origin in a state of sooiety possibly simpler than and certainly differenij. from the state of society existing in tbe present day, but tbis anomaly proceeds largely from tbe occidental habit of relying on mere analogy in the application of legal rules instead of deducing the applicatiou from a logical apprehension of the principle as the best Eastern thinkers do.' Be this as it may, they conceive it to be of the highest importance that no variations or uncertainties should be introduced 'into the establisherl and widely recognised laws, which govern an ancient Eastern civilisation, and least of all in matters affecting family rights end duties eonnsetsd with ancestral customs and religious convictions.

The appellant's liability is, of course, a liability in respect of bis sbare in the family property, including therein such of his own earnings as are partible under the rules above explained. Questions that may arise in regard toproperty, not the gains of science or partible on any ground, and also ill regard to the statutory rules, which restrict the ialienability of an official's emoluments, may properly be the subject of decisiou in execution proceedings if they arise. 'Pheir Lordships are of opinion that the appeal fails and should be dismissed, and they will humhly tender this advice to, His Majesty.

Appeal dismissed.

Solicitors for appellant—T. L. WILSON & 00:

acted as the natural guardian of the minors, it is no longer open to them to question the grant. I fail to, sae the force of this argument, because it is always open to a minor to repudiate the act of hiaguardian if it can be vehown that the act·wa·s clearly illegal. Here, in our opinion, the order of the District Judge granting Letters of Administration of only one quarter of the property wau illegal and there was just oauae .for revocatien within the meaning of section 50 of the Probate Act.. That being so, the minors through Sarade are enbibled to a' revocabicn of that· order.

"The. Iearned Vakil for the appellant has drawn our attention to the oase of *Janakbuti Thakurain v, Gajanand Thakur* (1), whicb indicates the extent to which a compromise made in .a Probate proceeding is a barto a future applio·ation to set asidefhe Probate. There is nothing in that dseuicn whiuh debars the minorsher.e from applying for revocation of: an illegal order...

The order of the Iear-ned District Judge .is;: thereforetset asida und grant of Letters of Administeation in rrespec] ofan ac.na sbsre in theestate in Isvocr of 'Sarada and his two minor brothers is herebr revoked and set aside.

The result of this order will be. that uct.il.afresh application is made in respecbof the whole, no one will be competent to administer the estate of the· testatrix. It will be open to the. beneficiaries to apply either jointly or severally and upon proof of the Will to take out administration of the whole.

The appeal succeeds and is decreed with ·Qosts.

ATKINSON, J.—I agree.

Appeal accepted.

(1) 37 Ind. Cas. 12; 1 P. L. J. 377; 20.0, W. N, 996; 1 P. L. W, 41.

versus

ZAFAR ALI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. U,». 2—Res judicata, p·lea.oj, depending on finding of fact, whether maintainable in second appeal—Plea of relinquishment—Duty of defendant—Evidence Act (I of 1872), ss. 11 (b), 13, 57—Documents not inter partes, admissibility of- "Matter of public history," meaning of —Historical works, admissibility of.

A plea of *res judicata* "depending on a finding of fact whioh has not been challenged in the lower Appellate Court cannot·be 'mainbained in' second appeal to the 'Ohief Court. [p. 120, col. 1.]

It is the duty of a defendant who seeks to avail himself ofbhe bar oreated by Order II, rule 2, Civil Procedure Oode, not only to put forward that defence, but also to establish it to the satisfaotion of the 'Oourt. [p. 120, col. 2.]

Documents oonta.iniug recitals that a particular plotof land belougs to a particular well are admissible in evidence either under section 11 (b) or section 13 of the Evidence Act, although they are not between parbieatobhe suit. [p. 121, col. 1.]

Dioarka Nath Bakshi v. Mukundu Lal Chowdhury, 5 C. L, J. 55, followed.

Cherag Ali Prodhania v. Mohini Mohan Bardhan, 19 Ind. Cas. 615, not followed.

The question of title bebwesn the trustee of a mosque, bhough an old aud historical institution, and a private person cannot be deemed to be a "matter ofpublic, hlstory" within the meaning of section 57 of tho' Evidence Act, and historical works cannot be used to eatablishtitle to such property.. [p. 121, col. 2.]

Second appeal from the .deceee of the Additional District Judge, Lahore, dated the 22nd Deoember 1914, reversing that of the Subordinate Judge, 1st olass, Lahore, dated the 31st March 1913, dismissing the olaim.

Tbe Hon'ble Mr. *Muhammad Shafi* and Sheikh *Niaz Ali*, for the Appellants.

Lala *Mati Sagar*, ·R.·S., for the Respondent.

JUDGMENT.—The property which is the subjaot·matter of dispute between the Mutwalli of the Wazir Khan's mosque and the defendants (the ..descendants of the late Imam) consists of a well, a vacant plot of land known as *baghichi* and a small house in the said *baghichi*. The Mutwalli claims it as part of the religious endowment,' and his claim has been decreed by the Additional Judge, who has,

upon a careful consideration of all the materials before him, expressed his dissent from the conclusion of the Court of first instance.

Before dealing with the question of title, we consider it necessary to dispose of the plea that part of the claim was *res judicata*, and that the rest was barred by Order II, rule 2, Civil Procedure Code. It was urged in the Court of first instance that the plaintiff, having failed to establish his title to the two houses claimed in a previous suit instituted in 1894, is not now entitled to include in the present suit one of those two houses. The Subordinate Judge, upon an examination of the respective contentions of the parties and an elaborate discussion of all the oral and documentary evidence on the subject, has arrived at the conclusion that the house in dispute, which is situate to the west of the well, is different from that which was brought, and he has accordingly over-ruled the plea of *res judicata*. It is to be observed that the plea depends upon a finding of fact, which finding was not contested before the lower Appellate Court, and the learned Additional Judge distinctly states that the findings recorded by the Court of first instance on the plea of *res judicata* and on the defence based upon Order II, rule 2, Civil Procedure Code; "have not been re-opened on their (defendants') behalf in the argument in any Court." In these circumstances, we have no hesitation in holding that the defendants cannot ask the Court of second appeal to consider a question of fact upon which they must be deemed to have accepted the decision of the trial Court.

The same remark applies *mutatis mutandis* to the alleged bar created by Order II, rule 2. A perusal of the written statement makes it clear that this defence was confined to the well, and the Subordinate Judge finds that "from 1894 to 1903 the well was being used for filling the Masjid Hauz as it had been for very many years prior to 1894;" and he accordingly holds that the plaintiff's right to sue for the possession of the well had not accrued on the date of the institution of the previous suit. This finding too was not challenged before the Additional Judge and the appellants are, therefore, precluded from raising the question on second appeal. It must be remembered that the claim with respect to the house was not resisted on the ground of Order II, rule 2, and it is a well established principle of law that it is the duty of the defendant, who seeks to avail himself of the bar created by Order II, rule 2, not only to put forward that defence but also to establish it to the satisfaction of the Court.

Coming now to the question of title to the property, we find that the learned Additional Judge has considered all the *pros* and *cons* of the case, and has based his finding in favour of the plaintiff upon the following facts and circumstances:—

(1) The property in dispute was shown as belonging to the mosque in a plan produced as an Exhibit in 1866 in a suit against the ancestors of the present parties, which plan "was put in by Counsel who represented not only the Mutwalli but also Hafiz Muhammad, the then Imam, who is the ancestor of Farzand Ali."

(2) From the time of the construction of the mosque the well has been used for supplying water to the tank in the mosque; and the land surrounding the well is absolutely necessary for working the Persian wheel attached to the well.

(3) A presumption should be drawn in favour of the plaintiff and against the defendants from the latter's failure to produce in Court an agreement which was admittedly entered into between their ancestor and *the charakhbaris*.

(4) The defendants have absolutely failed to show how they acquired the property.

(5) In these documents P-2, P-5 and P-9 between the Mutwalli and the former *charakhbans* the well is described as the well of the mosque.

(6) The plot of the land comprising the well and the building is described as the *baghichi* of Wazir Khan in a history published in 1854 by Nur Muhammad Chishti, and as the *maidan* attached to the well of the mosque in a work published by Rai Kanhaya Lal in 1874.

The question arises whether there is any adequate ground which would justify

The learned Counsel for the appellants has made an attempt to minimise the

Bardhan (2). In that case a Division Bench of the same High Court considered that the description of the property then in dispute contained in a deed relating property, w led

Oounael has pnodueed in this Court a deed purporting to be. the agreement in question, but the. dccumant. is" an unregistered one, and we are uneble to pronounce any opinion on its genuineness. The fact, howeve-, remains that for some reason best known to the defendants, they did not consider it advisable to prcduoa it before the Court of first". instancs, though they were repeatedly. asked to dcso.

It is argued that, because the defendants were not parties to 'the deeds (P-2, P-5 and P-9), the description of the "well contained there in Oannat be used it! evidence.. We observe that a similar objection was overruled by, the Calcutta High Court in a judgment reported as *Dwarka Nath. Bakshi* v. *Mukunda Lal Chowdhury* (1). It was held in that case, "documents, though not between. parties, containing, recite.Is that a particular plo't of land belongs to a particular *hoola*, which is in question, are admissible in evidence either under section 11 (*b*) or section 13 of the Evidence Act, although they are not conclusive or binding evidence, and may be very weak evidence or even of no weight at all." The learned Judges referred to other cases in support of the view taken by them, and the only judgment, which the learned Counsel for the appellants has cited as expressing an opinion to the contrary, is that reported as *Charag Ali Pradhania* v. *Kshini Mohan* ancestors never took the slightest objection to the Mutwalli controlling the use of the well and describing it as mosque property." There can be little doubt that the Imam, who was residing on the spot, was fully aware of what was going on, but he never asserted his title. This conduct affords a strong piece of evidence in support of the case set up by the plaintiff.

We are inclined to think that the use of the historical works to establish title to the property cannot be justified on the strength of section 57 of the Indian Evidence Act," the question of title between the trustee of a mosque, though an old and historical institution, and a private person cannot, in our opinion, be deemed to be a "matter of public history" within the meaning of the said section. We must, therefore, exclude this piece of evidence from consideration, and we do not think that this exclusion would make any difference in the result. The description contained in the two books does not advance the case for the plaintiff to any appreciable extent, and; indeed, this description can be gathered from other admissible evidence on the record.

The defendants are wholly unable to offer any satisfactory explanation of the use of the well for the purposes of the mosque, and the suggestion that the user was a permissive one rests upon no evidence whatsoever, and, indeed, runs counter to

(1) 6 C. L. J. 55.

(2) 19 Ind. Cas. 615.

all the circumstances of the case. This fact, coupled with the proximity of the property to the mosque and the evidence supplied by the plan of 1866, establishes a strong *prima facie* case on behalf of the plaintiff, and there is nothing to rebut that case. Indeed, as observed already, the appellants cannot show a semblance of title, and place their sole reliance on the adventitious circumstance that they are defendants in the case.

We are accordingly of opinion that there is no sufficient ground to justify our interference on second appeal, and we dismiss the appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 1237 OF 1916.
January 21, 1918.
Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, and Mr. Justice Kemp.
MANJU MAHADEV SHETTI—DEFENDANT—APPELLANT
versus
SHIVAPPA MANJU SHETTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 126, 128—"Liability," meaning of—Principal and surety—Principal debt barred—Surety, liability of.

By the word "liability" used in sections 126 and 128 of the Contract Act is intended a liability which is enforceable at law, and, if that liability does not exist, there cannot be a contract of guarantee. [p. 123, col. 2; p. 124, col. 2.]

There cannot, therefore, be a valid contract of guarantee, where the debt which is sought to be guaranteed has already become time-barred. In such a case there is no enforceable liability in the third person which can form the basis of a contract of guarantee. [p. 123, col. 2; p. 124, col. 2.]

A creditor sued the principal debtor and his surety for the debt and obtained a decree against both. The principal debtor alone appealed and his appeal was allowed, on the ground that on the date on which the contract of surety was entered into the principal debt had become time-barred. The surety not having appealed the decree against him was confirmed. The creditor recovered the debt from the surety, who then sued the principal for the recovery of the amount:

Held, that the principal debt having become barred at the date of the contract of surety, there could be no valid contract, and that the surety's suit must, therefore, be dismissed. [p. 123, col. 2; p. 124, col. 2.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 8 of 1916, confirming the decree passed by the Subordinate Judge, Kumta, in Civil Suit No. 120 of 1915.

Mr. *A. G. Murdeshvar*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondents.

JUDGMENT.

BATCHELOR, A. C. J.—The facts upon which this second appeal comes up for decision are these. In 1883, a sum of money was deposited by the trustees of a certain temple with the father of one Manju Mahadu. In 1889, there was a demand for the return of the money, and a refusal by Manju's father. In 1897, on the occasion of another refusal, it is found that there was an oral contract of guarantee by one Manju Buddu, who undertook to repay the temple trustees in case Manju Mahadu should not do so. In 1900, the temple trustees brought a suit against both Manju Mahadu and Manju Buddu to recover the deposit. The Subordinate Judge decreed the claim both against Manju Mahadu and against Manju Buddu. From this decree an appeal was taken to the District Judge, Mr. Leggatt. But it was taken only by Manju Mahadu. The learned District Judge held that the deposit with Manju Mahadu's father was proved, but that the suit had become time-barred five years prior to its institution in 1900, that is to say, it became time-barred in 1895. The suit was, therefore, dismissed as against the appellant, Manju Mahadu. But since Manju Buddu had not appealed, the trial Court's decree against him was confirmed. The then plaintiffs executed their decree against Manju Buddu in May 1912 and in 1915 Manju Buddu having died his sons brought this suit to recover from the defendant, Manju Mahadu, the sum which had been paid by them in the execution. The learned District Judge affirming the decree of the Subordinate Judge has held the plaintiffs entitled to recover from Manju Mahadu, the principal debtor.

He is the appellant before us, and on his behalf Mr. Murdeshvar's principal point is that the lower Courts were wrong in their determi-

anywhere as to whether the vocal cords were affected or not. The doctor, PW 7 specially stated in his evidence that the vocal cords were not at all affected and the victim could speak. This being the position, we do not find any substance in this point as well. For the foregoing reasons, we are of the view that the prosecution has failed to prove its case beyond reasonable doubts and the High Court was quite justified in upholding conviction of the appellant. As such, no ground whatsoever for interference by this Court is made out.

8. Accordingly, appeal fails and the same is dismissed.

(2004) 10 Supreme Court Cases 779

(BEFORE S. RAIENDRA BABU AND G.P. MATHUR, J1.)

.KARNATAKA BOARD OF WAKF Appellant;

Versus

GOVERNMENT OF INDIA AND OTHERS Respondents.

Civil Appeals No. 16899 of J996t with Nos. 16900 and 16895 of 1996, decided on April 1o, 2004

A. Muslim Law — Wakfs — Wakf Act, 1954 - SSe 4,26 & 56 - Nature of suit property - Whether government property or wakf property - Held, property must be "existing"; wakf property on the date of commencement of the Act so as to entitle the Wakf Board to exercise power over the same - Where the property in question had been acquired by Govt. of India under Ancient Monuments Preservation Act, 1904 and entered in the Register of Ancient Protected Monuments long back and Govt. of India remaining in absolute ownership and continuous possession thereof for the last about one century, held, the property cannot be said to he an "existing" wakf property and therefore, appellant Wakf Board cannot exercise any right over the same — Hence subsequent notification issued in 1976 by the appellant Board showing the property as having been declared wakf property under S. 26 of the Wakf Act, and published in gazette, would be null and void and Hable to be deleted — Factum of ownatsnip, possession and title over the property, having been proved on admissible evidence and records by Govt. of India, appellant's claim over the property based on SOlne borderline historical facts, unsubstantiated by concrete evidence and records, cannot be accepted (Paras 8 and 9)

B. Ancient Monuments Preservation Act, 1904 - S. 4 - Acquisition of immovable property by Govt, of India under the Act - Proof - Entry in Register of Ancient Protected Monuments - Evidentiary value of - Register maintained by Executive Engineer in charge of the ancient monuments produced wherein suit property was mentioned and the Govt., was referred, to as the owner — When manner of acquisition was not under challenge, held, the entry in the Register couldbe treated as a valid proof of acquisition under the appropriate provisions of the .Act (Para 8)

t From the Judgment and Order dated 10-3-1995 of the Karnataka High Court in RFA No. 549 of 1986

,C. Specific Relief Act, 1963 - S. 34 - Suit for declaration of ownership and title over immovable property — Proof — Held, must. be: proved by admissible evidence and records - In a title suit of civil nature, therelsno a scope for historical facts alld claims - Reliance oo borderline historieal facts would lead to erroneousconclusion - Plaintiff filing title suit should be very clear about origin of 'title over the property and must specifically plead it — Civil Procedure Code, 1908, Or. 6R. 4 (Paras 8 and 12)

D. Adverse Possession - Essentials of — Held, are exclusive physical possession and animus possidendi to hold as owner in exclusion .to.the actual. owner - Facts to establish claim for adversepossesslonystatede-c Pleas of b adverse possession and of title are mutually inconsistent — Limitation Act, 1963, Art. 65

In the eye of.the law, an owner would be deemed to he in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. c Adverse possession is a hostile 'possession by clearly asserùng ,hostile title In denial of the title of the true owner. It is a well-settled, principle that a party claiming adverse possession .must prove that his-possession *is,'"nec vi, neeclam; nee precario"*, that is, peaceful, open and continuous. The possession must.be. - adequate in continuity, in publicity and inextenrto.show tbarthetrpossessien is . adverse to the true owner. It must startwitha wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continuedover the.stanitory d period. Physical fact of exclusive possession' and: the *animis possidendi* to bald as owner in exclusion to the actualowner are the most important factors 'that are to be accounted in cases of this nature. Plea of. adverse possession is not a pure question of law but a blended one of fact and law. Therefore, aperson whc claims adverse possession should show: *(a)* on what, date he came into possession, *(b)* what was the nature of his possession, *(c)* whetherfiefactum.of.. possession was known to the other party, (d)how, long.bis-possessicnhas 's continued, and (*e*) his possession was open andundisturbed.'Aperson:pleading, adverse possession has no equities in his favour, Since he.is trying tc.defeatthe rights of the true owner, it' is for him to clearly plead-and establish "all facts necessary to establish his adverse possession. (Para 11)

S.M, Karim v. *Bibi Sakina,* AIR 1964 SC 1254; *Parsinni v, Sukhi,* (1993) 4 ,SEC 375; *D.N. venkatarayappa v, State of Karnataka,* (1997) 7 SCC 567; *Mahesh Chand Sharma (Dr.)* v. *Raj Kumari Sharma,* (1996) 8 SEC 128, *relied on*

A plaintiff, filing a title suit, should be very clear about the origin of title over the property, He must specifically plead it. The pleas on t.itle and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (Para 12)

S.M. Karim v, Blbi Sakina, AIR 1964 SC 1254; *P. Periasami v, P. Periathambi,* (1995) *6 SEC* 523; *Mohan Lal v, Mirza Abdul Gaffer,* (1996) 1 SEC 639, *relied on* 9

In this case, the respondent obtained title under the provisions of the Ancient Monuments Act. But, the alternative plea of adverse possession by the respondent is unsustainable. The element of the respondent's possession of the . suit property to the exclusion of the appellant with the *animus* to possess it is not .. specifically pleaded and proved. So are the aspects of earlier title.of the appellant or the point of time of disposition. (Para 13) h

E. Civil Procedure Code, 1908- Or, 41 R. 27 - Scope of — Additlonal evidence - Production of

a *Held:*

The scopeof Order 41 Rule 27 CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce properjudgment. (Para 6)

b Appeals dismissed R-P-M/Z/29967/S

Advocates who appeared in this case:
Salman Khurshid, Senior Advocate (lmtiaz Ahmed, Javed A. Warsi and Z. Ahmad Khan, Advocates, with him) for the Appellant;
Mukul Rohatgi, Additional Solicitor General (Sanjay Hegde, Satya. Mitra, S. Wasim A. Qadri, Anil Katiyar and Ms Sushma Suri, Advocates, with him) for the Respondents.

Chronological list ofcases cited *on pageis)*

c
1. (1997) 7 see 567, *D.N. Venkaiarayappa v. State ofKarnataka* *785c-d*
2. (1996) 8 *see* 128, *Mahesh Chand Sharma (Dr.) v, Raj Kumari Sharma* *785e-f*
3. (1996) 1 sec 639, *Mohan Lal v, Mirza Abdul Gaffer* *786a*
4. (1995) 6 SCC523, *P. Periasami v, P. Periathambl* *785f*
5. (1993) 4 see 375, *Parsinni v. Sukhi* *785c-d*
6. AIR 1964 SC 1254, *S.M. Karim* v. *Bibi Sakina* *785c-d,785/*

d The Judgment of the Court was delivered by

S. RAJENDRA BABU, J.— Three suits were filed by the first respondent in each of these cases seeking for a declaration that notifications issued by the Karnataka Board of Wakf i.e, the appellant before us, showing some of the defendants to be illegal and void or in the alternative, to declare the first respondent as owner of the suit properties on the ground that they have

e perfected their title by adverse possession and consequential relief Ilfor permanent injunction. There are three sets of properties in each of these three matters. One is CTS No. 24 of Ward No. VI,' described as "Karimuddin's Mosque", another is CTS No. 36 of Ward No. VI, described as "Mecca Masjid' and the other is CTS No. 35 of Ward No. VI, described as "Water Tower". All of them were situated at Bijapur.

2. The claim made by the first respondent is that they acquired the suit property under the Ancient Monuments Preservation Act, 1904 (the Ancient Monuments Act) and a notification had been published in that regard and the suit property had been entered in the Register of Ancient Protected Monuments in charge of the Executive Engineer. Thereafter, the Government of India enacted the Ancient Monuments and Archaeological Sites and

9 Remains Act, 1958 and the suit property came to be under the managernent of the Department of Archaeological Survey, Government of India. It is asserted by the first respondent that in all the relevant records, the name of the Government of India has been shown as the owner of the suit. property and that they came to know that the defendants got published Notification No. KTW/531/ASR-74/7490 dated 21-4-1976, showing the suit property as

h having been declared as "wakf property" in tenus of Section 26 of the Wakf Act, 1954' and was also stated to have been published in the gazette.

Inasmuch as the suit property since inception was under the' ownership of the plaintiff with lawful possession thereof, the defendants could not have made any claim thereto nor got the same declared as wakf property. The defendants a contested this claim of the plaintiffs in the 'original, suits and that after following due procedure publication'has been made in theKarnataka Gazette in terms of Section' 67 of the Karnataka Land Revenue Act and the.order passed by the officer concerned is binding on the plaintiff and, therefore, the plaintiff cannot claim any ownership on the ground of adverse possession.'

3. While this is the stand of the Wakf Board, the appellant before us, and b the other defendants described as to' be *"mutawallis":* of the wakf property, stated that one of the Arab preachers, Peer Mahabari Khandayat 'came, as a missionary to' the Deccan as early as ,AD 1304 and occupied whole Arkilla and erected "Mecca Masjid" according to the established customs to offer prayer which is surrounded by a vast open area. The 'said property had all ' along for seven centuries been treated, as wakf and has since after the time of c the Peer, been managed, looked after and maintained by *sajjada nashin* from time to time. No one has interfered with their right.They claim that they have appropriate *sanads* to show that the property in question is wakfproperty and that anothe portion of the suu property also belongs to the *Darga* ofPeer Mahabari Khandayat and Chinni Mahabari Khandayat DargaArkilla, Bijapur and, therefore, the same has been appropriately entered in the wakf register. d

4. The trial court raised several issues in the matter and gave a finding that on a consideration of the oral and documentary evidence in' the case it is clear that even prior to the introduction of the Survey Department at Bijapur, the Government of India had taken these properties as ancient monuments and they are protecting them by keeping appropriate watch over these monuments but now the defendants have come forward contending that these e properties are wakJ properties and they have nothing to show that even after the demise of Peer Mahabari Khandayat they remained in thepossession of the same, The properties in question were acquired by the Government of .India as long back as 1900 and they started preserving' them as important historical monuments and they remained in possession and enjoyment of them. This was clear both from oral and documentary evidence and on that basis, the trial court held that they are owning and managing the suit properties. The trial court also gave a finding that the Wakf Board itself declared these properties as wakf properties without properly following the relevant provisions of the Wakf Act. and without following due procedure prescribed therein and in a case where there is a dispute as to who is a stranger to the wakf, a mere declaration by the Wakf Board will not bind such 9 person and on that basis the trial court.decreed the suit.

5. The matter was carried in appeal. A Division Bench of the High Court examined the matter once over again and affirmed the findings of the trial court. rhe Divis·ion Hench also nohced that at Ule end of the arguments the . appellant. made a submission that as they have not produced some of the. important documents, the matter may be remanded to the trialcourt in order h to enable them to produce the said documents and with a direction to the trial

court fora fresh disposal in accordance with law. The High Court did not allow the plearaisedby the appellant that there are documents in question
a which will go to the root of the matter orwhich would be necessary' in terms of Order 41 Rule 27 .CPC..to permit them to adduce further evidence and on that basis rejected that claim. The High Court affirmed the various findings given by the trial court.

6. In the circumstances, the learned counsel for the appellant reiterated the claim made before the High Court that they should be permitted to
b adduce further evidence before the Courtto substantiate their claim but when the matters were pending before the trial court and the High Court they.had ample opportunity to do so. If they had to produce appropriate documents, they could have done so and also it is not clear as to the nature of the documents which they seek to produce which will tilt the matter one way or the other. The scope of Order 41 Rule 27 Cl'C is very clear to the effect that
c the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due' diligence, they could not produce such documents and such documents are 'required to enable the. court to pronounce proper judgment. In this view 'of. the matter, we do not think there is any justification for us to interfere with. the orders of the High Court, However, in view of the arguments addressed
. d . by the learned counsel for the appellant, we have also gone into various aspects of the matter and have given another look at the matter and our findings are that the view taken by the High Court is justified. However, one aspect needs to be noticed. The High Court need not have stated that the first respondent is entitled to the relief even on the basis of adverse possession. We propose to examine this aspect.

e 7. The case advanced by the appellants is that one Arabian saint.,...,..... Mahabari Khandayat came to Bijapur around the. 13th century, acquired certain properties (suit property) and constructed "Mecca Mosque" which.is under the management of the lineal descendants of the said saint; that by virtue of notification bearing No. }(TW/531/ASR-74/7490 dated 21-4-1976, issued by the appellant and the Karnataka Gazette Notification, p. 60S/Part VI dated 8-7-1976, they became absolute owners and title-holders of the suit property; that pursuant to the circulars dated 8-6-1978 and 22-1-1979, the Deputy Commissioner of tlle districts were insuucieo to hand over possession of any wakf properties that are under the possession of any government department; that by virtue of the said circular the Assistant Commissioner, Bijapur held enquiry under Section 67 of the Karn atak a Land
9 Revenue Act, 1964 and arrived at the conclusion that the suit property is a wakf property; that the alleged acquisition by" the respondent itself is a concocted story; that the notification and the gazette publication itself is a notice to all concerned and the respondent failed to reply to this notice; that the original suit is bad by limitation: that the original suit itself is not maintainable since there is no notice under Section 56 of the old Wakf Act;
h that the plea regarding title of the suit property by the respondent and the plea of adverse possession is mutually exclusive; that, therefore, the appeal is to be allowed.

8. Pertaining to the ownership claim of the appellants over the ,suit property, there is no concrete evidence on record. The contention of the .appellanrs that one Arabian saint' Mahabari Khandayat came to India and built the Mosque and his lineal descendants' possessed the property, cannot be accepted if it is not substantiated by evidence and records.'As far as a title suit of civil nature is concerned, there is no room for historical facts and claims, Reliance on borderline historical facts will lead to erroneous conclusions. The question for resolution herein is the *factum* of ownership, possession and title over. the suit. property. Only admissible evidence and records could be of assistance to' prove this. On the other hand, the respondent produced. the relevant copy of the Register of Ancient Protected Monuments maintained by the Executive Engineer in charge of the ancient monuments (Ext. P-l) wherein the suit property is mentioned and the, Government is referred to as, the owner. Since the manner of acquisition is not under challenge, the entry in the Register of Ancient Protected Monumeuts could be treated as a valid proof for their. case regarding the, acquisition of suit property under the appropriate' provisions of the Ancient Monuments Act. Gaining of possession could be either .by acquisition or by assuming guardianship as provided under Section 4 thereof. Relevant extracts of Ext. P-2, CTS records fortify their case. It shows that the property stands in the name of the respondent. Moreover, the evidence of Syed AhdulNabi who is the power-of-attorney holder (of Defendants 2-A and 2-B" in the original suit) shows that the suit property 'has been declared as, a protected monument and there is a signboard to this effect on the suit property. He also deposed that the Government is in possession of the suit property-and the Governmen t at. its expenditure constructed the present building in the suit property. On a conjoint analysis of Exts. P-1, P-2 and deposition of Syed Abdul Nabi, it couldbe safely concluded thatthe respondent is in absolute ownership and continuous possession of the suit property for, the, last about. one century, Their title is valid. The suit property is governmentproperty and not of a wakf character.

9. The old Wakf Act is enacted "for the better' administrationvand supervision of wakfs". Uncler Section 4 of the old Wakf Act, Survey Commissionerts) could only make a "... survey of wakf properties existing in the State at the date of the commencement of this Act". The Wakf Board could exercise its rights only over existing wakf properties. Since the suit property itself is not an existing wakf property the appellant cannot exercise any right over the same. Therefore, all the subsequent deeds based on the presumption that the suit property is a wakf property are of no consequence in law. The notification bearing No. KTW/531/ASR-74/7490 dated 21-4-1976, issued hy the appellant and the Karnataka Gazette Notification, p. 608IPart VI dated 8-7-1976 is null and void. The same is liable to be deleted. In view of this, the aspects relating to treating gazette notification as notice and limitation need not be looked into. As regards the compliance with notice under Section 56 of the old Wakf Act, the High Court based on evidence and facts ruled that the same is complied with. This is a finding of fact based on evidence.

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10. Now we will, turn to the aspect of adverse possession in the context of the present case. The appellants averred that the plea of the respondent based on title of the, suit property and the plea of adverse possession are mutually exclusive. Thus finding of the High Court that the title of the Government of Indiaover the suit property by way of adverse possession is assailed.

11. In the eye of the law, an owner would be deemed to be in possession of a property so long as the.re is no . . n-use of the property by the owner venor a ong tIme WOQ't affect his title. But the position will be b altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting host.ile title in denial of the title of the true owner. His a well-settled principle that a party claiming adverse possession must prove that his possession is *"nee vi, nec clam. nee precario"*, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show c that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over t.hestatutory period. (See *S.M. Karim* v. *Bibi Sakina*[1], *Parsinni* v. *Sukhi*[2] and *[I.N. Venkatarayappa* v. *State of Karnataka*[3].) Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are d to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore.vaperson": .. who claims adverse possession should show: *(a)*, on whatdate he came into possession, *(b)* what was the nature of his possession, (*c*) whether the factum of possession was known to the other party, (*d*) how long his possession has continued, and *(e)* his possession was open and, undisturbed. A person e pleading adverse possession has no equiti.es in his favour. Since he is trying to defeat the' rights of tlle true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. *[Mahesh Chand Sharma (Dr.)* v. *Raj Kumari Shanna*[4].]

12. A plaintiff filing a tit.le suit should be very clear about the origin of title over the property. He must specifically plead it. (See *S.M. Karim.* v. *Bibi .Sakinai.;* In P. *Periasami v. P. Periathambii* this Court ruled that: (See p. 527, para 5)

> "Whenever the plea of adverse possession. is projected, inherent in [he plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not. begin to operate until, the former is renounced. Dealing with

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1 AIR 1964 SC 1254
2 (1993) 4 SCC 375
h 3 (1997) 7 SCC 567
4 (1996) 8 SCC 128
5 (1995) 6 SCC 523

Mohan Lal v. *Mirza Abdul Gaffar*[6] that is similar to the case in hand, this Court held: (SeC pp. 640-41, para 4)

"*4*. As regards the firstplea, it is inconsistent with the secondplea, Having come into possession under the .agreement.hemusr disclaim his right thereunder,and plead,and prove assertion of his .independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the, latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period his, title by prescription *nee vi, nee clam, nee precario.* Since the appellant's claim IS founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available ro the appellant."

13. As we have already found, the respondent obtained title under the provisions of the Ancient Monuments Act, The element of the respondent's possession of the suit property to the exclusion, of the appellant with the *animus* to possess it is not specifically pleaded and proved. So' are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable. The High Court ought not to have found the case in their favour on this ground.

14. In the result, these appeals stand dismissed.

(2004) 10 Supreme Court Cases,786

(BEFORE ARIJIT PASAYAT AND C.K. THAKKER, J1.)

USMAN MIAN'AND OTHERS Appellants;

Versus

STATE OF BIHAR Respondent.

Criminal Appeal No. 587 of 1999[t], decided on October 4, 2004

A. Criminal Trial - Circumstantial evidence - When can conviction be based on - Principal fact can be inferred from the chain of circumstances '– Circwnstances must be proved beyond reasonable, doubt and must be shown to be closely connected with the principal fact - Chain of incrimlnating circumstances must be consistent only with the hypothesis of gull t of the accused

B. Penal Code, 1860 — Ss, *302/34* - Circumstantial cvidence- Accused's abscondence is a vital circumstance - Falsity of defence plea provides an additional link to the chain ,of, incriminating circumstances - Held, incriminating circumstances proved by prosecution conclusively established commission of murder by accused-appellants - Hence their conviction upheld

A woman was found dead in her husband's house. The prosecution case was based on circumstantial evidence. The circumstances which were pressed into

6 (1996) 1SCC 639

t From the Judgment and Order dated 7-8-1998 of the Patna High Court in Crl. A. No. 424 of 1986

to-an order for possession of'the premises in ques- "tion, Theappeal accordinglyfails 'and isdismissed with costs.

Appeal dismissed.

1963

Krishanlal Ishwar Desai
v.
Bai Vijkor Gujendragadkar

TILKAYATSliRIGOVINDLALJI, MAHARAJ

1963

January, 2j".

THE STATE OF RAJASTHAN AND OTHERS

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Nathdwara Temple—Private or public temple—Tests—Validity of enactment providing for proper administration of temple—Constitutionality—Nathdwara Temple Act, 1959 (Rajasthan 13 of IV,59) ss. 2 (viii), 3, 4, 5, 7, 10,1.1, 16, 21, 22, 27, 28, 30, 35, SO, 37—Constitution of India, Arts. 14, 19 (1) (f), 25, 26, 27 (2).

The history of the Nathdwara Temple in the District of Udaipur showed that Vallabha, who' was the founder of the denomination known as Pushtimargiya Vaishnava Sampradaya, installed the idol of Srinathji ina temple and that later on his descendants built the Nathdwara Temple in 1761. The religious reputation of the temple grew in importance and several grants were made and thousands of devotees. visiting the temple made offerings to the temple, The succession to the Gaddi of the Tilkayat received recognition from the Rulers of Mewar, but on several occasions the Rulers" interfered whenever it was found that the affairs of.the temple werenot managed prrperly. In 1934 a Firman was issued 'by the Udaipur Darbar, *by,* which, inter alia, it· was declared that according to the Iaw of .Udaipur all the property' dedicated or presented to or otherwise coming" to the Deity Shrlnathjl was property of the shrine, ,that "the Tilkayat MaharaJ fOf the time being w,as merely a, custodian, Manager and Trustee of the said property and that the Udaipur Darbar had absolute right to supervise that the

.1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

property dedicated to the shrine was used for the legitimate purposes of the shrine. The management of the affairs by the appellant Tilkayat was not successful and it became necessary that a scheme should be framed for the management of the Temple. On February 6, 1959, the Governor of Rajasthan promulgated an Ordinance, which was in due course replaced by the Nathdwara Temple Act, 1959. The appellant challenged the validity of the Act on the grounds, inter alia, that the idol of Shrinathjiin the Nathdwara Temple and all the property pertaining to it were his private properties and, as such, the State Legislature was not competent to pass the Act, that even if the Nathdwara Temple was held to be a public temple, he as Mahant or Shebait had a beneficial interest in the office of the high priest as well as the properties of the temple and that on that footing, his rights under Arts. 14, 19 (1) (f) and 31 (2) of the Constitution of India had been contravened by the Act. It was also urged that the provisions of the Act infringed the fundamental rights guaranteed to the Denomination under Arts. 25 (1) and 26 (b) and (c) of the Constitution. The question was also raised as to whether the tenets of the Vallabha denomination and its religious practices required that the worship by the devotees should be performed at the private temple and so the existence of public temples was inconsistent with the said tenets and practices,

Held, (1) that neither the tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple.

(2) that in view of the documentary evidence in the case it could not be held that the temple was built by the Tilkayat of the day as his private temple or that it still continues to have the character of a private temple; that though from the outside it had the appearance of a Haveli, the majestic structure inside was consistent with the dignity of the idol and with the character of the temple as a public temple,

(3) that an absolute monarch was the fountain-head of all legislative, executive and judicial powers, that it was of the very essence of sovereignty which vested in him that he could supervise and control the administration of public charity, and that this principle applied as much to Hindu monarchs as to any other absolute monarch, Any order issued by such a Ruler would have the force of law and govern the rights of the parties affected thereby; and that accordingly, the Firman issued by the Maharana of Udaipur in 1934 was a law by which the affairs of the Nathdwara Temple were governed after its Issue,

Madhaorao Phalke v. *The State of Madhya Bharat*, [1961] 1 S. C. R. 957, relied on.

(4) that under the law of Udaipur the Nathdwara Temple was a public temple and that the Tilkayat was no more than the Custodian, Manager and Trustee of the property belonging to the temple,

(5) that having regard to the terms of the Firman of 1934 the right claimed by the Tilkayat could not amount to a right to property under Art. 19 (I) (f). or constitute property under Art. 31 (2). of the Constitution; that even if it wereiheld that this right constituted a right to hold property, the restrictions imposed by the Act must be considered as reasonable and in the interests of the public under Art. 19 (5).

Vidya Varuthi Thirtha v, Balusami Ayyar, (1921) L. R. 48 I. A. 302 and the *Oommiesioner, Hindu Religious Endowments, Madras v, Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*, [1954] S. C. R. 1005, considered.

(6) that the Act was not invalid on the ground of discrimination under Art. 14.

Shri Ram Krishna Dalmia v, Shri Justice S. R. Tendolkar, [1959] S. C. R. 279, relied on.

(7) that the right to manage the properties of a *temple* was a purely secular matter and could not be regarded as a religious practice under Art. 25,(1,) or as amounting to affairs in matters of religion under Art. 26 (b). Consequently, the Act in so far as it provided for the management of the properties of the Nathdwara Temple under the provisions of the Act, did not contravene Arts. 25 (1) and 26 (b).

The Durgah Oommitiee, Ajmer v, Syed. Hussain Ali, [1962] S. C. R. 333, referred to.

(8) that the expression "Law" in Art. 26 (d) meant a law passed by a competent legislature and under that Article the legislature was competent te make a law in regard to the administration of the property belonging to the denomination and that the provisions of the Act providing for the constitution of a Board to administer the property were valid.

Ratilal Panachand Gandhi v, The State of Bombay, [1954] S. C. R. 1055, referred to,

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

(9) that the scheme envisaged by ss. 3, 4, 16, 2.2. and 34 of the Act merely allowed the administration of the properties of the temple which was a purely secular matter to be undertaken by the Board and that the sections were valid.

(10) that under s.5 (2) (g) it was necessary that the members of the Board other than the Collector of Udaipur District should not only profess Hindu religion but must also belong to the PushtiMargiya Vallabhi Sampradaya and that the proviso to s. 5 (2) (g) which enabled a Collector to be a statutory member of the Board even though he may not be a Hindu and may not belong to the denomination, did not contravene Arts. 25 (1) and 26 (b).

(11) that the expression "affairs of the temple" in s. 16 referred only to the purely secular affairs in regard to the administration of the temple and that the section was valid.

(12) that s, 30 (2) (a) in so far as it conferred on the State Government power to make rules in respect of the qualifications for holding the office of the Goswami, was invalid.'

(13) that ss. 5, 7, 10, 11, 21, 27, 28, 35, 36 and 37 were valid.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 652, 653 and 757 of 1962.

Appeals from the judgment and order dated January 31, 1962, of the Rajasthan High Court in D. B. Civil Writ Petition No. 90 of 1959.

AND

VICE VERSA

(b) Civil Appeals Nos. 654, 655 and 758 of 1962.

Appeals from the judgment and order dated January 31, 1962, of the Rajasthan High Court in D. B. Civil Writ Petition No. 310 of 1959.

AND

VICE VERSA

(c) Civil Appeal No. 656 of 1962.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

.Appeal .from the judgmenr and order dated January 31, 1962, of the Rajasthan High Court in D. B. Civil Writ Petition No. 421 of 1960.

(d) Writ Petition No. 74 of 1962.

Petition under Article'.32 of the Constitution of India for the enforcement.of fundamentalrights.

M. O. Setalvad, Attorney-General for India, G. S. Pathak, B. B. Desoi, ,V. A. Seyid Muhammad and *B. C. Misra,* 'for the appellant (in C. A. No. 652 of 1962)' and respondent No.1 (in C. As. Nos. 653 and 757 of 1962)0'

C. K. Daphtary, Solioitor-General of India, G. O.Kasliwal Adoocaie-General for the State oj Rajasthan, M. M. Teuari, S. K. Kapur, B. R. L, Iyengar, Kan Singh, V. N. Sethi, B. R..C. K. Achar and *P. D. Menon)* for respondents Nos. 1 and 2'(in C. A. Nos. 652 and. 656/62) respondent No. 1 (in C. A. No. 654/62), respondents Nos. 2 and 3 (in C,'A. No. 75'1/62), respondent No. 11 (in a. A. No. 758/62) and appellants (in C. A. Nos. 653) and 655/62).

Sarjoo Prasad, S. B. L. Saxena and *K.,K. Jain,* forrespondents Nos. 3 to 5 (in C. A. No. 652/62) respondents Nos. 2-4 (in C. A. No. 653/62), respondents Nos. 2, 3, 5, 6. and 7 (in C. A. No. 654/62), the Board and its members (in A, A.No. 655/62), respondents Nos. 3·12 (in C. A. No. 656/62J and the appellants (in C. 'A. N'os. 757 and 758 of 19'62.)

A. V. Viswanatha Sastri, Balkrishna Acharya and *M. V. Goswami,* for the appellants (in C. A. No. 654/62), respondents Nos. 1-10 (in C. A No. 655/62) and respondents Nos. 1-10 (in C. A. No. 758/62.).

P. K. Chakravarty, forthe appellant (in C. A. No. 656/62).

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G. S. Pathak, B. Datta and *B. P. Maheshwari*, for the petitioner (in W. P. No. 74/62).

C. K. Daphtary, Solicitor-General of India G. S. Kasliwal, Adoocate-Generalfor the State oj Rajasthan, M. M. Tewari, S, K. Kapur, B. R..L. Iyengar, Kan Singh, V. N. Sethi and *P.D.Menon*, for respondents.Nos. 1 and 2 {in W'. PiNo. 74/62).

Sarjoo Prosasi,'S. B. L. Sexena and *K. K, Jain*, for respondents Nos. 3-12 (in W. P.No.74/62).

1963. January 21. The Judgment of the Court was. delivered by

Gajendragadkar, J.

GAJENDRAGADKAR, J.—This group of seven cross-appeals arises from three writ petitions field ,in the High Court of Judicature for Rajasthan, in which the validity of the Nathdwara Temple Act, 1959 (No. XIII of 1959) (hereinafter called the Act) has been challenged. The principal writ petition was ,Writ Petition No. 90 of '1959; it was filed by the Present Tilkayat G,ovindlalji (hereinafter called the Tilkayat) on February 28, 1959. That Petition challenged the validity of the Nathdwara Ordinance, 1959' (No. II of 1959) which had been issued on February 6, 1959. Subsequently this Ordinance was repealed by the Act which, after receiving the assent of the President, came into force on March 28, 1959. Thereafter, the1'ilkayat was allowed to amend, his petition and after its amendment, the petition challenged the vires of the Act the provisions of which are identical with the provisions of its predecessor Ordinance. Along with this petition Writ Petition No. 310 of 1959 was filed on "August 17, 1959, by ten petitioners who purported to act on behalf of the followers of: the Pushtimargiya Vaishnava Sampradaya, This petition attacked the validity of the Act on behalf of the Denomination of the followers of V'allabha. On November 3, 1960,

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the third Writ Petition (No. 421 of 1960) was filed on behalf of Goswami Shri Ghanshyamlalji who as a direct descendant of Vallabha, set up an interest in himself in regard to the Nathdwara Temple, and as a person having interest in the said Temple, he challenged the validity of the Act. These, three petitions were heard together by the High Court and have been dealt with by a common judgment. In substance, the High Court has upheld the validity of the Act, but it has struck down as *ultra vires* a part of the definition of 'temple' in s. 2 (viii), a part of s. 16 which refers to the affairs of the temple; s. 28, sub-ss, (2) and (3); s. 30 (2)(a); ss. 36 and 37. The petitioners as well as the State of Rajasthan felt aggrieved by this decision and that has given rise to the present cross-appeals. The Tilkayat has filed Appeal No. 652 of 1962, whereas the State has filed appeals Nos. 653 and 757 of 1960. These appeals arise from Writ Petition No. 90 of 1959. The Denomination has filed Appeal No. 654 of 1962 whereas the State has filed Appeals Nos. 655 and 758 of 1962. These appeals arise from Writ Petition No. 310 of 1959. Ghanshyamlaljiwhose Writ Petition No. 421 of 1960 has been dismissed by the High Court on the ground that it raises disputed questions of fact which cannot be tried under Art. 226 of the Constitution, has preferred Appeal No. 656 of 1962. Since Ghanshyamlalji's petition has been dismissed *in limine* on the ground just indicated, it was unnecessary for the State to prefer any cross-appeal. Besides these seven appeals in the present group has been included *Writ* Petition No. 74 of 1962 filed by the Tilkayat in this Court under Art. 32. By the said writ petition the Tilkayat has challenged the vires of the Act on some additional grounds. That is now the principal point which arises for our decision in this group is in regard to the Constitutional validity of the Act.

At this stage, it is relevant to indicate broadly the contentions raised by the parties before the High

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Court and the conclusions of the High Court on the points in controversy. The Tilkayat contended that the idol of Shri Shrinathji in the Nathdwara Temple and all the property pertaining to it were his private properties and as such, the State Legislature was not competent to pass the Act. In the alternative, it was urged that even if the Nathdwara Temple is held to be a public temple and the Tilkayat the Mahant or Shebait in charge of it, as such Mahant or Shebait he had a beneficial interest in the office of the high priest as well as the properties of the temple and it is on that footing that the validity of the Act was challenged under Art. 19(1)(f) of the Constitution. Incidentally the argument for the Tilkayat was that the idols of Shri NavnitPriyaji and Shri Madan Mohanlalji were his private idols and the property pertaining to them was in any case not the property in which the public could be said to be interested. The Denomination substantially supported the Tilkayat's case. In addition, it urged that if the temple was held to be a public temple, then the Act would be invalid because it contravened the fundamental rights guaranteed to the denomination under Art. 25(1) and Art. 26(b) and (c) of the Constitution. Ghanshyamlalji pleaded title in himself and challenged the validity of the Act on the ground that it contravened his rights under Art. 19(1)(f).

On the other hand, the State of Rajasthan urged that the Nathdwara Temple was a public temple and the Tilkayat was no more and no better than its manager. As such, he had no substantial beneficial interest in the property of the temple. The contention that the Tilkayat's fundamental rights under Art. 19(1)(f) have been contravened by the Act was denied; and the plea of the Denomination that the fundamental rights guaranteed to it under Arts. 25(1), and 26(b) and (c) had been infringed was also disputed. It was urged that the law was perfectly valid and

did no more than regulate the administration of the property of the temple as contemplated by Art. 26 (c) of the Constitution. The Tilkayat's claim that the two idols of Navnit Priyaji and Madan Mohanlalji were his private idols was also challenged. Against Ghanshyamlalji's petition, it was urged that it raised several disputed questions of fact which could not be appropriately tried in proceedings under Art. 226.

The High Court has upheld the plea raised by the State against the competence of Ghanshyamlalji's petition. We ought to add that the State had contended that the Tilkayat's case about the character of the temple was also a mixed question of fact and law and so, it could not be properly tried in writ proceedings. The High Court, however, field that it would be inexpedient to adopt a technical attitude in this matter and it allowed the merits of the dispute to be tried before it on the assurance given by the learned counsel appearing for the Tilkayat that the character of the property should be dealt with on the documentary evidence adduced by him. Considering the documentary evidence, the High Court came to the conclusion that the temple is a public temple. It examined the several Firmans and Sanads on which reliance was placed by the Tilkayat and it thought that the said grants supported the plea of the State that the temple was not the private temple of the Tilkayat. It has, however, found that the Tilkayat is a spiritual head of the Denomination as well as the spiritual head of the temple of Shrinathji. He alone is entitled to perform 'Seva' and the other religious functions of the temple. In its opinion the two minor idols of Navnit Priyaji and Madan Mohanlalji were the private idols of the Tilkayat and so, that part of the definition which included them within the temple of Shrinathji was struck down as invalid. In this connection, the High Court has very strongly relied on the Tirman issued by the Maharana of Udaipur on December 31, 1934, and it

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has observed that this Firman clearly established the fact that the temple was a public temple, that the Tilkayat was no imoro than, a- Custodian, Manager and Trustee of the property belonging to the temple and that the State had the absolute right to supervise that the property dedicated to the shrine was used for legitimate purposes of the shrine. Having found that the Tilkayat was the head of the denomination and the head priest of the temple, the High Court conceded in his favour the right of residence, the right to distribute Prasad and the right to conduct or supervise the worship and the performance of the Seva in the temple. In the light of these rights the High Court held that the Tilkayat had a beneficial interest in the properties of the temple and as such, was entitled to contend that the said rights were protected under Art. 19 (1) (f) and could not be contravened by the Legislature. The High Court then examined the relevant provisions of the Act and held that, on the whole, the major operative provisions of the Act did not contravene the fundamental rights of the Tilkayat under Art. 19 (1) (f); ss. 16, 28, sub-ss. (2) and (3), s. 30 (2) (a), ss. 36 & 37) however, did contravene the Tilkayat's fundamental rights according to the High Court, and so, the said sections and the part of the definition of 'temple' in s. 2 (viii) were struck down by the High Court as *ultra vires*. The plea that the fundamental rights under Art. 25 (1) and Art. 26 (b) and (c) were contravened did not appear to the High Court to be well-founded. In the result the substantial part of the Act has been held to be valid. It appears that before the High Court a plea was raised by the Tilkayat that his rights under Arts. 14 and 31 (2) had been contravened by the Act. These pleas have been rejected by the High Court and they have been more particularly and specifically urged before us by the Tilkayat in his Writ Petition No. 740 of 1962. That, in brief, is the

nature of thefindings recorded by' the High Court in the three writ petitions filed before it.

'Before dealing' with the merits of the present dispute, it isnecessary to set out briefly the.historical b[a]ckgr. un.d of the temp.le of Shr.inathjiat Nathdwara and the incidents in relation to the management of its properties. which ultimately led to the Act. The templeof Shrinathji at Nathdwara holds a very high place among the Hindu temples in this country.and is looked, upon with great reverence by the Hindus in general and the \7aishnav followers of Vallabha in particular. As in the case of other ancient revered Hindu temples) so in the case of the Shrinathji temple at. Nathdwara, mythology has woven an attractive web .about the genesis of its .construction at' Nathdwara, Part of it 111ay be history and part may be fiction, but the' story is handed down from generation to generation of.devorees and is believed byall of them to be true. This temple is visited by thousands of Hindu devotees in general and by the followers of the PushtimargiyaVaishnava Sampradaya in particularvThe followers of Vallabhawho constitute a denomination are popularly known as such. The denomination was founded by Vallabha (1479-1531 A. D.)* He was the son ofa Tailanga Brahmin named Lakshmana Bhatt. On one occasion) Lakshrnana Bhatt had gone' on pilgrimage to Banaras with his wife Elamagara, On theway, she gave birth to a son in 1479 A. D. That son was known as Vallabha.It is said that God Gopala Krishna manifested himself to' Vallahha on the Govardhana Hill by the name of Devadamana, also known as Shrinathji. . Vallabha saw the vision in his dream and he was :commanded by God' Gopala Krishna to erect a shrine for Him and to propagate amongst his followers the cult of worshipping Him in order to. obtain salvation (1). Vallabha then went to the hill and he found the image corresponding to the vision which he had seen ill 'this dream. Soon thereafter, he got a small

*Some scholar» think that Vallahhawas born in 1473 A.D, vide The Cultural Heritage of India vol, III at p. 347.

(1) Bhandarkar on 'Vaishnavism, S'aivism & Minor Religious systems It p. 77;

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temple built at Giriraj and installed the image in the said temple. It is believed that this happened in 1500 A. D.. A devotee, named Ramdas Chowdhri: was entrusted with the task of serving in the temple. Later on, a rich merchant named Pooranmal was asked by Govardhannathji to build a big temple for him. The building of the temple took as many as 20 years and when it was completed" the Image was installed there by Vallabha himself and he engaged Bengali Brahmins as priests in the said temple, (1).

In course of time) Vallabha was succeeded by his son Vithalnathji who was both in learning and in saintly character a worthy son of a worthy father. Vithalnath had great organising capacity" and his work was actuated by missionary zeal, In the denomination, Vallabha is described as Acharya or Maha Prabhuji and Vithalnath is described as Gosain or Goswamin. It is said that Vithalnath removed the idol of Shrinathji to another temple which had been built by him.. It is not known whether any idol' was installed in the earlier temple.'Vithalnath lived, during the period of Akbar when the political atmosphere in the country in Northern, India was actuated by a spirit of tolerance. It appears that Akbar heard about the saintly reputation of Vithalnath and issued a Firman granting land in Mowza of Jatipura to Vithalnathji in, order to build buildings, gardens, cowsheds and workshops for the temple of Govardhannathji, This Firman was issued in 1593 A. D. Later, Emperor Shahajahan also issued another Firman on October 2, 163.3, which shows that some land was being granted by the Emperor for the use and expenses of Thakurdwara , exempt from payment of dues.

Ooswami Vithalnath had seven sons. The tradition of the 'denomination-believes that besides the idol of Shrinathj! Vithalnathji received from his father

(1) Bhai Manilal O. Parekh's 'A Religion of Grace'.

,seven other idolswhich were also "Swaroops". (manifestations) of Lord Krishne. Before his death Vithalnathji entrusted the principal idol of Shrinathji, to his eldest son Girdharji and the other Idols were given over to each one of his other sons. These brothers in turn Tounded separate shrines at various places which are also held by the members of the denomination in high esteem and reverence,

When .. Aurangzeb came-on the throne, the genial atmosphere of tolerance disappeared and the Hindu temples were exposed to risk and danger of Aurangzeb's intolerant and bigoted activities. Col. Todd in the first volume of his 'Annals of Rajasthan', at P: 451 says that "when Aurangzeb prescribed Kanaya and rendered his shrines impure throughout Vrij, Rana Raj Singh offered the heads of one hundred thousand Rajpoots for his service, and the God was conducted by the route of Kotah and Rampoora. to Mewar. An omen decided the spot of his future residence. Ashe journeyed to gain thecapital of the Sessodias, the chariot-wheel sunk deep into the earth and defied extrication; upon which theSookuni, (augur) interpreted the pleasure-of the deity-that he, desired-to dwell there. This circumstance occurred, at an inconsiderable village called Siarh, in the fief of Dailwara, one of the sixteen nobles of Mewar. Rejoiced at this decided manifestation of favour, the chief hastenedto make a perpetual gift of the village and its lands which was speedily confirmed by the patent of the Rana. Nathji (the god)' was removed from his car, and in due time a temple was 'erected for his reception, when the hamlet of Siarh became the town of Nathdwara. This happened about 1671 A. D." This according' to the tradition" is the genesis of the construction of the temple at Nathdwara. Since then, the religious reputation of the temple has. grown by leaps and bounds and today It can. legitimately claim to be one of the few leading 'religious temples of the Hindus; Severa]

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grants were. .made and thousands of devotees visiting the temple in reverence made-offerings to the temple almost everyday throughout the ,year. No wonder that the temple' has now become one of the richest religious institutionsin the country.·

,The succession to' the Gaddi of the Tilkayat has, from the, beginning, been governed by therule . otPrimogeniture. This succession received recognition from the rulers of .Mewarfrom time to time. It appears that in 1813 A. D. Tilkayat Govindlalji was adopted by rthe'widowof Tilkayat Damodarji and the ruler of Mewar recognised the said.adoption. Later, the relations between the ruler of Mewar and the Tilkayat. were strained during the time • of : .Tilkayat Girdharlalji. It .seems that the Tilkayat was not content with the position of a spiritual leader of the denomination but he began to claim special secular rights, and when the Darbar of Udaipur placed the villages belonging to the Nathdwara Temple under attachment, a protest was made by the members of the denomination on behalf of the Tilkayat. It was as a result of this strained relationship between the Darbar and the Tilkayat that in 1876 Tilkayat Girdharlalji was deposed and was deported from Nathdwara by the order passed by the Rana of Mewar on May'S, 1876 The reason given for this drastic step was that the Tilkayat disobeyed the' orders of the ruling authority and so, could not be allowed to function as such. In place of the deposed Tilkayat, his son Gordhanlalji was appointed' as Tilkayat. Girdharlalji then went to Bombavand litigation started betweerrhimand his Tilkayat.son in respect of extensive properties in, Bombay, Girdharlalji claimed. the properties as his own whereas his Tilkayat son urged that the fact that Girdharlalji had been deposed .by the Rana of Udaipur showed that the properties no longer vested in him. It appears that the Bombay High Court ' consistently took the view that the order passed by

the Rana,'ofUdaipUf on May 8, 1876, was an act of a foreign State and did not effect his right to property ,'in' Bombay. It was observed that Girdharlalji was regardedasowner of the property, he had not lost his right as such tothesaid property in consequence of his deposition, .and ifhe wa merely a. trustee, he had notbeen removed from his officeby any competent iTribunal vide *Nanabai* v. *Shriman Goswami Girdharji* (1). *Goswami Shri Girdharji Maharaj Shri Govindraiji Maharaj Tilkayat* V. *Madhowdas Premji and Goswami Shri Govardhanlalji Girdharji Maharaj* (2) and *Shriman* G08t1Jami *Shri 108 Sliri Govardhanlalji Girdharlalji* v. *Goswami Shri Girdharlalji Govindrajji* (8). "So far as the Nathdwara..temple and the properties situated in Mewar were concerned; the Tilkayat Gcrdhanlalji who h'ad been. appointed by the Rana of Udaipur continued to be 'in possession and management of the same.

. Unfortunately, in 1933, another occasion arose when the Rana ·ofUdaipur had to take drastic action. After the death of Goverdhanlalji on. September 21, 1933, his grand son Darnodarlaljibecame the Tilkayat.His conduct. however, showed that he did not deserve to be a spiritual-leader of the. denomination and could not be left in charge of the religious affairs of the .Shrinathji temple at .N·athdwara.· That is why on October 10, 1933, he was deposed and. his son Govindlalji, the present Tilkayat, was appointed the Tilkayat of the temple. Before adopting this -course, the Rana had given ample opportunities to Damodarlalji to improve his conduct, but despite the promises made by him Darnodarlalji persisted in tlle course of'behaviour which he 'had adopted and so the Darbar was left with no other -alternatiye but to depose him. That is' how the present Tilkayat's regime began even during the lifetime"of his father.

(1J12 Born, 331. (2) 17 Bern, 600.
(3) 17 Bom. 620

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As on the occasion of the depositlon of Girdharlalji in 1833, so on the occasion of the deposition of Damodarlalji, litigation followed in respect of Bombay properties. On January 6, 1934, Damodarlalji filed a suit in the Bombay High Court (No. 23 of 1934) against the Tilkayat and other persons representing the denomination, In this suit, he claimed a declaration that he was entitled to and had become the owner of all the properties mentioned in the plaint and, that he was the owner of all the rights, presents, offerings, and emoluments arising in and accruing from the ownership of the idols, Shrinathji and Shri Navnit Priyaji as well as his position as the Tilkayat Maharaj in due course of his succession. In the said suit, the idols of Shrinathji and Shri Navnit Priyaji were added as defendants. At, that time, the Tilkayat was a minor. ;Written statements were filed on his behalf and, on behalf of the two idols. A counter claim was preferred on behalf of the idols that the properties belonged to them. Subsequently, the suit filed by Damodarlalji was withdrawn; but the counterclaim made by the idols was referred to the sole arbitration and final determination of Sir Chimanlal H. Setalvadra leading Advocate of the Bombay High Court. On April 10, 1942, the arbitrator made his award and in due course, a decree was passed interms of the said award on September 8, 1942. This decree provided that all the properties, movable, and immovable, and all offerings and Bhents donated to the idol of Shrinathji or for its worship or benefit belonged to the said idol, whereas properties donated, dedicated or offered to the Tilkayat Maharaj for the time being, or at the Krishna Bhandar Pedhis if donated) dedicated or offered for the worship or benefit of the idol belonging to the said, idol, It also provided that the Tilkayat Maharaj for the time being in actual charge at Nathdwara is entitled to hold, use and manage the "properties of the said idol according to the

usage of the Vallabhi Sampradaya." The said award and, the decree which followed in terms of it were naturally confined to the properties in the territories which then comprised British India". It did not include any properties in the territories which then formed part of princely India or Native States as they were then known.

Meanwhile, after Darnodarlalji was deposed and his son Govindlalji was appointed the Tilkayat, the Rana of Udaipur issued a Firman on December 31, 1934. By this Firman it was laid down that the shrine of Shrinathji had always been and was a religious institution for the followers of the Vaishnavas. Sampradayak and all the properties offered at the shrine were the property of the shrine and that the Tilkayat Maharaj was merely a Custodian, Manager and Trustee of the said property for the shrine. It also provided that the Udaipur Darbar had absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. It also made certain other previsions to which we shall have occasion to return later.

When he was appointed the Tilkayat, Govindlalji was a minor and the management of the temple and the property remained with the Court of Wards, till April 1, 1948. On that date, the management of the Court of Wards was withdrawn and the charge of the property was handed over to the Tilkayat. It appears that the management of affairs by the Tilkayat was not very happy or successful and the estate faced financial difficulties. In order to meet this difficult situation the Tilkayat appointed a committee of management consisting of 12 members belonging to the denomination some time in 1952. This was followed by another committee of 21 members appointed on June 11, 1953. Whilst the latter committee was in charge of the

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management, some valuables stored and locked in the room in the premises of the Temple of Shrinathji were removed' 'by the, Tilkayat in December, '1957. Thi,s news createdexcitement amongst the membersof the public in generaland the followers" of the.denomination in particular, and so, the RajasthanGovernment appointed a Commission of Enquiry. 'In .the preamble to". the notification by which the Commission of Enquiry was appointed, it was stated thattheState' of Rajasthan as the successor of the covenantingState. of Mewar had a special' responsibility ·tosupervise, that the endowments and properties: dedicatedtothe shrine are safeguarded and used for. the legitimate purposes ,of the shrine', The' Commission of the Enquiry made .its report on, October II', 1959. This report passed severestrictures against the conduct of the Tilkayat. At this stage, we ought to add that the dispute between the Tilkayat andthe Rajasthan Government as to the ownership, of the valuable articles removed from the temple .was later referred to the sole arbitration of Mr..Mahajan; the retired Chief Justice of this Court, The arbitrator made his award on September 12) 1961, and held that' except in regard to the' items specified by him in his award, the rest of the property belonged to the, Tilkayat; and he found. that when the Tilkayat. removed the properties, he believed that they were his persona 1 properties,

It was in the background of these events that the State of Rajasthan thought it necessary thata". scheme should be drafted for the .nanagement ofthe. Temple and this proposal received the apprevelol.. the TJlkayat. In order to give effect to this proposal· it was agreed between the parties tha] a suit und,er,"' s. 92, Code of Civil Procedure, should be filed in ,the- Court of the District Judge at Udaipur. The parte then thought that the suit would be non-contentious and would speedily end 'in a scheme of maaBeus ment being drafted with the consent of parties

Accordingly, suit No. 1 of 1956 was filedin the District Court at Udaipuraad ,in accordancewith the agreement which he had reached with the authorities, the Tilkayat fileda noncontentious written statement. However, before the suitcould make any appreciable progress, Ghan yamlalji and Baba. Rajvi, the son of Tilkayat, applied to be made partiesto the suit and it became clear th'at these added parties desired to raise contentions in the suit andthat entirelychanged the complexion of the litigation. It was then obvious that the litigation would be a long-drawn out affair and the object of evolving a satisfactory scheme for the management of the affairs of the templewould not be achieved until the litigation went through a protracted course.

It was, under these circumstances that .the Governorof Rajasthan promulgatedian Ordinance called the Nathdwara Ordinance, j,9.59 (No. II of 1959) on. February 6, 1959. The Tilkayat immediately filed .his Writ Petition No. 90 of 1959 challenging the validityof the said Ordinance, The Ordinance was in due course replaced by Act 13 of 1959, and the Tilkayat was allowed to amend his original writ petition so as to challenge the viresof the Act. Shortly stated, this is the historical backgroundof the present dispute.

The first question which calls for Our decision is whether the tenets of the \1allabh denomination and its religious practices postulate and require that the worship by the devotees should be performed at the private temple owned and managed by the Tilkayat, and so, the existence of public temples is inconsistent with .the said tenets and .practices, In support of this argument, the learned Attorney-General has placed strong reliance on theobservations made by Dr. Bhandarkar in his .work, on Vaisnavism, Saivism and Minor Religious Systems, ti 80. In the section dealing with Vallabh and his

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school; the learned Doctor has incidentally, observed. that the Gurus of this sect ordinarily called Maharajs are descendants of the seven sons .of Vithalesa.". Each Guru has a temple of his own, and there are no. publle places of worship. He has also added that the influence exercised by Vallabh and his successors over their adherents. is kept up 'by. the fact that God cannot bei worshipped independently .in a public place of worship, 'but in the house ,and' temple of the Guru or the Mabaraj which, 'therefore, has to be regularly visited 'by' the devotees with offerings. These temples are generally described as. Havelis and the argument is that the said description also brings o.Ut. the fact that the temples are-private temples owned by 'the Tilkayat of the day. It is true that the observations .made by Dr. Bhandarkar lend support to the contention raised, before us by the learned ,'Attorney-General on behalf of the Tilkayat, but if the discussion' contained in Dr. Bhandarkar's work in the section dealing with Vallabh is considered-as a whole, it would be clear that these observations are incidental and cannot 'be 'taken to indicate the' learned Doctor's conclusions' after a careful examination of all the relevant considerations, bearing on, -the point. Since, however, these observations are in favour of the plea raised by the Tilkayat, it is necessary very briefly to enquire. whether there is anything in the tenets or the religious practices of this denomination which justifies the claim made by the learned Attorney-General.

What then is the nature of the philosophical doctrines of Vallabh? According to Dr. *Radha Krishaum* (1), ,Vallabh accepts the authority not only. of the Upanishads, the Bhagvad.gita and the Brahma Sutras, but also of. the Bhagavata Purana. In his works, Anubhasya, Siddhantarahasya and Bhagavata-Tikasubodhinl, he offers a theistic inlerpretation of .the Vedanta, which differs from those of Sankara and Ramanuja. His view is called Suddhadvaita, or

(1) "Indiaa Philosophy" 'by Dr. Radha Krishnan,; pp. 756 and 758.

pure non-dualism, and declares that the whole world is real and is subtly Brahman. The individual souls and the inanimate worldiare in essence one with Brahman. Vallabha looks upon God as the whole and the individual as Part. The analogy of parks of fire is employed by Him to great purpose. The Jiva bound by mayacannot attain salvationexcept through the grace of God, which iscalled Pushti, Bhakti is the chiefmeans of salvation, though Jnana is also useful, As regards. the-fruit of Bhakti, there are diverse opinions, says *Dasgupta* (1). Vallabha said in his Sevaphala-vivrti that asa result-of it one..may attain a great power of experiencing the nature of God, or may. also have the experience of continual 'contact with God, and also may have a bodybefitting tbe service of God" Vallabha, however, is opposed to renunciation 'after the. manner of monisticsanyasa, for this can only bring repentance. as 'being inefficacious. Thus, it will be seen that though Vallabha in his philosophical theories differs from Sankara and Ramanuja, the ultimate path .for.salvation which he has emphasised is that of Bhakti and by Bhakti the devotee obtains Pushti (divine grace). That is why the cult of Vallabha is known as Pushtimargor the path for obtaining divinegrace.

Dr. Bhandarkar points out that according to Vallabha, Mahapushti.vor the highest grace) is' that which. removes great obstacles and conduces to the attainment of God himself.' Thus Pushtibhakti is of four kinds: (1) Pravaha-Pushtibhakti, (2) Maryada-. Pushtibhakti, (3) Pushti.Pushtibhakti and .(4) Sudha-Pushtibhakti. The first is the path of those who while engaged in aworldly life with .its me and mine; do acts calculated to bring about the attainment of God. The second is', of those who, withdrawing their minds from worldly enjoyments, devote themselves to Godby hearing 'His' praise and listening to discourses about Him. The third is of-those who already enjoyed God's grace and are made competent

(1) A history on "Indian Philosophy" by Das Gupta, pp. 355—356.

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to aquire knowledge useful for adoral]on and thus come to know all about the ways of God. The fourth is of those who through mere lovedevote themselves to the, singing and praising of God 'as, if it were a haunting passion. . Thus, it would be, seen that the tenets' of the cult emphasised the .importance of Bhakti and the religious practices accordingly centered round this doctrine of Bhakti,

The practical modes of worship adopte members of this cult bring out the same effec Krishna as a child is. the main object of His worship consists ofseveral acts of performance every day' in the prescribed order of cere These begin with the ringing of the bell in the ning and putting the Lord to bed at night. the Lord is awakened by the ringing of the bell, th is a blowing of the, conch-shell, awakening ofthe Lord and offering morning refreshments; waving .of lamps; bathing; dressin,g; food; 'leading. the cows out for grazing; ,the mid-day meal; waving of lamps again; the evemng service; the evening meal and going to bed. These rituals performed with meticulous care from day to day constitute the prescribed items of Seva,' which the devotees attend every day in the yallabh temple, In order to be able to offer Bhakti in a proper ,way, the members of this denomination are 'iuitiated into this cult by the performance of two rites; one is Sharana Mantropadeshand the other is Atma Nivedan. The first gives the devotee the status: of aVaishnava and the second confers upon him the status of an Adhikari entitled to pursue the path of service of devotion. At the performance of the first rite, the mantra which is repeated in the ears of the devotee is "Shree Krishna SharanamMamah" and on the occasion a 'tulsi Kanthi' is put around the neck of the devotee. At the second initiation, a religious formula is repeated, the effect of which is' that the devotee treats .himself and all his properties as belonging to Lord Krishna, We, have already

referred to the original image which Vallabha installed in the temple built in his time and the seven idols which Yi,thalnathji gave to his sons. These idols are technically described as tNidhi 'Swaroops'. Besides these idols there are several, other idols which are worshipped by Vaishnava devotees after they are sanctified by the Guru. It is thus clear that believing in the paramount importance and efficacy of Bhakti, the followers of Vallabha attend the worship and services of the NidhiSwaroops or idols from day to day in the belief that such devotional conduct would ultimately lead to their salvation.

It is significant that this denomination does not recognise the existence of Sadhus or Swamis other than the descendants of Vallabha and it emphasises that it is unnecessary to adopt ritualistic practices or to repeat Sanskrit Mantras or incantations in worshipping the idols. Besides, another significant feature of this cult is that it does not believe in celibacy and does not regard that giving up worldly pleasures and the ordinary mode of a house-holder's life are essential for spiritual progress. In fact Vallabha himself lived a house-holder's life and so have all his descendants. This cult does not, therefore, glorify poverty and it teaches its followers that a normal house-holder's life is quite compatible with the practice of Bhaktiv provided of course, the devotee goes through the two ceremonies of initiation and lives up to the principles enunciated by Vallabha.

The question which we have to decide is whether there is anything in the philosophical doctrines or tenets or religious practices which are the special features of the Vallabhaschool, which prohibits the existence of public temples or worship in them. The main object underlying the requirement that devotees should assemble in the Haveli of the Guru and worship the idol obviously was to encourage collective and congregational prayers. Presumably

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it was, realised by' Vallabha rand ,his descendants that worship in 'Hindu. "public' temples Is apt·t.Q··· clothe the images' worshipped with a. formal and rigid character and the element of personality is thereby obliterated ;' and .this school believes that. in order that Bhakti should begenuineandvpasaionaterin the mind of the devotee there must be ·present thenecessaryelement. of the personality otGod, It istrue. that Vaishnava temples of theVallabha .sect are:.. ,generally described as Havelis and though theyare grand and majestic' inside, the outside. appearance isalways attempted to' resemble that of.a private house, This feature can, however, be,easily. explained if we recall the fact that during the time when Vithalnathji with his. great missionary zeal spread the doctrine of Vallabha... Hindu temples were cons· ,tantly faced with the danger of . attack. from Aurangzeb. In fact, the traditional story about the foundation ·of theBrinathji temple at Nathdwara itself eloquently brings out the fact that owing, to. the. ,religious persecution practised during Aurangzeb's time, Srinathjihimself had to give IIp his abode near Mathura and to start on a journey in search of a place for residence in more hospitable and .congenial surroundings. Faced with this immediate problem Vithalnathji may have started building the temples in the form of Havelis so that from outside nobody should know that there is. a temple within-. .

It rnay. also be true historicallythatwhen the. . first temple was built in the life. time of Vallabha it may have been a modest house where the original image was installed and during the early years just a few devoteesmay have been visiting the .said temple-. Appropriately enough, it was then called a Haveli, :.' Later; even when the number of devotees increased and th temples built by the Vallabhajsect ,began to collect" thousands of visitors, traditional adherence to time-honoured words described all subsequent temples .elso as Havelis however big and majestic

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they were. Therefore, we are satisfied that neither the tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple. Some temples of this cult may have been private in the past and some of them may be private even today. Whether or not a particular temple is a public temple must necessarily be considered in the light of the relevant facts relating to it. There can be no general rule that a public temple is prohibited in Vallabha School. Therefore, the first argument urged by the learned Attorney-General in challenging the finding of the High Court that the Srinathji temple at Nathdwara is a public temple, cannot be accepted.

The question as to whether a Hindu temple is private or public has often been considered by judicial decisions. A temple belonging to a family which is a private temple is not unknown to Hindu law. In the case of a private temple it is also not unlikely that the religibusrepuration of the founder may be of such a high order that the private temple founded by him may attract devotees in large numbers and the mere fact that a large number of devotees are allowed to worship in the temple would not necessarily make the private temple a public temple. On the other hand, a public temple can rbebuilt byaubscriptiona raised by the public and a deity installed to enable all the members of the public to offer worship. In such a case the temple would clearly be a public temple. Where evidence in regard to the foundation of the temple is not clearly available, sometimes, Judicial decisions rely on certain other facts which are treated as relevant, Is the temple built in such an imposing manner that it may *prima facie* appear to be a public temple? The appearanceof the temple of course cannot be a decisive factor; atbest itmay be a relevant factor. Are the members of the public entitled to an entry

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in the temple? Are they entitled to take part in offering service and taking Darshan in the temple? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple? Are their offerings accepted as a matter of right? The participation of the members of the public in the Darshan in the temple and in the daily Acts of worship or in the celebrations of festival occasions may be a very important factor to consider in determining the character of the temple. In the present proceedings, no such evidence has been led and it is, therefore, not shown that admission to the temple is controlled or regulated or that there are other factors present which vindicate clearly that the temple is a private temple. Therefore, the case for the Tilkayat cannot rest on any such considerations which, if proved, may have helped to establish either that the temple is private or is public.

There are, however, certain ancient documents which show that the temple cannot be a private temple. We have already referred to the Firmans issued by Akbar and Shahjahan. These Firmans are strictly not material for the purpose of the present dispute because they have no relation to the temple at Nathdwara. However, as a matter of history, it may be worthwhile to recall that the Firman issued by Akbar on May 31, 1593 A. D. shows that Vithalrai had represented to the Darbar that he had purchased on paying its price land from the owners thereof in the Mowzah of Jatipura, situated in the Paraganah, adjoining Gordhan and had caused to be built thereon buildings, gardens, cowsheds and Karkhanas (workshops) for the temple of Gordhan Nath and that he was residing there. Having received this representation, Akbar issued an order that the above-mentioned Mowzah had been given over tax-free into the possession of the above-mentioned Goswami from descendant to descendant. It would thus be seen that though the grant by which the land

in question was, exempted from payment of taxes is in the name of the Goswami, there can be no doubt that it was so named on the representation made by the Goswami that he had purchased the land and built structures on it for the temple of Gordhan Nath. Thus, in substance, the grant was made to the Goswami who was managing the temple of Gordhan Nath, The grant of Shah Jahan made in 1633 A. D. is to the same effect. These grants are in reference to the temple built by Vithalrai in Jatipura. We have already seen that the idol of Shrinathji was removed from the said temple and brought to Nathdwara in about 1671.

The earliest document in regard to Siarh is of the year 1672 A. D. The document has been issued by the Rana of Udaipur and it says that "Be it known that Shrinathji residing at Sihod Let uncultivated land as may desire be cultivated till such time,' When Shrinathji goes back to Brij the land of those to whom it belongs will be returned to them. If any one obstructs in any way he will be rebuked." The next document is of 1680 A. D. It has been issued by Rana of Udaipur and, is in similar terms. It says that when Shrinathji goes back to Brij from Singhad Brahmins will get the land which is of the Brahmins. They will get the land as is entered in previous records. So long as Shrinathji stays here, no Brahmin shall cultivate towards the West of Shah Jagivan's wall up to and across the foot of the hillock.' If anyone cultivates a fine of Rs. 2'25/. shall be realised. collectively. Fortunately,' for Nathdwara, the temple which was then built for Shrinathji for a temporary abode has turned out to be Shrinathji's permanent place of residence. These two documents clearly show that after Shrinathji was installed in what is now known as Nathdwara, the land occupied for the purpose of the temple was given over for that purpose and the actual occupants and cultivators were told, that they would get the land back when Shrinathji goes back to Brij.

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We have already cited the extract from Col. Todd's ,tAnnals of Rajasthan' in. which he has graphically described the traditional belief in regard to the choice of. Siarh for theabode ofShrinathji.. That extract shows that as soon the chariot wheel of Shrinathji .slopped and would not move, the chief hastened to makea perpetual gift of the" 'village and its lands which was speedily' confirmed by the patent .of the' Rana. Nathji was removedfrom his car and in due course of time a temple was rrectedforhis. reception. That is how the hamlet of Siarh became the town, of Nathdwara. This assurance given ;by" the chief.wasconfirmed by the two .grants to which, wehave-just referred. Thus, therecanbenodoubr , thatthe original grants were for' the purpose of 'the" temple.

A deed of dedication executed by Maharana. Shrl Bhim Singhji in favour of 'Gusainji in 'S'ambat 1865 also shows, that the lands therein described had been dedicated to Shriji and Shri Gusainji and that all the income relating' to, those landswould be dedicated to the Bhandar of Shriji, " .:

A letter written by the Maharana on January 17, 1825, speaks to the sarne effect. "Our ancestors," says the letter, "kept the Thakurji Maharaj and the Gosainji Maharaj at the village of Shinhad which is near Udaipur and presented that village to the -Thakurji, After this, ourancestors became followers of that religion and agreed to obey orders. .They all granted lands and villages for the expenses of the God. Besides these certain lands' were granted for the grazing. of the cows belongingto.the Thakurji." This letter contains certain orders to the" officers of the S to respect the rights of th temple and Gosaij

Consistently with thisrecord.we find a declaration made byTilkayat Gordhanji in 1932 in which he

stated that "the money of Shri Thakurji as is the practice now, that it is not spent in our private expenditure the same will be followed", though along with this declaration he added that the proprietary right was his own from the time of the ancestors. In conformity with the same, the entry will continue as usual in the accounts of credit and debit as is the continuing mutation. Even though the Tilkayat set up the claim that the temple was private; it is consistently adhered to that the income derived from the properties of the temple, is not intended to be and has never been used for the personal requirements of the Tilkayat.

It is true that there are other grants which have been produced on the record by the Tilkayat for the purpose of showing that some gifts of immovable property were made in favour of the Tilkayat. Such grants may either show that the gifts were made to the Tilkayat because he was in the management of the temple, or they may have been made to the Tilkayat in his personal character. Grants falling in the former category would constitute the property of the temple, whilst those falling in the latter category would constitute the private property of the Talikayat. These grants, however, would not affect the nature of the initial grants made to the temple soon after Shrinathji came to Nathdwara. Therefore in our opinion, having regard to the documentary evidence adduced in the present proceedings, It would be unreasonable to contend, that the temple was built by the Tilkayat of the day as his private temple and that it still continues to have the character of a private temple. From outside it no doubt has the appearance of a Haveli, but it is common ground that the majestic structure inside is consistent with the dignity of the idol and with the character of the temple as a public temple.

We have referred to these aspects of the matter because they were elaborately argued before us by

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the. learned . Attorney-General. But as we .wiU presently point out, the Firman issued by the Udaipur Darbar in 1934 really' concludes the controversy between the parties on these points and. it showafhat the Shrinathji Temple at Nathdwera is undoubtedly a public'temple. It is therefore; nownecessary to consider this Firman. This Firman consists of four clauses. .The first clause declares that according to the law of' Udaipur, the shrine ofBhrinathji.has always been and is a religious institution for the followers of the VaishnavaSarnpradaya and that allthe property immovable and movable dedicated, offered or presented to or otherwise coming to the .Deity Shrinathji has always been and is the property of the shrine and that the Tilkayat Maharaj for the time being is merely a Custodian, Managerand Trustee of the said property forthe shrine of Shrinathji and that the ,UdaIpur Darbar has absolute right to supervise, that the property dedicated to the shrine is used for legitimate purpose of the shrine. The second clause deals WIth the question of succession and it provides that the law of Udaipur has always been and is that the succession to the Gaddi'of Tilkayat Maharaj is reguiated .by the law of Primogeniture, and it ,adds that the Udaipur,' Darbar has. the absolute right. to depose any ,Tilkayat Maharaj for the time being if in its absolute .discretion such Maharaj is considered unfit and, also for the same, reason and in the same way to disqualify any person who would otherwise have succeeded to the Gaddi according to the Iawof primogeniture. 'The third clause provides that in case, the iTilkayat Maharaj is a minor, the Darbar .always had' and.has absolute authority. to take any measures for, the .management of the. shrine and *its* properties during sue' monity. TIle last clause adds that In accorda with the said law of Udaipur, the Rana had declared Shri DomodarJalji unfitvto occupy the Gadd! and' had appreved of the succession of Ooswami Dovindlalji to th'e .Gaddi of Tilkayat

Maharaj, and it ends with the statement that the order issued in that behalf on October 10, 1933, was issued under his authority and is lawful and in accordance with the law of Udaipur.

In appreciating the effect of this Firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is covered by decisions of this Court and it has not been disputed before us, Vide *Madhaorao Phalke v. The State of Madhya Bharat* (1). *Ammer-un-Nisa Begum* v. *Makboob Begum* (2), and *Director of Endowments, Government of Hyderabad* v. *Akram Ali* (8).

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challenge when It seeks.totdeclare that the temple in queadonhas always beena public.temple.We have already, seen that the original grants amply bear out the recital in cl, lof.thC·FIrm'anaboUt the character of this te.:.. The Firman then clear pro ides that the Tilkayat Maharaj is merely a custodian, Manager andTrusteeof the said property and that finally determines the nature of the office held. by the TilkayatMaharaj, .He can claim nobetter and no higher rights after the Firman was Issued. The' said clause also."declares that the Darbar has absolute right to seeto it that the property is used for legitimate purpose of the shrine. This again is an assertion whichis validly' made to assertthe sovereign's rights to-supervlse the administration of. public charity, Clause 2 lays down the absolute right of the' Darbar to depose the Tilkayat and to disqualify anyone from claiming the succession to the Gaddi. It shows that succession to the Gaddi and continuing in the office of theTilkayat are wholly 'dependent on the discretion of theDarbar, .The Right of the Darbar to depose the Tilkayat and to recognise a successor or not is described by this clause as absolute. The third and the fourth clauses are consistent with the first two clauses. Reading this Firman as a whole, there can be no doubt that under the law of Udaipur,' this temple was held to be a public temple and the Tilkayat was held to be no more than the Custodian, Manager and -Trustee of the property belonging to the said' temple. It is on the basis of this law that the vires of the Act must inevitably be determined.

. Thelearned AttorneyGeneral has. invited our, attention to some decisions in which the temples of this cult were .held tobeprivate temples.. ,We would now very briefly refer to these decisions before we' proceed, to deal with the other points raised in the present 'appeals. In' *Gossamee Sree Greedhareejee v, Rumanlolljee Gosscmee,* (1), the Privy Council held that when the worship of a Thakoor has' been

'(I) .16 I. A. 137.

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founded under Hindu law, the shebaitship isheldto be vestedinthehelrs of the founder, in default of evidence thathe has disposed of it otherwise, or that: there has been. some usage, course of dealing, or circumstances to s.how a different mode .of devolution, Greedhareejeewhoas the plaintiff .appeared before the Privy Council as the appellant-had been-deposed by the Rana of Udaipur in 1876. He claimed the rights of shebaitship of a certain consecrated-Idol and as incident thereto to the' things which hadbeen offered to the idol. This claim was based on the allegation that by the rule of primogeniture he had preferential right and not his opponent Rumanlolijee Gossamee. The High Court 'of Calcutta 'by.' a majority judgment had held that Greedhareejee's title as a founder had been established and that. the bar of limitation pleaded by the respondent applied 'to the temple and the land on..which it was built but not to the image and the movable property. connected with it. In the. result, Greedhareejee got a decree for so much of his claim as was not barred by lapse of time. This conclusion was confirmed by" thePrivy Council. .It would be .noticed' that since. the dispute was between two rival claimants neither of whom was interested it' pleading that the temple was a public temple, that aspect of the matter did not fall to be considered in the said Jitiga'. tion, and so, this decision can be regarded as all authority only for the proposition which .it laid down in regard to the. succession of the Shebaitship. The learned .Attorney-General no doubt invited. ouratten-.. tion to the fact that in the courseof his judgment,'. Lord Hobhousehas mentioned that all the "male". members of the Vallabh's family are in, their lifetime esteemed by their community as rtaking of the . Divi' essence, and as entitled to veneration and: worship. This observation, however, an be of little help to the Tilkayat inthe presentproceedings where. we have to deal with the matteron the basis'of the.' Firman to which we have just referred. Besides, we

may incidentally add that the Tilkayat's claims to property rights in the present proceedings based 'on the allegation that the members of the denomination regard all successors of Vallabha with the same respect which they had for Vallabha himself is unds incongruous with the essential tenets of Vallabha's philosophy.'

In *Mohan Lalji v, Gordhan Lalji Maharaj* (1), the dispute which was taken before the Privy Council was in regard to the right claimed by the sons of a daughter to the shebaitship of the temple of Vallabha sect, and in support of the said right the sons of the daughter relied upon the earlier decision of the Privy Council in the case of *Gossommee Sree Girdhareejee* (2). In rejecting the plea made by the said sons, the Privy Council observed that the principle laid down in the earlier case cannot be applied so as to vest the shebaitship in persons who, according to the usages of the worship, cannot perform the rites of the office. In that case it was found that the sons of the daughter who were Bhats and who did not belong to the Gosain Kul were incompetent to perform the "diurnal rites for the deity worshipped by the sect" and so, the decision of the High Court which had rejected their claim was confirmed.' In this case again neither party was interested in pleading the public character of the temple and so, that point did not arise for decision,

The same comment falls to be made about the decision of the Allahabad High Court in *Gopal Lalji v, Girdhar Lalji* (3); It is true that in that case the plaintiff challenged a gift deed executed by one Goswami of the Vallabha sect in favour of another Goswami and in doing so he alleged that the donor Goswami was a Trustee and not the owner of the property. But in the course of the evidence, it was virtually conceded by him that the property belonged to the donor Goswami, and so, the case was

(1) 40 I.A. 97, (2). 16 I.A. 137.

(3) A.I.R 1915 All. 44.

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, decidedon that basis: In its judgment, the High Court observed that there can be no doubt thatif" we must . regard the property' as "trust property:',' in the strict sense, dedicated for a charitable or religious purpose in the hands of duly .constituted trustees of the charitable or religious object, oneormoreofauch ' trustees would have no power' to alienate thc trust property or delegate theirpowers andduties. contrary . to the trus.t.But ,the High. Court found that.theevi-dencead.duced conclusivelyestablished that.. the. property in question was private propertyand so, the . challenge to the validity of the gift was repelled. This decision also cannot beof any assistance in deciding the question ae to whether the temple with which the present proceedings concerned is a prlvate.icr.a public temple. Besides, as we have' already indicated,.. this question' is really concluded by the Firmanof.. 1934 and so, the temple must be held to be a public temple and in consequence the challenge .to the validity,of the Act on the basis thatthe Acthasinterfered with the Tilkayat's rights of ownership over his private property cannot succeed.

Let us now' examine the material.pro'vi-sio:ns of the Actbefore dealing with 'theoontentlonsof the Tilkayat that thesaid provisions contravene hisfundamental rights under Art. 19 (l) (f'jand Arts. 14 and 31(2) even On the basis-that the temple is a public' temple. The Act was passed to provide for the better "adminiatraticn and governance of the temple of Shri Shtinathji. at Nathdwara. It consists of 38 sections. Section 2 is a definition section: under s. 2(i) "Board" means the Nathdwara Temple Board established and constituted under the. Act, and is. 2 (ii) defines "Endowment" as meaning all property.jnovableer. movable belonging to or given or endowed in any me for the maintenance or support of the temple or for the performance of any service or charity connected therewith or for the benefit, convenience or comfort of the pilgrims visiting .the temple, and

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(a) the idols installed in the temple.

(b) the premises of.the temple.

(c) all jagirs, muafis and other properties, movable or immovable, .wherever situate and all income derived from any source whatsoever and standing' invany name, dedicated to the temple or placed for any religious} 'pious or charitable purposes under the Board or purchased fromout of the temple funds and all .offerings and bhents made for and received on behalf of the temple, "

but shall not include ,a,ny property belonging to the Goswami personallyalthough the same or income thereofmightihitherto have been utilised' in parrorin wholein the service of the temple.'

Section 2 (viii) defines "temple" as meaning the temple ofShri Shrlnathjiat Nathdwarain Udaipur District and. .includes the temple of Shri Navnitpriyaji and ShriMadan Mohanlalji together with all. addi-.tions thereto or 'al1'alterati9ns thereofwhichmay be made from time to time after the commencement of the Acta' "

Sections 3 and 4 are important provisions of the Act.· Section 3 provideg that the ownership of 'the .temple and all its; endowments including'. all offerings which have been or may hereafter be made shall .vest in the deity Q,f, Shri Shrinathji and the Board· constituted under the Act shall be entitled to their possession. In other words,' all property of the temple vestsJn the, temple and the right to claim possession of it vests in the-Board. As a corollary to

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the provisions of s. 3, s, 4(1) provides that the administration of the temple and all its endowments shall vest in the Board constituted in the manner hereinafter provided. Sub-section (2) lays down that the Board shall be a body corporate by the name of the Nathdwara Temple Board and shall have perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and may sue or be sued in the said name. The composition of the Board has been prescribed by s. 5: it shall consist of a President, the Collector of Udaipur District and nine other members. The proviso to the section is important: it says that the Goswami shall be one of such members if he is not otherwise disqualified to be a member and is willing to serve as such. Section 5 (2) prescribes the disqualifications specified in clauses (a) to (g)—unsoundness of mind adjudicated upon by competent Court, conviction involving moral turpitude; adjudication as an insolvent or the status of an undischarged insolvent; minority, the defect of being deaf-mute or leprosy; holding an office or being a servant of the temple or being in receipt of any emoluments or perquisites from the temple; being interested in a subsisting contract entered into with the temple; and lastly, not professing the Hindu religion or not belonging to the Pushti-Margiya Vallabhl Sampradaya. There can be no doubt that "or" in clause (g) must mean "and", for the context clearly indicates that way. There is a proviso to s. 5 (2) which lays down that the disqualification as to the holding of an office or an employment under the temple shall not apply to the Goswami and the disqualification about the religion will not apply to the Collector; that is to say, a Collector will be a member of the Board though he may not be a Hindu and a follower of the denomination. Section 5 (3) provides that the President of the Board shall be appointed by the State Government and shall for all purposes be deemed to be a member. Under s, 5 (4) the

Collector shall be an ex-officio member of the Board. Section 5 (5) provides that all the other members specified in sub-cl, (1) shall be appointed by the State Government so as to secure representation of the Pushti-Marg Vaishnavas from all over India. This clearly contemplates that the other members of the Board should not only be Hindus, but should also 'belong' to the denomination, for it is in that manner alone that their representation can be adequately secured. Section 6 gives liberty to the President or any member to resign his office by giving a notice in writing to the State Goverament. Under s. 7 (1), the State Government is given the power to remove from office the President or any member, other than the ex officio member, including the Goswami on any of the three grounds specified in clauses (a), (b) & (c); ground, (a) refers, to the disquallfication specified by s. 5 (2), ground; (b) refers to the absence of the member for more than four consecutive meetings of the Board without obtaining leave for absence; and ground (c) refers to the case where a member is guilty of corruption, or misconduct in the administration of the endowment. Section 7 (2) provides, a safeguard to the person against whom action is intended to be taken, under sub-cl. (1) and it lays down that no person shall be removed unless he has been given a reasonable opportunity of showing cause against his removal. It would be noticed that by operation of s. 7 (I), the Goswami is liable to be removed, but that removal would, in a sense, be ineffective-because the proviso to s, 5 requires that the Goswami has to be a member of the Board so that even, though he is removed for causes (b) and Ic), he would automatically be deemed to be a member under the proviso to s. 5. It would be a different matter if the Goswami is removed by reason of the fact that he is disqualified on any of the grounds -described- in s. 5 (2). Such a disqualification may presumably necessitate the appointment of a successor, Goswami in lieu of the disqualified,

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one and then it would be the successor Goswami who, will be a member of the Board under the proviso to s. 5 (1). This positionis made clear if we look at s. 11 which provides that any person ceasing to be. a.membershall, unless disqualified under s, 5 (2) be eligible forre appointment, whereas other members who are removed under s. 7 (1) for causes specified in clauses (b) and (c) may not be eligible.for reo appointment, the Goswami would be entitled to such re-appointment. . Section 8 prescribes the term of office at 3 years. Section 9 provides for the filling up of. casual vacancies. Section 10 empowers. the State Government to dissolve the Board and reconsti. tute it if it is'satisfied that the existing, Board isnot competent to perform or persistently makes default in performing the duties 'imposed on it under-this Act, or exceeds or abuses Irs powers; and this-power can be exercised after due-enquiry. This section further provides that if a Board is dissolved, immediate action should be taken to reconstitute afresh Board in accordance with the provisions of this Act. Section 10(2) provides a safeguardvtotheBoard against which action is proposed to be'takenunder sub-so (I) inasmuch as it requires that before the n.otification of the Board's dissolution isissued, Government will communicate to the Board'the grounds on which it proposes so to do} fix a reasonable time for the Board to show cause .and consider, its explanation or objections, ifany. Section 10 (3) empowers the State' Government, asa provisional and ' interim measure, to appoint a person to perform the functions of the Board untllafresh-Board is reconstituted, and under s. 10 (4), theState] Governmentis given the power to fix the remuneration of the person so -appointed,ection 12, makes e member of the' Board 'lia'. for loss, waste or. misi pplication of any money or property belonging to the temple, provided such loss, waste or misapplication is a direct consequence of his wilful act or. omission, and it allows a suit to be instituted to

obtain such .compensation, Under s. 13, members of the Board as well as the President are entitled to draw travelling and halting allowances. as may be prescribed. S on 14, deals with the offic and meetings of the Board ands. 15 provides t any defect or vacancy in the constitutionof the Board will not invalidate the acts of the Board. Section 16 is important; It lays down that subject to the prcvisinns of this Act and of the rules made thereunder, the Board shall manage the properties and affairs' of the. temple and arrange for the conduct ofth.e dailyworship and ceremonies and of festivals in the temple according to the, customs and usage of the Pushti-Margiya VallabhiSampradaya.Section 17 (1) provides that the jewelleries ior other .valuable .moveable property .of a non-perishable character the adm'nistration of which vests in the Board shall not be transferred without the-previous sanction of the Board, and if the value of the property to be transferred exceeds ten, thousand rupees, the previous approval of the State Government has to be obtained.v.Section 17 (2) requires the. previous sanction of the State Government for leasing the temple property for more than five years, or mortgaging, selling or otherwise alienating. it. Seetion 18 imposes a ban on the borrowing power of the Board. Section 19 (1) provides.for the appointment iof the Chief Executive Officer of the temple, and the remaining four subsections of s, 19 deal with his terrrlS and conditions of service'. "Section20 speaks of the powers and duties of che Chief Executive Officer which relate to the administration of the temple properties. Section 21 provides that the .Board may appoint, suspend, remove.. dismiss. or reduce in rank or in any way punish all officers and servants of the Board other than the' Chief ExecutiveOfficer, in accordance with rules .made by 'the State Government. Section 22 is very important. It provides thatsave asother.. , wise expressly provided in or under this Act, ,nothing

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herein contained shall affect any established usage of the temple or the rights, honours} emolumentsand perquisites to which any person may, by custom or otherwise, be entitled, in the temple, Section 23 deals with the budget} s, 24 with accounts ands, 25 with the Administration Report. ,Section 26· confers on the State Government power to call for such information and accounts as .rnay, in its opinion, be .reasonably necessary to satisfy. it that the temple is being properly maintained, and its administration carried·, onaccording to the, prcvislons.of this Act. Under this section, the Board is under an obligation to furnish forthwith such information-and accounts as may be called for by the State Government. Under s', 27, the State Oovernment unay depute any person to inspect any movable or immovable property, records, correspondence, plans, accounts and .other documents relating ,to the temple, and' .endowments, and the Board and'. its officers and servants shall he bound to afford all facilities to such. persons 'for such inspection. Section 28(1) specifies the' purposesfor vwhichthe funds of the temple may \be utilised .and .s.28(2)' provides that without prejudice to the pllrposes referred to in sub.a..{1), the Board rnay, with the previous sanction of the; State Government, 'order that the surplus funds of the temple be utilised for the purposes mentioned in clauses (a) to ,(e).. Sechon 28(3) requires that the orderof the 'Board under sub-g. (2) shall be published inthepresc ribedmanner. Section 29 deals with the duties of trustee-ofspecific" endowment; s. 30(1) confers the power on the State Government to make rules for carrying out all orany of the purposes of the Act; s, 30(2) providesthat in particular and without prejudice to the generality he foregoing power, the Stat'";:' lovernment shall ve power to make rules with ference to matters covered by clauses (a) to (i). Under sub-section(S) it 'is provided that ,the rules made under thisAct shall be placed before the House of the,.. State

Legislature at the session thereof next following. Section 31 provides that the State Government or any person interested may institute a suit in the Court of District Judge to obtain a decree for the reliefs mentioned in clauses (a) to (f). These reliefs correspond to the relief which may be obtained in a suit under s. 92 of Civil Procedure Code. In consequence s. 31(2) provides that s. 92 and 93 and O. I, r. 8, of the First Schedule to the Code of Civil Procedure shall have no application to any suit claiming any relief in respect of the administration or management of the temple and no suit in respect thereof shall be instituted except as provided by this Act. In other words, a suit which would normally have been filed under s. 92 and 93 and O. I, r. 8, of the Code has now to be filed under s. 31. Section 32 deals with the resistance or obstruction in obtaining possession and it provides that the order which may be passed by the Magistrate in such matters shall, subject to the result of any suit which may be filed to establish the right to the possession of the property, be final. Section 33 deals with the costs of the suit, etc. Section 34 provides that this Act shall have effect notwithstanding anything to the contrary contained in any law for the time being in force or in any scheme of management framed before the commencement of this Act or in any decree, order, practice, custom or usage. Section 35 contains a transitional provision and it empowers the State Government to appoint one or more persons to discharge all or any of the duties of the Board after the Act comes into force and before the first Board is constituted. Under s. 36 it is provided that if any difficulty arises in giving effect to any of the provisions of this Act) the State Government may, by order, give such directions and make such provisions as may appear to it to be necessary for the purpose of removing the difficulty. Section 37 prescribes a bar to suit or proceeding against the State Government for anything done or purported to be done by

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-it under the provisions of this Act. TIle last section deals with repeal and savings. The Rajasthan Ordinance No. 20f 1959 which had precededthis Act has been repealed by this section. That in brief, is the scheme of the Act.

Later, we will have occasion to deal with the specific sections which have been challenged before us, but at this stage, it is necessary toconsiderthe broad scheme of the Act in order to be able to appreciate the points raised by theTilkayat and the denomination in challenging its validity. For the purpose of ascertaining thetrue scope and effect of the scheme envisaged by the Act it is necessary to concentrate on sections 3, 4, 16, 22 and 34. The scheme ofthe Act) as its preamble indicates, is to provide for the better administration and governance of the temple of Shri Shrinathji at Nathdwara. It proceeds on the basis that the temple..ofShrinatbjl is a public temple and having regard to the background of the administration of its affairs in the past, the legislatu-re thought that it was necessary to make a more satisfactory provision which will lead to its better administration and governance. In doing so, the legislature has taken precautionto safeguard the performance of religious rites and the observance.cf religious practices in accordance with traditional usage and custom, When the validity of any legislative enactment is impugned on the ground that its material provisions contravene one or the otherof the fundamental rights guaranteedby theConstitution, it is necessary to bearin mind theprimaryrule of construction. If the impugned provisions ofthe Statute are reasonably capable of a construction whi does not involve the infringement of any fu·mental rights, that construction must bepreferred though itmay reasonably be possible toadopt another constructionwhich leads to the infringement of the said fundamental rights. If the impugned

provisions are reasonablynot' capableof the construcdon which would save its validity, that of course is another mattenbutif twoconstructions are reasonably possible then ,it is necessarythatthe Courts' should adopt that construction which upholds the validity of the Act rather than the one which affects its validity. Bearing this rule of construction in mind, we most examine the five',' .sections to. which we have, just referred. Section 3 nodoubt provides for the vesting of the 'temple property and all its endowments includingvofferings in the deity of Shrinathji, and that clearly is unexceptionable, If the, temple is a public temple, under Hindu Law the idol of Shri-.nathji is a 'juridical person and so, the ownership of the templeandall its endowments includingofferings made before the idol constitute the property of the idol. Having thus stated what is, the true legal posltion about th.eownershipof the temple and the endowments.is. 3 proceeds to add that t.heBoard constituted under this Act shall rbeientitled to the possession of the' said property. 'If the 'legislature intended to provide for the better administration of the templevproperties, it was absolutely essential to constitute a proper Board to look after the said administration, and so, all that s.3does is to enable the Board, to take care of the templepropertiesand in that .sense, it provides that the Board shall,be entitled to claim possession of the, saidproperties, ' In " the context. this provision does not mean that the Board would be entitled to dispossess persons who are in ipossession of the said' properties : 'it only means that the Board will be .entiiled to, protect its possession by' taking such steps as in law may be open to it and necessary in thatbehalf 'Section'4 is a mere corollary to s. 3 because it provides that the administration of the temple and all its endowments shall vest in the Board. Thus, the result of reading ss. 3 and 4 is thatthestatute declares that the properties Or the temple vest in.the deityofShrinathji and *provides* for the administration of the said

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properties by appointing a Board and entrusting to the Board the said administration, ...

The true scope and effect of these provisions can be properly, appreciated only when, they are, co-related to ss. 16 and 22, Section 16 prescribes the duties of the Board; it requires that subject to the provisions of the Act and the rules framed under it, the Board has to manage the properties and affairs of the temple and arrange for the conduct of the daily worship and ceremonies and of festivals in the temple according to the customs and usages of the Pushti-margiya Vallabhi Sampradaya. It would be noticed that two different categories of duties are imposed upon the Board. The first duty is to manage the properties and secular affairs of the temple. This naturally is a very important part of, the assignment of the Board. Having thus provided for the discharge of its important function in the matter of administering the properties of the temple, the section adds that it will be the duty of the Board to arrange for the religious worship, ceremonies and festivals in the temple, but this has to be done according to the customs and usages of the denomination. It is thus clear that the duties of the Board in so far as they relate to the worship and other religious ceremonies and festivals, it is the traditional customs and usage which is of paramount importance, In other words, the legislature has taken precaution to safeguard the due observance of the religious ceremonies, worship and festivals according to the custom and usage of the denomination. Section 22 makes this position still clearer; it provides that save as otherwise expressly provided in or under the Act, nothing herein contained shall affect any established usage of the temple or the rights, honours, emoluments and perquisites to which any person may, by custom or otherwise, be entitled in the temple. The saving provisions of s. 22 are very wider unless there is an express provision to the contrary in the

the temple; as such Mahant he has a right to conduct or. arrange for and supervise the worship of theidol in .the temple and the services renoered rherein In accordance with the .,tradItIOnal, custom and usage.

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Act,' all matters whichhavebeen saved by,s.22 will be governed. by.fhe traditional usage and, custom. If only we consider the very wide terms in which the saving clause under s. 22 has been drafted, it will be clear that the.legislature was anxious to provide for the better administration of the temple properties .and not to .infringe upon the traditional religious . ceremonies, worship and festivals in the. temple and the rights, honours, emoluments and .the perquisites attached thereto. Section 34 which provides for the over-ridingeffect qf the Actmust be' read alongwith s. 22 and so, when-it provides that the:' Act shallhave effect notwithstanding practice) custom or usage, it only means thatpractice, custom and usage will not avail if there is an expressprovision jo the-contrary as prescribed by s, 22.

Reading these fivesections together,,it seemsto us clear that' the Legislature has. provided' for the" appointment of a Boardtoloos after the administration offhe property of the temple and manage its secular affairs as well as the religious affairs of the temple, but in regard' to these religious' affairs consisting of the worship, . services, festivals and' other ceremonies," the", custom prevailing in the temple consistently with the tenets of Vallabha philosophy are to be .respected. ,The learned Attorney .General no doubt attempted to read ss. 3 and 4 in a *very* wide manner and he sought to place a narrow construction on s. 22, thereby indieating that even religious cerernoniesand rites and festivals' would remain within the exclusive jurisdiction of the Boardwithout reference to the traditional custom or usage, We do not think that it would be appropriate to adopt such an approach in construing the relevant provisions of the Act. We have 'no' doubt that when rules are framedunder s, 30 .of'<the

have the custody of the property such as the Oustodian has, or. the-right to manage the property such as the Manger possesses" orrhe right to administer the trust property for the benefit of the beneficiary which. the Truste .an do, cannot be regarded right to property under Art.19 (1)(f) and for the s e reason, it does not constitute property under Art. 31(2). If it is Leld that the Tilkayat was no more than' a Custodian.v Manager and Trustee properly so called, there can be no doubt that he is not entitled to rely either on Art. 19(I)(f) or on Art. 31(2). Therefore, on this construction of clause I of the Firman, the short answer to the pleas raised by the Tilkayat under Arts. 19(1)(f) and 31(2) is that the rights such as he possesses under the said clause cannot attract Art, 19(1)(f) or Art. 31 (2).

It has, however, been strenously urged before us that the .words .''Custodian, Manager or Trustee' should be ,liberally .construed and the positionofthe. Tilkayat should be taken to be similar to that of a Mahantof a 'MathoraShebait of a temple. Under Hindu Law) idols and Maths are both juridical persons and Shebaits and Mahantswhc manage their, properties are recognised to possess certain rights and to claim a certain status. A Shebait by virtue of his office is the person entited to administer the property attached to the temple of which he is a Shebait. Similarly a Mahant who is a spiritual head of the Math or religious institution is entitled to manage the said property for and on behalf of the Math, The position of the Mahant under Hindu law is not strictly that of a Trustee. As Mr. Ameer Ali delivering ,the judgment of the Board observed in *Vidya Varuthi 'Ilhirtha* v. *Balusami Ayyar* (1), "called by, whatever name he is only the manager and custodian of the idol or the institution." When the gift isdirectty to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. In almost every 'case the' Mahant is given the right to a

(1) (1921) L; R. 48 I.A; 302, 311.

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part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term-though in view of the obligations and duties resting on him he is answerable as a trustee in the general sense for mal-administration.

This position has been accepted by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.* (1). Speaking for the unanimous Court (in that case), Mukherjea, J. observed, "Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together, and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties: and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right." On this view, this Court held that the right of this character-vesting in a Mahant is a right to property under Art. 19(1)(f) of the Constitution. Relying on this decision, it is urged that the Firman should be construed to make the Tilkayat a Mahant or a Shebait and as such, clothed with rights which amount to a right to property under Art. 19(1)(f) and which constitute property under Art. 31(2).

Assuming that the construction of clause 1 of the Firman suggested by the learned Attorney-General is possible, let us examine the position on the basis that the Tilkayat can, in theory, be regarded as a Mahant of the temple. What then are the rights to which, according to the relevant evidence produced in this case, the Mahant is entitled in respect of the temple? As a Tilkajat, he has a right to reside in

(1) [1954] S.C.R. 1005.

the temple; as such Mahant he has a rightto conduct or arrange for and supervise the worship of the idol in the temple and the services rendered therein in accordance with the traditional custom and usage. He has also the right to receive bhents on behalf of the idol and distribute *Prasad* in accordance with the traditional custom and usage. So farasthese rights are concerned, they have not been affected bythe Act, and SO,nQ argument can be raisedthat inaffecting the said rights the Act has contravened either Art. 19(1)(f) oriArt. 31(2). It is, however) argued that as a Mahant, the Tilkayat had the right to manage the properties of the temple, to leasethem out and in case of necessity, to alienate them for the purpose of the temple; and it is suggested that these rights constitute a right-to property under Art. 19(1)(f) and property under Arr. 31(2). The learned Attorney-General fairly conceded that there was no evidence to show that the right to alienate had ever been exercised in this case, but he contends that the existence of the right cannot be denied. It is also conceded that the right to manage the properties was subject to the strict and absolute supervision of the Darbar, but it is suggested that even so, itis a rightwhich must be regarded as a right to property: In dealing with this argument, it is necessary to bear in mind that the extent of the rights available to the Tilkayat under clause 1 of the Firman cannot be said to have become larger by virtue of the fact that the Constitutioncame into force in 1950. It is only the rights toproperty which subsisted in the Tilkayat under theisaid Firman that would be protected by the Constitution; provided, of course, they are rights which attract the provisions of Art. 19(1)(f) or Art. 31(2).

This branch of the argument urged on behalf of the Tilkayat naturally rests on thedecisionof this Court inuhe case of the *Commissiner, Hisuiu. Religious Endowments, Madras* (1), that right ofa Mahant

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does amount to "a genuine legal right" and that the said right must be held to fall under Art. 19(1)(f) because the word uproperty" used in the said clause ought to receive a .vcrv liberal! imerpretaticn. It will be recalled that in, the .said case, thisCourt in terms and expressly approved iof the decision of Mr. Ameer Ali in *Vidya Viruthi Thirtha's* case (1), which iexhautively dealt with. the position of the Mahant or .theShebait under 'Hirld,u law. We have already quoted the relevant observations madein that judgment and it would be relevant to repeat one of those observations in which the Privy Council stated that in almost every case the Mahant-is given the right to a part of the .usufruct, the mode of enjoy.. ment and the amount of usufruct depending. again on usage and custom. It' is true 'that in the passage in Mr. Justice Mukherjea's judgment in the case of the *Oommiseioner, Hindu Religious Endowments, Madras* (2), this particular statement has not been cited; but having 'referred to. the rights whicb'<the Manant can claim, the 'learned Judge has added that these and other rights of a similar characterinvest, the office of the Mahant with theieharacter "of proprietary right which, though anomalous to some extent, is still a genuine legal right.. It ...is clear that when this Court' held that the rights vesting in the Mahant as a manager of the Math amount to a genuine legal right to property, this Court undoubted- ly had in mind the fact that usually, the . Mahant, or Shebait is entitled to 'be maintained out .offhe property of the Math or the temple and that the' extent of the right to a part of the usufruct and .the mode of enjoyment and the amount of ·thetisufruct always depended on usage and custom of the Math or the' temple. It is in the light of these rights, in ding particularly the righ] to claim a part of t· sulruct for his maintenance hat thIs.Court held that the totality of the rights amount to. aright to property under Art. 19 (1) (f).

(1) (1921) L.R. 48 I.A. 302, 31].

(2) [1954] S.C.R. 1005.

That takes us to the question as the nature and extent of the Tilkayat's rights in regard to the temple property. It is clear that the Tilkayat never used any income from the property of the temple for his personal needs or private purpose. It is true that the learned Attorney-General suggested that this consistent course of conduct spreading over a large number of years was the result of what he described as self-abnegation on the part of the Tilkayats from generation to generation, and from Tilkayat's point of view, it can be so regarded because the Tilkayat thought and claimed that the temple and his properties together constituted his private property. But once we reach the conclusion that the temple is a public temple and the properties belonging to it are the properties of the temple over which the Tilkayat has no title or right, we will have to take into account the fact that during the long course of the management of this temple, the Tilkayat has never claimed any proprietary interest to any part of the usufruct of the properties of the temple for his private personal needs) and so that proprietary interest of which Mr. Ameer Ali spoke in dealing with the position of the Mahant and the Shebait and to which this Court referred in the case of *Commissioner, Hindu Religious Endounnenis, Mtuiras* (1), is lacking in the present case. What the Tilkayat can claim is merely the right to manage the property to create leases in respect of the properties in a reasonable manner and the theoretical right to alienate the property for the purpose of the temple; and be it noted, that these rights, could be exercised by the Tilkayat under the absolute and strict supervision of the Darbar of Udaipur. Now the right to manage the property belonging to the temple, or the right to create a lease of the property on behalf of the temple, or the right to alienate the property for the purpose of the temple under the supervision of the Darbar cannot, in our opinion, be equated with the totality of the powers generally possessed by the Mahant or

(1) [1954] S.C.R. 1005.

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even the Shebait, and so, we are not prepared to hold that having regard to the character and extent of the rights which can be legitimately claimed by the Tilkayat even on the basis that he was a Mahant governed by the terms of the Firman.iamounr.to a right to property under Art, 19 (L) (f) or constitute property under Art. 31 (2).

Besides, we may add that even if it was held that these rights constituted a right to hold property their regulation by the relevant provisions of the Act would undoubtedy be protected, by Art. 19 (6).',T,he temple is a public temple 'and what theIegislature has purported to (10 is to regulate the.administration of the properties of the temple by the Board of which the Tilkayat is and has to be a member, Having regard to the large estate owned by the Tilkayat and having regard tothe very wide extent of the offerings made to the temple by millions iof devotees from day 'to day; the legislature was clearly justified in providing for proper administration of the properties of the temple. The restrictions imposed by the Actmust.. therefore, be treated as reasonable andin theinterests of the gener'al public.

Turning to Mr. Pathak's argument that the rights constitute property under .Art.31 (2) and the Act contravenes the said provision' because 'no compensation hacl been provided for.; or no principles have been prescribed in connection therewith, the answer would be the same. Thevright which:' the Tilkayat possesses cannot be regarded as property, for the purpose of Art. 31 (2). Besides, even if the said rights are held to be'property for the purpose.of Art. 31 (2), there arc some obvious nswers to the,'plea wh may be briefly indicated.

After Art. 31 (2) was amended bytbeConstitution (Fourth Amendment) Act, 1955, the position with regard to, the scope and effect of the, provisions of

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Art. 31 (1) and 31 (2) is no longer in doubt. Article 31 (2) deals with the compulsory acquisition or requisition of a citizen's property and it provides that a citizen's property can be compulsorily acquired or requisitioned only for public purpose and by authority of law which provides for compensation and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given: and it adds that no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate. Art. 31 (2A) which is expressed in a negative form really amounts to this that where a law provides for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall be deemed to provide for the compulsory acquisition or requisition of property. If, on the other hand, the transfer of the ownership or the right to possession of any property is not made to the State or to a corporation owned or controlled by the State, it would not be regarded as compulsory acquisition or requisition of the property, notwithstanding that it does deprive any person of his property. In other words, the power to make a compulsory acquisition or requisition of a citizen's property provided for by Art. 31(2) is what the American lawyers described as "eminent domain"; all other cases where a citizen is deprived of his property are covered by Art. 31(1) and they can broadly be said to rest on the police powers of the State. Deprivation of property falling under the latter category of cases cannot be effected save by authority of law; this Court has held that the expression "save by authority of law" postulates that the law by whose authority such deprivation can be effected must be a valid law in the sense that it must not contravene the other fundamental rights guaranteed by the Constitution,

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The argument which has been urged before us by Mr. Pathak is that the right to administee the properties of the temple which vested in the Mahant has been compulsorily acquired and transferred to a Board constituted under the Act which Board is controlled by the State. We will assume that the Board in question is controlled by the State; but the question still remains whether the right which is allowed to vest in the Tilkayat has been compulsorily acquired and has been transferred to the Board. In our opinion, what the Act purports to do is to extinguish the secular office vesting in the Tilkayat by which he was managing the properties of the temple. It is well-known that a Mahant combines in himself both, a religious and a secular office. This latter office has been extinguished by the Act, and so, it cannot be said that the rights vesting in the Tilkayat to administer the properties have been compulsorily acquired. Acquisition of property, in the context, means the extinction of the citizen's rights in the property and the conferment of the said rights in the State or the State owned corporation. In the present case, the Act extinguishes the Mahant's rights and then creates another body for the purpose of administering the properties of the temple. In other words, the office of one functionary is brought to an end and another functionary has come into existence in its place. Such a process cannot be said to constitute the acquisition of the extinguished office or of the rights vesting in the person holding that office.

Besides, there is another way in which this question may perhaps be considered. What the Act purports to do is not to acquire the Tilkayat's rights but to require him to share those rights with the other members of the Board. We have already seen that the Act postulates that the Mahant for the time being has to be a member of the Board and so the administration of the properties which was so long carried on by the Mahant alone would hereafter.

have to be carried on by the Mahant along with his colleagues in the Board. This again cannot, we think, be regarded as a compulsory acquisition of the Tilkayat's rights. It is not suggested that the effect of the relevant provisions of the Act is to bring about the requisition of the said rights. Therefore, even if it is assumed that the rights claimed by the Tilkayat constitute property under Art. 31(2), we do not think that the provisions of Art. 31(2) apply to the Act. But as we have already held the rights in question do not amount to a right to hold property under Art. 19(1)(f) or to property under Art. 31(2).

That takes us to the argument that the Act is invalid because it contravenes Art. 14. In our opinion, there is no substance in this argument. We have referred to the historical background of the present legislation. At the time when Ordinance No. II of 1959 was issued, it had come to the knowledge of the Government of Rajasthan that valuables such as jewelleries, ornaments, gold and silver-ware and cash had been removed by the Tilkayat in the month of December 1957, and as the successor of the State of Mewar, the State of Rajasthan had to exercise its right of supervising the due administration of the properties of the temple. There is no doubt that the shrine at Nathdwara *holds* a unique position amongst the Hindu shrines in the State of Rajasthan and no temple can be regarded as comparable with *it*. Besides, the Tilkayat himself had entered into negotiations for the purpose of obtaining a proper scheme for the administration of the temple properties and for that purpose a suit under s. 92 of the Code had in fact been filed. A Commission of Enquiry had to be appointed *to* investigate into the removal of the valuables. If the temple is a public temple and the legislature thought that it was essential to safeguard the interests of the temple by taking adequate legislative action in that behalf, it is difficult to appreciate how the Tilkayat can seriously

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'contend that in passing the Act, the legislature has been guilty ,of unconstitutional discrimination.". As has been held by this Court in the case of *Shri Ram Krishna Dulmia* v. *Shri Justice S, R. Tendolkar* (1), that a law may ibe constitutional: even though it relates to a single· .individual if, .on'accou,nt of some special circumstances or reasons epplicable-to him and not applicable to others, that singl, individual rnay be treated as a class by.himself Therefore, the 'plea raised under Art. 14 fails. " ".

The next' point to consider is in regard to the pleas raised more by the denomination than by the Tilkayat himself under Arts. 25 and. 26 of the Constitution, The attitude adopted by the denomination in its writ petition is not very easy to appreciate. In the writ petition filed on behalf ofthe denornina. tion, it was urged that the Tilkavat hirnselfjs the owner of all the properties of the temple and as such, was entitled to manage them in his discretionand as he liked. This plea clearly supported the Tilkayat's stand that the temple in question was a private temple belonging to himself and vas "such.vail the temple properties were his private properties. The denomination was clearly ir.. two minds, .It was inclined more to suppDrt the Tilkayat's case than to nut up an alternative case that thedenominationwas interested in the mauagcrucnt of these properties. Even so) some allegations have been madein the writ petition filed on behalf" of the denomination from which it 111ay .pcrhaps be inferred that it was the alternative case of the denomination that thetemple and the properties connected therewith belonged to the denomination according to its usages and tradi- .1 n, and therefore, the man er ent of the said ple and the properties ca t be transferred to the Board. .It is this latter alternative plea which is based on Art. 25 (1) and Art.:,26{b) a f the-Constitution. The arzumcnt is that the Actcontravenes . the right guaranteed to the denomination by

(1) [1949) S.C.R. 279, 297.

Art. 25(1) freely to practise its religion and that it also contravenes the denomination's right guaranteed under Art. 26(b) and (d) to manage its own affairs in matters of religion, and to administer its property in accordance with law. For the purpose of dealing with these arguments, we will assume that the denomination has a beneficial interest in the properties of the temple.

Articles 25 and 26 constitute the fundamental rights to freedom of religion guaranteed to the citizens of this country. Article 25 (1) protects the citizen's fundamental right to freedom of conscience and his right freely to profess, practise and propagate religion. The protection given to this right is, however, not absolute. It is subject to public order, morality and health as Art. 25 (1) itself denotes. It is also subject to the laws, existing or future, which are specified in, Art. 25 (2). Article 26 guarantees freedom of the denominations or sections thereof to manage their religious affairs and their properties. Article 26 (b) provides that subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion; and Art. 26 (d) lays down a similar right to administer the property of the denomination in accordance with law. Article 26 (c) refers to the right of the denomination to own and acquire movable and immovable property and it is in respect of such property that, clause (d) makes the provision which we have just quoted. The scope and effect of these articles has been considered by this Court on several occasions. "The word "religion" used in Art. 25 (1)," observed Mukherjea J. speaking for the Court in the case of the Commissioner, Hindu Religious Endowments, Madras (1), "is a matter of faith with individuals and communities and it is not necessarily theistic. It undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess

(1) [1954] S.C.R. 1005.

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that religion as conducive to their spiritual wellbeing. but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these formsand observances might extend even to matters of food and. dress."

In *Shri Venkataramana Deoara v. The State of Mysore* (1), Venkatarama Aiyar, J., observed "that the matter of religion in. Art, 26(b) include even practices which are regarded by the community as parts of its religion." It would thus be clear that religious practice to which Art. 25 (1), refers and affairs in matters of religion to which Art. 26 (b) refers, include practices whicharean integral part of the religion itself and the protection guaranteed by Art 25 (1) and Art. (b) extends to such practices.

. , In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given-proceeding; one section of the community claims that while performing certain rites while dress is an integral-:" part of the religion itself, whereasanothersection contends that vellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question ? Similar disputesmay ani in regard to food, In cases. here conflicting e nee is produced in respect of al contentions as to competing religious practices the Court maynot be able to resolve the dispute by a .blind application of the formula that the comrnunirydecides which

(1) [1958] s.c.n. 895, 909.

practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the *practice* in question is religious in character and if, it is so, whether it can be regarded as an integral or essential part of the religion and the finding of the Court on *such* an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It is *in the light* of this *possible* complication which may arise in some cases that this Court struck a note of caution in the case of *The Durgah Committee, Ajmer* v. *Syed Hussain Ali* (1), and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a *religious* form and may make a claim for being treated as religious practices within the meaning of Art. 25 (1).

In this connection, it cannot be ignored that what *is* protected under Arts. 25 (1) and 26 (b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which *is* controlled by the statute *is* essentially and *absolutely* secular in character, it cannot be urged that Art. 25 (1) or Art. 26 (b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an *individul* citizen that the impugned statute contravenes *his* fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in

(1) [1962] 1 S.C.R. 383, 411.

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matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matters of religion, then, of course, the rights guaranteed by Art. 25 (1) and Art. 26 (b) cannot be contravened.

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration we may refer to the fact that the Smritis regard marriage as a Sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy it must nevertheless be attempted in dealing with the claims for protection under Arts. 25 (1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Arts. 25(1) and 26(b), Latham, C.J.'s observation in *Adelaide Company of Jehovah's witnesses Incorporated* v. *The Commonwealth* (1), that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously

(1) 67 C.L.R. 116, 123.

secular matter isclaimed to' be matter-of religion, or if an obviously secularpracticeis alleged to bea religious practice, the Court would be justified i rejecting ,the claim because the-protection guaranteed by Art. 25(1) and Art. 26(b) cannot be extended to secular practices in regard to denominational matters which are not matters of religion, an so, -a claim made by a citizen that a purely secular matter amounts. to a religious practice) or a similar claim made on 'behalf of the denomination that a purely' secular matter is an affair in matters of religion} may have to be rejected on the ground that it is based on irrationalconsiderationaand cannot attract the provisions of Art. 25(I) or Art., 26(b). This aspect of the matter must be borne 10 mind in dealing with the true scope and effect of Art, 25(1) and Art. 26(b).

Letus thenenquirewhat is the right which has been contravened by the relevant provisions of the, Act. The only right which, according to the denomination, has been contravened is the right of the Tilkayat to manage the property belonging to the. temple. It is urged that throughout the history of this temple, its properties have been. managed by the Tilkayat and so) such management by the Tilkayat amounts to a religious practice under Art. 25(I) and constitutes the denomination's right to manage the affairs of its religion under Art. 26(.b). W'e have no hestitation in rejecting this argument. The right' to 'manage the properties of the temple is a purely secular matter and it cannot, in our opinion, be regarded as a religious practice' so as to fall under Art. 25(1) or as amounting to affairs in .matters of religion. It is true that the Tilkayats have been respected by the .followers of the denomination' and it is also true that the managemenr Eas remained with the Tilkayats, except on occasions like the minority of the Tilkayat when the Court of Wards stepped in. If the temple had been private and the properties of the temple had belonged to the THkayat, it was another matter.

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But once it is held that the temple is a public temple, it is difficult to accede to the argument that the tenets of the Vallabha cult require as a matter of religion that the properties must be managed by the Tilkayar, In fact) no such tenet has been adduced before us. So long as the denomination believed that the property belonged to the Tilkayat, like the temple, there was no occasion to consider whether the management of the property should be in the hands of anybody else. The course of conduct of the denomination and the Tilkayat based on that belief may have spread for many years, but, in our opinion, such a course of conduct cannot be regarded as giving rise to a religious practice under Art, 25(1). A distinction must always be made between a practice which is religious and a practice in regard to a matter which is purely secular and has no element of religion associated with it, Therefore, we, are satisfied that the claim made by the denomination that the Act impinges on the rights guaranteed to it by Art. 25(1) and 26(b) must be rejected.

That leaves one more point to be considered under Art. 26(d). It is urged that the right of the denomination to administer its property has virtually been taken away by the Act, and so, it is invalid... It would be noticed that Art. 26(0) recognises the denomination's right to administer its property, but it clearly provides that the said right to administer the property must be in accordance with law. Mr. Sastri for the denomination suggested that law in the context is the law prescribed by the religious tenets of the denomination and not a legislative enactment passed by a competent legislature. In our opinion, this argument is wholly untenable. In the context, the law means a law passed by a competent legislature and Art. 26(d) provides that though the denomination has the right to administer its property, it must administer the property in accordance with law. In other words, this clause emphatically

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,brings out the competence of the legislature to make a law in regard to .rhe administration of the property belonging to the, denomination- 'It is true that nder the guise of regulating the' administrati, f the property by the deno..._tion, the denomination's right must not be extinguished or altogether destroyed-. That is what thh Court has beldin the case of the *Commissioner, Hindu Religious Endowments, Madras* (1) and. *Ratilal Panachand Gandhi* v. *The State 01 Bombay* (2).

Incidentally, this clause will help to determine the scope and effect of the provisions of Art. '26(b).. Admlnlstration of the.denomination's property which is thesubject.matter. of this clause is obviously out-.side the scope of Art. 26 (h). Matters relating .to the administration of the denomination's property fallto be governed by Art.26(d) and cannot attract the provisions of Art. 26(b). Article 26 (b) relates to affairs in matters of religion such as the performance of the religious rites or ceremonies, or the observance of religious festivals and the like; it does not refer to the administration of the property at all. Article 26(d) therefore, justifies the enactment of a law to regulate the administration of the denomination's property and that is precisely what the Act has purported todo in the present case. If the clause ((affairs in matters of religion' were to include affairs in regard to all matters, whether religious or not the provision under Art. 26 (d) forlegislative regulation of the administration of the denomination's property would, be rendered illusory.

It is however, -argued that the constitution of the Board in which the administration of the property now vests is not the denomination, and since the. administration is now left to the"Board, the denomination has bee.n wholly deprived of its right to administer the property. It is remarkable that ,this plea should be made by the representatives of the

(1) [1954] S.C.R. 1005. (2) [1954] S.C.R. 1055.

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denomination who in their writ petition were prepared to support the Tilkayat in his case that the temple and the properties of the temple were his private property. That apart, we think that the constitution of the Board has been deliberately so prescribed by the legislature as to ensure that the denomination should be adequately and fairly represented on the Board. We have already construed s. 6 and we have held that s. 5(2)(g) requires that the members of the Board other than the Collector of Udaipur District should not only profess Hindu religion but must also belong to the Pushti-Margiya Vallabh Sampradaya. It is true that these members are nominated by the State Government. but we have not been told how else this could have been effectively arranged in the interests of the temple itself. The number of the devotees visiting the temple runs into lacs; there is no organisation which comprehensively represents the devotees: as a class; there is no register of the devotees and in the very nature of things, it is impossible to keep such a register. Therefore, the very large mass of Vallabh's followers who constitute the denomination can be represented on the Board of management only by a proper nomination made by the State Government. and so, we are not impressed by the plea that the management by the Board constituted under the Act will not be the management of the denomination. In this connection. we may refer to clause 1 of the Firman which vested in the Darbar absolute right to supervise the management of. the property. As a successor-in-interest of the Darbar, the state of Rajasthan can be trusted to nominate members on the Board who would fairly represent the denomination. Having regard to all the relevant circumstances of this case we do not think that the legislature could have adopted any other alternative for the purpose of constituting the Board. Therefore, we must hold that the challenge to the validity of the Act on the

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ground that it contravenes Arts. 25 (1), 26 (b) and 26 (d) must berepelled.

It still remains to consider the provisions of the Act which have been challenged by the Tilkayat and the denominaiion as well as those which have been struck down by the High Court and in respect of which the State has preferred appe"ls. We will take .these sections in their serial order- We have considered ss. 3, 4, 16, 22 and 34 andhaveheld that these sections are valid because the schemeenvisaged by the said sections clearly pro,tects. the religious rites, ceremonies and services rendered in the temple and the Tilkayat's. status and powers in respect thereof. The'tsald scheme merely allows the administration of the properties of the temple which is a purely secular matter to be undertaken by the Board, and so, it is not necessary to refer to the said sections' again.

Section 2 (viii) which defines a temple as including the-temple of Shri Navnitpriyaji andiShr! Madan MohanlaJji has been struck. down by the High Court in regard to the said two subsidiary deities. The High Court has held that the two deities Navnitpriyaji and Madan Mohanlalji are the private deities of the Tilkayat andit was not competent to the legislature to include them within the definition of the tem.pie. under s. 2 (viii). It was urged before the High Court that the said. two idols had been transferred by the Tilkayat to the public temple and made a part of it, but it has held that there was no gift or trust deed .by the Tilkayat divesting himself of all his rights in those two idols and its property ,and so, the validity of the section .could not be sustained on' the ground of 'suchtransfer. The correctnesso]' this conclusion ischallenged by the learned Solicitor-Generalon behalf of the State. In, dealing with thls question, the conduct of the Tilkayat needs to be examined. On October 15, 1956 a report

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was made by Mr. Ranawat to the Tilkayat in respect of these two Idols, It appe,ars that the: grant of some villages in respect of these Jdolsrstood in the name of the Tilkayat and after the said-villageswere resumed by the State..a question arose as to the compensation payable to. the owner of the said villages. Inthat connection" Mr. Ranawat reported to the TiJkayat that it' would .be to the advantage of the two idols if thesaid lands alongwiththe idols were treated, as a partof the public temple. He cited the precedent of the lands belonging .to the Nathdwara Temple in support of his.plae.. On receiving this report, the Tilkayat was pleased to 'transfer the. ownership of Shri Thakur Navntpriyaji, Shri Madan Mohanji and Bethaks to the principal temple of Shri Shrinathji. ,Of course, he retained tohimself. the right and privilege of worship overthose temples. and Bethaks as in the case of Shrinathji temple. The' Tilkayat also expressed his concurrence with the proposal imade in this report and signed in tokenof' his agreement. It. appears that after orders were issued in accordance with the decision of the': Tilkayat, the two temples were treated as part of .the bigger temple. of Shrinathji, This isevidenced by the resolution.which was -passed'. at .the meeting. of the Power of Attorney Holders-of theTilkayaton the same day i.e.,]5-,10·1956; One of the resolutions passed at the said meeting shows that the proposal regarding the temples and Bethaks owned by His Holiness, stating therein, thatHisHoliness had been pleased to transfer the, ownership thereof'. to Shrinathji, was. considered'. That proposal along with the list of temples and Bethakswasproduced] before the Committee. The Tilkayat .was present at the meeting and. he .confirm the proposal and put his signature thereon before the Committee. Thereupon. the Committee accepted..the .proposal ,·with thanks andTnstructed the Executive Officerto' do the needfulin that .behalf Thus.. the Tilkayat proposed tothe Committee of his Power of Attorney

Holders that the two-idols and their' Bethaks should' betransferred from his private estate to the principal temple of Shrinathji and that-proposal was accepted and thereafter e two idols were treated as part of the principal " ,ple. ', . " ' .

After this transfer was thus formally completed it appears that the Tilka-yat was inclined to change his mind and so in submitting to the. Committee a list of temples and Bethakstransferred' by him to the ,principal temple of Shrinathji, he put .a heading to the list which showed that the said transfer had been made for, management and administration only and was not intended to be an 'absolute transfer. .This was done-on or about November 23, 1956.

This conduct on the part of "the Tilkayat was naturally disapproved by the Committee and the headingof the list was objected to by it in a letter writtenon December 31, 1956. To this letter theTilka· yat gave a reply onJan,uary 7,1957, and he sought to explain and justify the wording adopted in the heading of the list. It is thus clear that the heading of the list forwarded by the Tilkayat to the Commi- ttee must be ignored because that heading clearly shows a change of mind on the part of the Tilkayat and the question as to whether the two idols form part of the principal temple of Shrinathji must be decided in the light of what transpired on Octo· ber 15, 1956. Judged in that way, there can be no doubt that the Tilkayat solemnly transferred the two idols to the principal temple arid in that sense, gave up his ownersbipover the idols and a formal proposal made in that behalf was accepted by the Committee. In our opinion, the High Court was in error in not giving effect .to this transfer on the ground: that no gift or trust deed had been duly executed by' the Tilkayat in that behalf. A dedi. cation of private property to a charity. need. not be made by a'writing: it cen be. made orally or evencan

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be inferred from conduct. In the present case, there is much more than conduct in support of the State's plea that the two idolshad been transferred. There is a formal report made by the Manager to the Tilkayat which was accepted by the Tilkayat; it was followed by a formal proposal made by the Tilkayat to the Committee and the Committee at its meeting formally accepted that proposal and at the meeting when this proposal wasaccepted the Tilkayatwas present.' Therefore, we must hold that the two idols now form part of the principal temple and have been properly included within the definition of the word "temple" under..s. 2 (viii). We should accordingly set aside the decision of the High Court and uphold the vaJidity of s. 2 (viii).

The proviso to s. 5 (2) (g) has been attacked by the learned Attorney-General. He, contends that in making the Collector a statutory member of the Board even though he may not be a Hindu and may not belong to the denomination, the legislature has contravened Arts. 25 (1) and 26 (b). We have already dealt with the general plea raised under the said two articles. We do not think that the provision that the Collector who is a statutory member of the Board need not satisfy rhe requirements of -s. 5 (2) (g), can be said. to be invalid.' The sole object in making theColJector a member of theB0ard is to associate the Chief Executive Officer in the District with the administration of the property 'of the temple. His presence in the Board would naturally help in the proper administration of the temple properties and in that sense, must be treated as. valid and proper. This provision is' obviously consistent. with the State's right ofsupervision over the rnana-. geme: of the temple properties as cified in the Firmal , f 1934.

Sections 5, 7 and 11 have already beenccnsi-dered by us with particular reference to thepossible

removal of the Tilkayat under s, 7 and its consequences. It may be that.in view of thefact that even if the 'Iilkayathremoved under s. 7(l)(b) and (c) he h to be again nominated to the Board, the legislatur may well have exempted the Tilkayat from the ration of s. 7 (1) (b) and (c). That, however, cannot be said, to make the said provision invalid in law.

Sections 10 and 35 .have been attacked on the ground that they .empowe.r the StatejGovern-.ment to leave the administrationvo] :the te.npleprope.fty to a non-Hindu. It will be.noticed that s.···10-contemplates that if a Board is dissolved for the reasons specified in ,it. the Government is required tcdlrect the immediate reconstitution of another Board and that postulates that the interval between the dissolution' of one Board and the constitution of a fresh Board' would be of a very short duration. If the legislature thought it necessary to provide for the ma.nageme nt ,of the temple properties for such a short period on an ad hoc basis, the provision cannot be seriously challenged. What is true about this provision under s, 10, is equally true about the transitional provision in s. 35.

"-"A 'part of s. 16 has been struck down by the High Court 'in so far as it refers to the affairs of the temple. This section authorises the Board to manage the, properties and affairs of the temple. The High Court thought that the expression "affairs of the temple" is toowide and may include religious affairs ,of the templejand since in managing these affairs of the temple, the 'section does .not require that the management should be according to. the customsand 'usages of the denomination,", it came.to the conclusion that the clause "affairs of the temple" is invalid and should, therefore, be -struckdown.

We are not satisfied that this view is correct. In the context the expression "affairs of the temple"

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clearly refers to the purely secular affairs in regard to the administration of the temple. Clearly, s. 16 cannot be construed in isolation and must be read along with s. 22. That is why it has been left to the Board to manage the properties of the temple as well as the purely secular affairs of the temple, and so this management need not be governed by the custom and usage of the denomination." If the expression "affairs of the temple" is construed in this narrow sense as it is intended to be, then there is no infirmity in the said provisions. We may add that the expression "affairs of the temple" has been used in s. 28 (1) of the Madras Hindu Religious and Charitable Endowments Act No. 22 of 1959 in the same sense. Therefore, we would hold that the High Court was in error in striking down the clause "affairs of the temple" occuring in s. 16.

The next section to consider is s. 21. This section gives to the Board complete power of appointment, suspension, removal, dismissal, or imposition of any other punishment on the officers and servants of the temple or the Board, the Chief Executive Officer being exempted from the operation of this section. It has been urged before us that this section might include even the Mukhia and the Assistant Mukhia who are essentially religious officers of the temple concerned with the performance of religious rites and services to the idols; and the argument is that if they are made the servants of the Board and are not subjected to the discipline of the Tilkayat, that would be contrary to Art. 25 (1) and 26 (b) of the Constitution. In considering this argument, we must have regard to the fact that the Mukhia and the Assistant Mukhia are not only concerned with the religious worship in the temple, but are also required to handle jewellery and ornaments of a very valuable order which are pliton the idol and removed from the idol every day, and the safety of the said valuable jewellery is a secular matter within

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That why the jurisdiction of the Board is necessary it was that the Board should be given jurisdiction over those officers in so far as they are concerned with the property of a temple. We have no doubt that in working out the Act, the Board will act reasonably and fairly by the Talkayat and nothing will be done to impair his status to affect his authority over the servants of the temple in so far as they are concerned with the religious part of the worship in the temple. Since the worship in the temple and the ceremonies and festivals in it are required to be conducted according to the customs and usages of the denomination by s. 16, the authority of the Tilkayat in respect of the servants in charge of the said worship and ceremonies and festivals will have to be respected. It is true that soon after the Act was passed and its implementation began, the parties appeared to have adopted unhelpful attitudes. We were referred at length to the correspondence that passed between the Tilkayat and the Committee in respect of some of these matters. We do not think it necessary to consider the merits of that controversy because, we are satisfied that once the Act is upheld, it will be implemented by the Board consistently with the true spirit of the Act without offending the dignity and status of the Tilkayat as a religious head in charge of the temple and the affairs in matters of religion connected with the temple. Therefore we do not think it would be right to strike down any part of s. 21 as suggested by the learned Attorney-General.

The validity of s. 27 has been challenged by the learned Attorney-General on the ground that it empowers the State Government to depute any person to enter the premises of the temple, though in a given case, such a person may not be entitled to make an entry. Even a non-Hindu person may be appointed by the State Government to inspect the properties of the temple and if he insists upon making an entry in the temple, that would contravene the provisions

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of Art. 25 (1) and 26 (b) of the Constitution; that is the argument urged in support of the challenge to the validity of s, 27. We do not think there is any substance in this argument. All that the section does is to empower the State Government to depute a person to inspect the properties of the temple and its records, correspondence, plans, accounts and other relevant documents. We do not think that the section constitutes any encroachment of the rights protected by Art. 25 (1) or Art. 26 (b). If the administration of the properties of the temple has been validly left to the Board constituted under the Act, then the power of inspection is necessarily incidental to the power to administer the properties, and so in giving the power to the State Government to depute a person to inspect the properties of the temple, no effective complaint can be made against the validity of such a power. The fear expressed by the learned Attorney-General that a non-Hindu may insist upon entering the temple in exercise of the authority conferred on him by the State Government under s. 27 is, in our opinion, far-fetched and imaginary. We are satisfied that the power of inspection which the State Government may confer upon any person under s. 27 is intended to safeguard the proper administration of the properties of the temple and nothing more. Therefore we do not think that s. 27 suffers from any constitutional infirmity. In this connection, we may add that a similar provision contained in the Madras Religious Endowments Act has been upheld by this Court in the case of *The Commissioner, Hindu Religious Endowments, Madras* (1).

That takes us to s. 28 (2) and (3). These two sub-sections have been struck down by the High Court because it thought that they were inconsistent with the view expressed by this Court in the case of *Ratilal Panachand Gandhi* (2). While discussing the validity of these two sub-sections, the High Court has observed "that without entering into an elaborate

(1) [1954] S.a.R. 1005.

(2) [1954] S.C.R. 1035.

discussionon the point, we may point out that such provision has been held.to be invalid by. the. Supreme Court in thecase of *Ratilal Panaclumd. Gandhi'* (1). The leamedSolicuor-General contends and, wejhink, rightly, that the observations on 'which he High Court has relied support the validity of th wo sub-sections and are inconsistent with' the decision of the High Court itself. In the case of *Ratilal Panachand Gandhi* (1), this Oourt was dealing with the validity of'es, 55 and 56 of the Bombay Public Trusts Act. 1950 (No. 29 of 1950). Sectiol1·55·of thesaid Act purported to lay down the rule of *cy pres* in relation to the administration of religious and chari·· table trust; and s. 56 dealt with. the powers of the courts in-relation to the said application of *cy pres* doctrinevThis Court observed that these two sections purported to lay down how the idoctrine of *cy pres* is to be applied in regard to the administration of publlc.trustof a religious or charitable character; and then it proceeded to examine the doctrine. of *cy·pres* as it was developed by the Equity Courts in England and as it had been adopted by our Indian Courts since a longtime past. In the opinion of this Court, the proviaions of sS.·55 and 56 extended the said doctrine much 'beyond its recognised limits and further introduced certain principles which ran counter to well. established rules of law regarding theadministration ofcharitable trusts. It is significant that what the impugned sections purported to authorise. was the diversion of the trust property or funds for purposes which the Charity Commissioner or the courtconsidered expedient or proper although the original objeers of the founder could still be carried out-andthat was an unwarrantable encroachment on the freedom of religious institutions in regard to .the. management of their religious affairs. In support of this view) the tenets of the Jain religionwere referred to and it was observed that apart from the tenets of the Jain religion" it would ':bea violation of the freedom of religion and of the right. which a. religious

(1) [1953] S.C.R. 1055.

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denomination has, to manage Itaownaffaira.inmatrers of religioo, to allow any secular authoritytodlvert the trust' money for purposes other than those for whieh the tnstwas created. On this view, s. 56 (3) which contained' the offending. .provision, and the corresponding provision relating to the, powers of the Court occurring in the latter part of s. 56 (1) were struck down. In "thla connecrion. .it is, however, necessary to bear in mind that 'in' dealing with this question, this Court has expressly' observed.rthatthe doctrine of *cy pres* can be applied where there' is a surplus left after exhausting the purposes specified by the: settler. In. other words; the' decision of this Court in thecaseof *Ratilal Panachand Gandhi* (1), cannot be applied to the provisions of s. 28 (2) and (3) which-deal with the application of the surplus in fact after this -declsion was pronounced, the relevant provisionof the Bombay Act has been amended and the application.of the doctrine. of *cy pres* is now confined to, the surplus. available after the purposes of the trust have been dealt with. The High Court has not noticed the fact that s, 28 (2) and (3), dealt with the application of the surplus funds and that postulates that these two sub-sections can be invoked only if and afterthe main purposes of the public temple' have been duly satisfied.. Therefore, we hold that the High Court was in error in striking down s, 28 (2) and (3) on the ground that they are inconsistent with-the decision of this Court in the case of *Ratilal Panachand Gandhi* (1). We may add that this' position was.not seriouly dis- ,puted before us by the learned Attorney-General. ,

The next section is 30 (2) (a). Itconfers.on the State Government the power to make rules in respect of the qualifications for holding the office of an the allowances payable to the Goswami. This sub: . two has been struck down, e HIgh Court and the learned Solicitor·General does notquarrel with the · conclusion-of the High Court. He has, however, fairly conceded that though the first part ,of

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s.30 (2) (almaybe.struck.down, the latter part need not be.struck down. This latter part allows rules to be framed by the State Government inregard to .the allowable to the Goswami. We think it is but fair that this part should be upheld so that a proper rule can be made by the State Government determining the quantum of allowances which should be paid ,to the Goswami and the manner inwhich it shouldbe sopaid.We would" therefore strike down the firstpart of .s. 30 (2) .(a) and uphold the latter, part or it-which has relation to the allowances payable to Ihe Goswami, The two parts of the said .sub-section are clearly severable·and so, one can be struck down without affecting the other. '

;In regardto So. 36, the High Court thought that it gives far, too sweeping powers to the Government and so, it has struck it down. Section: 36 .merely empowers the Government to' .give such directions-as may be necessary to carry out theo:bjects ofthe Act in case a difficulty arises Tn giving effect to the provisions of the Act. We may, in this connection, refer to the fact that a similar provision iscontained in s. 36 of the Jagannath Temple Act (Orissa IIof 1955). The object of s, 36 in the Act is merely to remove difficulties inthe implementation of the Act, It is in that sense that the section must be'narrowly construed .and the scope and ambit vof the power 'conferred on the State Government be circumscribed.. If the section is so, construed, it would not be open to any serious objection. Therefore}. we are satisfied that the High Court was' in error in striking down, thissectioo on the ground' that the powers conferred onthe ,State Government are too wide.

That takes us to s., 37 which has been struck down by the High Court on the ground that it can .be utilised as a defenceto a suit under.s, 31. We have already noticed that s. 31 empowers a person having 'an interest to institutea suit for obtaining any ofthe

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reliefs specified in clauses (a) to (e) of that section. The High Court thoughtthat s,,37 may introduce an impedirnentagainst a suit brought by a private individual under s, 31. We are satisfied that the High Court was in error in taking this view. All that this section purports to do is to provide for a bar to any suits or proceedings against the State Government for any thing done or purported to be done by it under the provisions of the. Act. Such provisions are contamed m many Acts, like, for instance, .Acts in. regardto Local Boards and Municipalities, It is: true that s. 37 does not .require that 'the actdone or purported to, be done ,should be done bona fide, but that is presumably because the protection givenby s. 37 is to the State Government and not to the officers of the State. .The effect of the section merely is to save acts done or purported to be done by the State under the provisions of the Act; it cannot impinge upon the rights of a citizen to file a suit unders. 31 if it is shown that the citizen is interested wirhinthemeaning of s. 31 (1). We are inclined to hold that the High Court has, with respect, misjudged thetrue scope and effect of the provisions of s. 37 when it struck down the said section as-being invalid. We must accordingly reverse the said eonelusion of the High Court and uphold the. validity, of s. 37.

The result is that the appeals preferred by the Tilkayat, the denomination. and Ghanshyamlalji fail and are dismissed. So does the writ petition filed.by the Tilkayat fail. and thes3me is dismissed. The appeals preferred by the State substantially rucceec and the decision of the High Court striking down as *ultra vires* part of s, 2 (viii) in relation to the idols of Navniu ·-aji and Madan Mohanlalji; part of 8.16 in so fa sit refers to the affairs of e temple; s. 28 (2)"nd (3), s. 36 and s; 37 is reversed. 'We however, confirm the decision of the High Court in so far as it has struck down's, 30 (2) (a) in regard to

the' qualifications for' holding the office of the Goswaml but we" reverse its" decision in so Car as it relates. to the latter part of s. 30 (2) (a) .which deals with the allowances payable to the Goswami. In the circumstances of this ease, we direct that parties should ear their own costs' throughout..

.Appeal dismissed.

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CHANDRA DEC SINGH.'

v.

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January, 22.

(S. J. IMAM, K. SUBBA RAO, N. RAGHUBAR DAYAL, and J. R. MUDHOLKAR, JJ.)

Criminal Law—Proceeding under s. 202 Criminal Procedure Code—Revision petition by respondent No. 1 and the other persons—Whether respondent No. 1 ha. locus standi to contest criminal case before issue of process—Procedural defect—Powers 0/. Magistrate in committal proceedings and in considering evidence—Recording 01 reasons—Code oj Criminal Procedure, 1888 (*Act 5 otf 1898*), *ss. 202, 203.*

A first information. report was filed .stating that the respondent No.:.! and some others committed murder. Therc- .after a person claiming. to be a relative of tbedeceased filed a .complaint, alleging, that the first information report was false and;' that .certain persons other than those-steted in the first, information report had committed the 'murder, ,It was prayed that process be Issued, against these persons. The Sub-Divi- slonal Magistrate beforewhom thiscomplaint was filed directed the First Class Magistrate to inquire into the aHegatfo'n'and to make a report. Subsequently the nephew of the deceased filed a complaint alleging that respondent No. 1 had committed the 'Inurder. The Sub-Divisional Magistrate directed the *First* Class Magistrate to enquire "Into this. complaln! also-and to report. During: the enquiry apart from the witness produced

... 2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206.

JEWUN DOSS SAHOO,—*Appellant*; *v.* SHAH KUBEER-OOD-DEEN,—*Respondent.** [December 8 and 9, 1840.]

On Appeal from the Sudder Dewanny Adawlut in Bengal.

Mahomedan Law (Wukf)—Use of term "wukf," if necessary constitute endowment to retlgious and charitable uses—"Altamgha or altamgha-inam,' Use of term in royal grant, if conveys absolute proprietary right—Alienation of eadowed property, such endowment being perpetual—Reg. XIX of J810 (Bengal Charitable Endowments, Pubrlc Bultdlngs and Escheats)—Reg. II of 1805 (Limitation), 5, 2—Suit tor recovery of endowed property, if subject to law of limitation.

The term *Altamgha* or *Altamgha-inam*, in a royal grant, does not, of itself, convey an absolute proprietary right to the grantee; where, from the general tenor of the grant, it is to be inferred, that a *Wukf*, or endowment to religious and charitable ueea, was intended, and property aoendowed eannct be alienated by the grantee or his representatives.

According to the Mahomedan Law, it is not necessary, in order to constitute a *Wukf*, or endowment to religious and charitable uses, that the term *Wukf* be used in the grant; if, from the general nature of the grant, such tenure can be inferred.

An endowment for charitable and public purposes being a perpetual endowment, it is by Regulation XIX of 1810, the duty of the Government to preserve its application; and being excepted by see, 2 of Regulation II of 1805 from the general operation of the Regulation of Limitation, no suit for its recovery is barred, until at least the officer entitled to administer it has been in possession of his office for twelve years.

By a *Firman* or royal grant, oftbe 14th of *March* 1717, in tbe filtb yea r of *Mahomed Feroksir*, one lao [391] of *dams* from *Pergunnah Havilly Suhseram* in the *sooba Bahar*, being equal to aboub 1,197 rupees, was granted in *Altamgha*, crroyal free gift, in perpetuity, for she purpose of defraying the expenses of the *Khankah*, a religious establishment of *Sheikh Kubeer, Deroish*, so descend to his heira in succesaicn.

In pursuance of this grant, *Sheikh Kubeer* received the revenue during his life, applying it for the purpose of meeting the charges of travellers frequenbiug the *Khankah*, of which be was the *Sijjada-nashin*, or superior. Upen bis death he was succeeded in his office by his son, *Sheikh Ehulleei-oolle;*

By a *Sunud* from *Nawab Fukhr-ood-deen Bahadur*, on the 16th *Sheban* and the fcurteeneh year of the reign of *Mahomed Shah Badshah*, (21st *January* 1733,) certain *Mouzas* or villages in the *Pergunnah Suhseram*, in the *Sircar* or division *Rowtas*, *sooba Bohar*, with some *Tuiera* and

* Present: Members of the *Judicial Committee*,—Lord Brougbazn, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

2 M.I.A. 390=8 W.R. 9 (P.O.) = 1 Suth. P.C.J. 100-1 Sar. P.C.J. 206—(Contd.).

Khankah lands, were appropriated for the purpose of meeting the expenses of travellers, and of *Sheikh Khulleel-oolla*, sud freed from abs Government charges and reveeues, Upon the death of *Sheikh Khulleel-oolla*, he was succeeded, as *Sijjada-nashin*, by *Gholam Shurfood-deen*, his son, who, on the 6th of *JuZy* 1744, obtained a royal *Sunud*, and on the 4th of *December* in the same year a royal *Ferwannah*, confirming him in the dams originally granted to his paternal grandfather, *Sheikh Eubeer*,

Shah Kaim-ood-deen succeeded his father, *Gholam Shurf-ood-deen* as *Sijjada-nashin*, and obtained a like *Perwannah* to those granted to his father and grandfather, and by a *Firman* of *Shah Alum*, dated the 13th of *October* 1762, a further grant of 2.81;000 *dams* from the *Pergunnah Suhseram* was made to him in *Aliamqna.* [392] *inam*r for the purpose of defraying she esnenaes of the frequenters to and frow him,' and all ranks were enjoined "always to maintain and uphold the august order, and to relinquish the aforesaid *dams* to them to descend to the offspring in suceeaaion, to be enjoved by them," free from all Government and revenue charges.

On the 10th of *January* 1764, *Mahomed Jafir Khan* augmented the revenues of the *Khankah* by the grant of cerbain *Ayeema* * *Dehauts*, conaisbing of fourteen *Mouzas* iu the same *Pergunnah*; and he executed a *Sunud lor*, that purpOS,8,

Shah Kiam-ood-deen was euceeeded as *Sijjada-nashin* of the *Khankah* by hia son, *Shah Shumsh-ood-deen*, who, on the 27th of *January* 1807, some time after he had been in poasesaice, entered Into a contract with the Appellant, *Jewun Doss Sahoo*, for the loan of rupees 23,501, and, as security for the repayment sherec], transferred sixteen *Mouzas*, conipriged in and constituting nan of the above-mentioned grants. As the revenue authorities do not register mortgages or conditional conveyances, *Shah Shumsh-ood-deen* at the same time executed an absolute bill of sale, conveying the *Mouzas* to the Appellant, and the Appellant, as is usual in such transactions, executed a *Meadi Ikrar-namah*, or defeazance; which nrovided, that if *Shah Shumsh-ood-deen* repaid .she sum advanced on or before a particular day, the sale sbould be void, but if he didnc] repay that sum within the stipulated period, then the *Mouzas* should become tbe absolute property of the Appellant. Shortly after the execution of these [393] instruments, the Appellant entered into possession of the *Mouzas*.

The loan was not repaid within the stipulated period; in consequence of abe Appellant not having taken the course pro ed for by Regulation XVII of 1806, the *Mouzas* still remalned in the possession of

* Charitable grants made by the Sovereign to religious Mahomedans.

sa.r.s. 390=6 W.R, 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

the Appellant, according to the terms of the conveyance above referred to, subject to the right of redemption by *Shah Shumsh-ood-deen*, the mortgagor.

On the 13th of *Magh* 1217 *Fusly*, (2nd *February* 1810 ,,) *Shah Shumsh-ood-deen*, in consideration of a further sum of rupees 5,000, executed another *Ikrar-namah*, conveying the *Mouzas* to the Appellant absolutely.

On the 3rd of *February 1810*, the day after the execution of the above *Ikror-nameh*, *Shah Shumsh-ood-deen*, died, leaving *Mussumat Kadira*, his widow, and *Shah Kubeer-ood-deen*, the present Respondent, his son, an infant of the age of twelve years, hereditary successor to the *Sijjada-nashin*.

Shah Shumsh-ood-deen attained the age of eighteen in the year 1816, when he preferred a petition to Mr. *John Deane*, the Commissioner of *Bahar* and *Benares*, asserting his right and title to the whole of the Janda above stated. Mr. *Deane* directed inquiries to be made by the local agents, who, on the 10th *of December* 1818, reported in his favour, and thereupon orders were issued by the Governor-General in Council, on the 29th of *February* 1819, and the 8th *September* 1822, that the Respondent *Shah Shumsh-ood-deen* should recover possession of the property by assistance of the officers of the Government.

In consequence of these proceedings, the Respondent commenced two suits in the Provincial Court of *Patna* [394] for the recovery of the villages which had been alienated from the *Khankah*. Some of these villages being in the possession of one *Mussumat Kadwa*, or *Beeby Ismet;* a suit was instituted against her; and for the recovery of the *Mouzas* taken possession of by *Jeuna Doss Sahoo*, under the circumstances above stated, a suit was brought against him on the 17th of *April* 1822. In the plaint filed in this latter suit, the Plaintiff set forth his title as already detailed, and insisted that the *Mouzas* in question were *Wukf** property, of which, neither a conditional or *bona fide* sale could be made; he insisted also that the sale was in itself illegal, not being perfected according to Regulation XVII of 1806; and he prayed to be put in possession of the annual produce, being rupees 3,678, *10.*, the eighteen-fold of which was rupees 66,179. 4 anes,

On the 28th of *June* 1822, and before any answer had been put in by the Defendant in this suit, the Provincial Court of *Patna* made a Decree in the other suit against *Mussumat Kadira*, or *Beeby Ismut*, whereby they declared, that it appeared from the documents, among which were the two royal *Firmans* above stated, and the evidence and opinions of the law-officers of the Sudder Dewanny in a cause therein

* In Mahomedan Law, a bequest for pious uses.

2 M.I.A. 390=6 W,R. 3 (P.C.)=1;Suth. P.C.J. 100=1 Sar. P O.I. 206—(*Contd.*).

referred to, that lands, which were *Wukf*, could not be alienated to any other person by sale or gift, nor could they be lnberlsed as heritable property, or mortgaged or sold conditionally. The Court went on to declare that it was no] in the power of any of the former *Sijjada nashins* to alienate the *Altamgha* and other *dams*, or the *Dehaui«;* in favour of any one, or to sell [395] cz otherwise dispose of the property : a Decree was therefore passed in that suit in favour of the Plaintiff, the present Bespondenr, from wbiob Decree the said *Mussumat Kadira* afterwards appealed to the Budder Dewanny Adawlut; but the Decree was, on the 24th of *August* 1824, affirmed by tbe Sudder Dewanny Adawlus,

On the 9th of *March* 1824, the preaent Appellant put io hla answer, insisting upon the legality of the sale to him, that it was a *bonafid«* sale, and not within Regulation XVII, A.D. 1806, and that, had not the *Deluiut«* been aliensble, the collector would not have entered the name of the Defendant in the public books, and be also se] up the Iscse of time as a bar to the Plaintiff's claim. He contended moreover, that the conditional sale had become absolute, and that a further advsuce of 5,000 rupees having been made, a new convevance was execnssd to the Appeliant, and the power of redempaioa extinguished, and insisted that the property in question was legally saleable,

In his replication the Respondent relied upon his minority to prevent the lapse of time from barring the claim.

The suit betwsec the parties to the present appeal being at issue, evidence was produced by the Respondent, consisting of the several documenss already stated, forming and establishing his title, and proving the nature of the *Dehaui«* or villages in quessico, and the objects for which they were granted ; the different *Pervmnnah»* and *Sunuds* confirming the Respondent's ancestors in the possession ; two opinious of the law officers upon the tenure of the lands, sbowio.g, that by the Mahomedan law the sale or mortgage of *Wukf* lands were illegal, and that the lands in question were [396] of that description. The Defendant alae produced documentary evidence, conaissing of the instruments by which the conditional sale in 1809 was effected, and the document which he purported to be the absolute eonveyance and sale relied upon.

On the 29th *December* 1825, the cause came on for hearing before Mr. *Fleming*, the Third Judge of the Provincial Court of *Patna*, when the following judgment was given :—"That the Defendant (present Appellant) admits, that the disputed *Dehauts* were sold to him conditionally, and yet he did not fulfil the conditions of Regulation XV of 1806 A.D., to render the transactions a *bona fide* sale : and as to the second *Ikrarnamah*, executed by *Shah Shumsh-ood-deen*, the date of the execution of

2 M.I.A. 390=6 W.R. 3 (P.O.)-1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

wblebis one day only before the death of the said *Shah*, which fact the Defendant does not deny, is invalid : in addition to which, according to the decision pronounced by the Budder Dewanny Adawlut, a conveyance like this is not legal, upon a consideration therefore of all the circumstances attendant on this transaction, the conditional sale stands in the character of a mortgage; it therefore becomes necessary to take up an account of the produce of the said *Debaats*, and sbs principal and interest that is receivable by the Detendans : " for which reason it was ordered, that the Defendant should, within fifteen days, file the *Wasilant** papers from the *Fusly* year 1814 to 1832, agreeably to the intent and meaning of Regulation XV of 1793.

The Appellant, *Jewun Doss Sahoo*, dissatisfied with this declsion, presented a petition to the Provinctet Oours, praying that wituessea might be examined touching the exeeutlon of the second *Ikrar-namah*, [397] which the Oour] had in its Decree held to be illegal ; but this application was refused, as the ground on which the *Ikrar-namah:* had been deemed invalid had been recorded in tbe previous prcceediagacf the Court.

The Appellant took no steps to bring these Decrees under Appeal ; but the subsequent proceedings in the Provincial Court, up to the Decree. of Mr. *Steer*, of the 25th *June* 1827, related to the inquiries into the aunual value of the property. The Appellant filed certain revenue papers, called *Jumma-bundi* and *Jwmmo-khurch*, to show the collections received by him whilst hawas in possession ; and inhese papers were referred to the Provincial Oour] of Beuares, (where the Defendant reaided.) in order that they might take the Defendant's acknowledgment of their genuineaess and accuracy.. In pursu snoe of this reference, the Provincial Court of *Benares* summoned the Appellant, wbo, after procuring a delay of fifteen days, put in a petition, wherein he again insisted on the genuineness and legality of tbe *Ikrar nomah*, but did not produce any evidence in support of the *Jumma-bundi* and *Juanmc-khurch* papers, thougb he swore to the eatries therein being just and true.

On nbs 19th *September* 1826, the cause came on again before the Previacial Court of *Patna*, when an order was made so suspend the proosedings for one week, to allow tbe Plaintiff to produce evidence to falsify the *Jumma-bundi*.

During the prosecution of this cause in the Provincial Court, the Respondent had also been prosecuting against *Sultan* and *Ruheem-ood-deen* and others, a cause (No. 803) in the same Courb: relating to the *Talook Ahunpore*, which contained some of the [398] *Mouzas* originally granted for the expenses of the *Khankah*, and whioh were claimed by the Defendants in that suit, under an alleged sale by the Plaintiff's father.

* Accounts showing tbe mesne profits.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.O.J. 100=1 Sar. P.O.J. 206=(*Contd.*).

That cause (No. 803) came on to be heard before *William Steer*, Esq., the Fourth Judge of the Provincial Court, on the 25th of *June* 1827, when deeming the case to be of the same nature as the present appeal, he proceeded to take both suits into consideration, and after stating the various documents already set forth, pronounced the following judgment:—"That if the conditional sale writing had stood, in that case a *bona fide* sale could not have been effected without acting up to the provisions of Regulation XVII, A.D. 1806; but as the conditional sale did not stand, but *Shah Shumsh-ood-deen* having taken a further sum of rupees 5,000, returned to the Defendant the *Ikrar-namah* which this individual had executed, purporting to be a conditional sale, and even executed in the Defendant's favour, another statement upon the subject thereof, which transaction made the affair terminate in a *bona fide* sale, and that circumstance took place more than fifteen years, reckoning to the period the suit was brought,—justice now demands, that after the lapse of so long a time, the Defendant shall not be deprived of the full and *bona fide* possession. As to the plea of the Plaintiff adduced at this time, after the period of limitation has gone by, that the *Ikrar-namah* dated the 13th of *Magh* 1217, F. S. (2nd of *February* 1810,) was written only one day before the demise of *Shah Shumsh-ood-deen*, because of the return of the *Ikrar-namah* executed by the Defendant under date the 3rd of the month of *Magh* 1214, F.S., (*27th January* 1807,) that cannot be admitted by the Court. Had [399] the assertion been founded on fact, it is certain that the objection would have been made at about the time of the termination of the period of limitation, or before that time. There can be no doubt, besides, that in the manner the *Dehauts* and lands that were litigated in cause 303 have been sold, the *Dehauts* litigated in the present suit have been sold, in the character of a *bona fide* sale after the period of the conditional sale expired, and the grounds on which those lands were deemed not to be a *Wukf* endowment have been recorded, in the proceedings holden in that cause. For the above reason it is ordered, that the Plaintiff's claim is dismissed, and he is rendered liable to pay the whole of the costs of suit."

The Respondent appealed from this decision to the Sudder Dewanny Adawlut, and filed his petition on the 23rd of *September*, 1829.

The Appellant, *Jeulun Doss Bahoo*, after objecting to the security of the Respondent, which was overruled, put in his answer to the appeal on the 30th *December* 1829.

On the 18th *February* 1830. the cause, after some preliminary proceedings, came for judgment before the Sudder Dewanny Adawlut, when the Court ordered and decreed that the claim and appeal of the Appellant (the present Respondent) should be decreed to him, and the

2 M.I.A. 390=6 W.R. 3 (P.G.)-1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(Contd.).

decision of the *Patna* Provincial Court reversed; that the Appellant, (the present Respondent, without being subject to the payment of the purchase-money, should be put in possession of the *Mahal* in question, and that the costs of both parties should be defrayed respectively by each.

From this Decree the present Appellant appealed to his late Majesty in Council.

[400] Mr. *Miller*, Q.C., Mr. *Wigram*, Q.C., and Mr. *Jackson*, for the Appellants.

This is a question of considerable importance, involving one of the most difficult points of Mahomedan law: it is the first of this nature that has been appealed to *England*. It resolves itself into three heads: *first*, whether the property which was purchased by the Appellant from the Respondent's father was of that description called *Wukf*, which is altogether inalienable. Inasmuch as it is given to an inhabitant of a religious nature for charitable purposes; *secondly*, assuming it to have been of that nature, whether the Respondent was competent to institute a suit for the recovery of the lands so alienated; and, *lastly*, whether the Respondent was not precluded and barred by the Appellant having held possession under a fair title, being a purchaser for a valuable consideration without notice, for twelve years before the commencement of the suit.

I. It is necessary, in order to arrive at a true conclusion of the tenure of this property, to look at the language of the *Firmans* and *Sunuds*, by virtue of which the lands are held. The words of the first grant by *Mahomed Feroksi*, dated the 14th of *March* 1717, are, "that one lac of *dams* from *Pergunna Havilly Suhseram* in *sooba Bahar* are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*," as an *Altamgha* grant, for "him to manage and control, and to descend to his heirs in succession from remove to remove." Now it is clear that the expression contained in this grant, "for the purpose of defraying the expenses of the *Khankah*," &c., is altogether destroyed by the limitation to the heirs: the grant is to *Sheikh Kubeer*, in the same way of limitation from remove to [401] remove. It seems strange that lands limited to heirs should have been treated by the Courts below as lands necessarily given for charitable purposes. The second grant of the third year of *Shah Alum* is in terms nearly similar, being granted as an "*Altamgha-inam* to *Sheikh Eiam-ood-deen*;" "to descend to the offspring in succession to be enjoyed by them." It is apparent therefore that none of these grants establish the fact that the property in dispute is *Wukf*; on the contrary, the very instruments themselves show that they were granted to different

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

perscns "as an *Altamgha-inam*," wbiob is a royal grant, perpetual and bereditary, "to descend to his (tbe grantee's) heirs in succession,"—terms whieb clearly convey a proprietary right. ,Tbe term *Wukf* does not once oecurin tbe graubs: which moreover contain no declaration of trust whatever. The Court below hss treated this in a way quite inconsistent with the notlon of its being a trust: the doctrine of a Court of Equity is this—tbat if you want to fix a trust upon a property, you must show that the object is certain, and that it is given in such a way that the perscn to whom it is given upon trust shall not have power to dispose of it for biscwe benefit, .lu the grant of the third year of *Shah Alum*, it is said to be for tbe purpose of defraying bhe expenses of the frequenters to acd from him, tbe grantee. Now this expression is perfectly appropriate in a grant to a *Dervish* for his .persone] benefit, without implying a perpetual (oundasiou for eleemosynary uses: .indeed, tbe words are mere common-place terms, and, in tbe absence of any other expression, not suffioieut to render tbe donation a *Wukf* endowment. ':No proof whatever has baen adduced, tbat tbe property .in quesbicnwss *Wukf* property.

[402] II. Now admitting this bo have been *Wuk]*, .or' endowed property, and to have been inalieuable, still there is a fatal objection to .tbe Respondent's claim; itneverean be said tbat if property is improperly alienated, tbe party to undo the transacsicn is bhe person who conveyed it, or even those claiming under him, still more so when the Appellant insists thabhe is a purcbaser for a valuable conaiderabion without notice. Tbe Bespcndent bad no righ] to sue at all, for if this property was granted for charisahle purposes, and really is of tbs nature of *Wukf*, tbe Gozern... ment,' wbose duty is to provide tbat the endowmeets ,for plous -und charitable purposes be applied according to their real intentions, alone can sue for bhe recovery of the *Mouzas*.

III. Tbe claim of the Resnondents is barred. by section xiv, Regulation III. of 1793, and clauses first and third, section iii. Ql Regulation II. of 1805; incsmucb as tbe property in dispute has been held under a fair bitie within the meaning of those Regulations for npwarde of twelve years before tbe institution of the suit. These Regulatione areane.logous to our Statute of Limitations, and bvaeobion ii, of Regulation II. of 1805, it is perfectly clear tbat twelve years is an absolute bar to every bodvexcepb bbe Govemmenn, who may claim for" sixty years. As bhere was no authority from abe Government for the. Respondent to sue for recovery Of bbe *Mouzas*, and tbe.. of erby was beld,. and uces bn had, by the Appellant for upwards elve years before the comi icement of the sui], his claim is barred nd concluded by the Regulations.

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Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for tbe Respondents.

The first qu on raised by tbe Appellant is, whe[ ]ther this property is *Wukf*: that mus] be governed by tbe principles applying to grants of this nature provided for by tbe Mahomedan law.

1. In reading tbe grant by *Mahomed Feroksir* of tbe 14th of *March* 1717, no one for a momen] can doubt bus that tbe land was given for religious nurposea : the words are, " A diguified and itn perative *Firman* bas been issued, that oce lac of *dams* from *Pergunah Havilly Suhseram* in *sooba Behar*, wblob yields the sum of about 1,179 rupees to tbe Royal Treasury, are endowed and bestowed for the purpose of defraying the expenses of the *Khankah of Sheikh Kubeer*, as an *Altamgha* grant." The expressions in the second grant are mueh stronger, and sbow that tbe royal donor and founder, who was a Mahomedau, intended it for religious purposes : it states that a certain sum is to be fixed as an *Altamgha-inam* to the sanctified *Sheikh Kiam-ood-deen* for tbe purpose of defraying the expenses of the frequenters to and from him, exempting the lands from tbe present aassessmenb," The words, " to descend to the offspring in succession, to be enioyed by them," doas no] convey a proprietary right, [or it clearly is a mere trust, " for the purpcseof defraying the expenses of the *Khankah*," whiob specifies the object and purposes lor which it was granted to the offspiring in succession as the mode in whlob it was to be held, as the establishment could not take care of itself. It is a grant for the *Khankah*, and the frequenters of it; a distinct appropriation to religious and charitable purposes, very common in *India*, to the memory of some eminently religious or holy person. Here an actual trust is created : the grant is to *Sheikh Kiam-cod-deer:* as *Sijjada-nashin*, tbe superior of the endowed establishment, a corporatiou sole, in the nanire [404] of a trustse : be has no right to apply a portion to his own use; he is a corporation sola to carry on tbe easablfshmenb; be is nob tbe person to be benefited, he is only to give to it the effect whioh the founder lnaended, be is only entitled to participate in its benefit as *Sijjada-nashin*.

The ebieetlon next raised by tbe Appellants, namely, that tbe specification *Wukf* is not to be found in tbe grauta, is of an extremely striot and refined nature. In Maonaghten's Mahomedan Law, *Wukf* Is defined bo be endowment, that is, appropriation 'of ceraain property to religious or useiul, orwbab, we should call, generallv, charitable purposes ;* if land, as in this oase, is, the subjecb-matser, the profits are

* Maonaghten, Mah. Law, pp. 69, 329 and 338.

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dedicated to religious objects. The *Hidaya*,* a book of authority on the Mahomedan law, treats largely upon *Wukf*, or appropriation, as it is there termed, which is declared, "in the language of the law, to signify the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures." But it is unnecessary to pursue this argument further, as the case of *Mussumat Qadira, alias Mussummaut Usmut*, v. *Shah Kubeer-ooddeen*;† has already decided that this very property now under dispute was *Wukf*, or property appropriated to religious purposes; that by the use of the word *Inam* in a royal grant, it did not necessarily follow that the property specified was con- [405] veyed in absolute proprietary right, if from the general tenor of the instrument it could be inferred that a *Wukf*, or religious endowment, was intended, *Kulb Ali Hossein* v. *Syf Ali*‡ was to the same effect. These cases dispose of the whole question; they are most distinct authorities that the word *Wukf*, in a grant, is not necessary in order to constitute a religious appropriation for charitable purposes, provided the nature of the tenure be to be inferred from the nature of the grant. The same principles prevail in the *Hindoo* law. § This then being the law applicable to this species of tenure, it follows that the *Ikrar-namah*, or deed of conveyance, whether conditional by way of mortgage, or absolute by sale, by *Shah Shumsh-ood-deen* was illegal, and consequently void.

II. The point raised, that the Appellant's father was a purchaser for valuable consideration without notice of the trusts is untenable, and cannot be insisted upon here, inasmuch as it was never raised in any of the pleadings in the Courts below. The Appellant's father had every opportunity of investigating the title of the lands, and seeing the nature of the grants creating the trusts: if we can succeed in showing that this property is *Wukf*, or property devoted to charitable use, and impressed with a charitable trust: if the Appellant purchased without notice of the trusts, even supposing he gave a valuable consideration for the subject of the purchase, he could only take it subject to the trusts, and would himself become a trustee.

III. The remaining question is the limitation, which is also untenable; for it is obvious that this property, [406] being *Wukf*, comes

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* *Hidaya*, vol. 11. pp. 334 and 344, translated by Hamilton. See also Col. Galloway's book on the Law and Constitution of India, p. 75.

† 3 Mac. 8, new, R. 407. ‡ 2 Mac. Sud. new. R, 110,

§ 4 Mac. Su new. R, 343. 2 Macnaghten's Hindoo Law, 305. 1 Strange's Hindoo Law, 151.

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that she transfer'ollS10, which purported to be absolute, ln consideration .of the payment of rupees 0,000, was fraudulent and void, having been made by *Shah Shumsh-ood-deen* in bis last Illness, and shortly before bis death, and consequec tly that the transfer of 1807, whieh was originally cocditional, bad never become absoluee.

On the part of bhe Defendant, it was contended that the property in question was not *Wukt*, but a proprietary interest given by royal sutbcritv to tbs grantees and their heirs as bereditary property, wbicb they were at libertyno diaposect: tbat the transler of 1807, admitted to be conditlonal, bad, by the'sale of [408] 1810. become absolute, notwithstanding the omission to take the proceedings prescribed by Regulation XVII. of 1806, suob sale of 1810 being *bona fide*; and further, that having been made by *Shah Bhumsh..ood-deen*, heir of the persons named in the royal grant as grantees, the right of tbe Plaintiff to sue for the recovery of bbe villages was barred by lapse of time, more than twelve, years having elapsed from the time of shs sale in *February* 1810, to the cctnruencement of the suit in 1822, for which Regulations *III. 01* 1793, and II. of 1805, were Yelled on.

The Plaintiff appears to have been under age at the death of his father in 1810, but in 1819 he was appointed by the Government to be' , *Mutwaly* or manager of the establishment, and *Sijjada-nashin* or superior thereof, at which time it is to be presumed that he had attained his majority.

The villages in question were granted by two royal *Firmans*, the firs] by *Mahomed Feroksir*, 14th *March* 1717, the second by *Shah Alum*, 13th *October* 1762.

The first of these instruments states, that a *Firman* has been issued, that one lac *of dams* from *Perqunnch. Hav-illy Suhseram*, in *sooba Bahar*, which yields the sum of about 1,179 rupees to the Royal Treasury, are endowed and bestowed for the purpose of defraying the expenses of the *Khankai:* of *Sheikh Kubeer*, *Derineh*, as an *Altamgha* grant, and that it shall be established according to the specificatcn made therein. The obildren of the Sovereign, the *Amirs*, and those who transact the affairs of state, and the *Jaghiredars* and their auooessora, are enjoined to relinqulsb the said *dams* to the aforensmed individual for him to manage and conbroulvand to descend to his 'heirs in successionIrom remove to remove, and they are [409] required to consider, the grant in every respect xempt from all contingencies, and not to demand from the aaid person a sh *Sunud.* annually, Upon this instru t a memorandum is endorsed, that one lac of *dams* have been granted by His Majesty as an *Altamgha*, for the use and expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*.

2 M.I.A. 390 .. 6 W.R. 8 (P.C.) = 1 Suth. P.C.J. 100 = 1 Sar. P.C.J. 206 — (Contd.).

In 1744, on the petition of *Sheikh Gholam Shurf-ood-deen*, the grandson of *Sheikh Kubeer*, who had succeeded him as the *Sijjada-nashin*, a *Perwannah* was granted by *Mahomed Shah*, enjoining the *fowdries*, cultivators, &c., to consider the said one lac of *dams* as an *Altá a-inam*, by virtue of the *Perwannah* of His Majesty, for the purpose of being appropriated to the charges of the travellers to and from the *Khankah* of the said *Sheikh Kubeer*, as it stood before, to descend to the offspring in succession, and to refrain from taking from the said *Gholam Shurf-ood-deen*, as was the rule before, the true and fair revenue payable to the state, and the *Dewanny* taxes, and enjoining them not to deviate from what may be for the benefit of the person in question.

The terms expressing the grant to have been made (or the purpose of meeting the charges of the *Khankah*, and the travellers who frequent the *Sheikh Kubeer, Dervish*, are repeated several times in the endorsement.

A similar *Perwannah* was granted on the petition of *Sheikh Kiam-ood-deen;* the son of *Sheikh Gholan: Shurf-ood-deen;* after the death of his father, and it is declared that *Sheikh Kiam-ood-deen* is established in the *Sijjada-nashi«* in the same manner as his father and grandfather were.

The second instrument of the third year of *Shah Alum*, about the 18th of *October* 1762, is a grant, [410] nearly similar in form, of two lacs and eighty-one thousand *dams*, the produce of which is rupees 3,000, to be fixed as an *Altamgha-inam* to the sanctified *Sheikh Kiam-ood-deen*, for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment and from all that may be realised thereout by his good management; and the children and *Viziers*, &c., of the sovereign are enjoined always to maintain and uphold the said order and to relinquish the aforesaid *dams* to them, to descend to the offspring in succession to be enjoyed by them, and deeming this grant free from the contingency of alteration or change, the public officers are not to demand anything from them upon the score of revenues or charges, and to consider the grant free of all *Dewanny* taxes, or for any writings whatever made on account of the state. Deeming this a full and positive injunction, they are not to demand a fresh *Sunud* annually, nor deviate from these royal and munificent borders.

Upon this instrument, a memorandum was endorsed that 281,000 *-dam«* have been granted by His Majesty in *Perouwna);-Suheeram*, &c., as an *Altamgha-inam* to *Sheikh Kiam-ood-deen* for the charges of the *Fakirs*.

The proceedings in another suit commenced by the Plaintiff on the 6th of *April* 1821, against *Mussumat Beeby Ismut*, the widow of *Shah Shumsh-ood-deen*, to recover from her certain other villages comprised in the same royal grants, and claimed as *Wukf* property, were put in with

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the Decree of the Sudder Dewanny Adawlut of the 24th of *August* 1824, in wbicb proceedings were set forth certain opinionsot native law-officers respecting the uature of *Wukf* property taken under the authority of the Court.

[411] The present cause being brough] before Mr. *Fleming*, the Thivd Judge of the Provincial Oour]'of *Potna*, on the 29th 'of *December* 1825, be determined, that as the disputed villages hadbeen sold conditionally, and the conditionaot Regulation XVII. of 1806 not fulfilled, the transaction could not be conaidered a *bona fide* sale; that the second *Ikrcr-namah*, executed by *Shah Shumsh-ood-deen*, the date of which (be said) was cnedevonlv before the death of the said *Shah*, which faot, he savs, the Defendant does not deny, is invalid, in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut, (*i.e.* in the suit agains] *Beeby Ismut*,) a conveyance like this is, not legal. On consideration therefore of all the circumstanoea; heconaidered ths conditional sale to stand In the character of a mortgage, that it was tnerefore neceaaary to take an account of the produce of the 'villages, and of the prlncipe.l and interest received by the Detendsns; and tbere-fore ordered him to file the *Wasilaut* papers.

00 the 2nd of *February* 1826, the Defendant presented a petition to the Provincial Oourb, that witnesses might be examined In regard to the second *Ikrar-nomah;* The cause corning on again before Mr. *Fleming* on the 19th of *September* 1826. be determined, that aa the grounds on which the *Ikrarnamah* in question had been rendered null and void had been recorded in the proceedings holden on she 29th of *December* 1825, no Iurther orders could be passed on that head; but on the Plaintiffs stating that the accounts of the Derendanta were 'erroneous, it was ordered that the proceedings should be suspended: and Mr. *Fleming* having, on the 18th of *November* 1826, expressed suspicion respecting the genuineneas of the accounte, thought proper to [412] give time tothe Plaintiff to falsify them, and as be was going the circuit, he directed the cause to be brought on before the FourthJudge, before whom another cause connected with the present was pending.

OD the 25th of *April* 1827, Mr. *Steer*, the Ecurth Judge, ordered that an inquiry into the accounts should be znede through the Oollecsor of *Zillah Shahabad*, and a return was made by the Collector, the particulars of wbioh it is not ueceesarv to notice.

On the 25th of *June* 1827, Mr. *Steer* proncuheed the following judgment:—That if the con dibional sale writing had stood, in that case a *bona fide* sale o.. nob have been effected without acting ... the provisions of Regu ..n ,XVII. of 1806; but as the conditio.. Sale did not stand, by *Shah Shumsh-ood-deen* having taken a further sum" of:

2 M.I.A. 390=6 W.R. S (P.O.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

rupees 5.000, and returned to she Defendant the *Ikrar-namuh.* wbleb this individual had executed, which circumstance had taken place more than fifteen years, reckoning to the period the suit was brought, justio demanded that, after the l of go loog a time, the Defendant sh not be deprived of the ful and final *bona fide* sale; that after the eriod or limitation had gone by; the plea that the *Ikrar-namah.* dated the 2nd of *February* isio, was written only one day before bhe demise of *Shah Shumsh-ood-deen*, could not be admitted; that the villages hadbeen sold in the character of a *bona fide* sale after the period of a conditional sale expired: and that the grounds on.wbicb these lands were deemed not to be a *Wukf* endowment had besn recorded in the proceedings holden in a cause Ne. 803. For these reasons he ordered ths] the Plaintiff's claim should be dismissed with costs of suit.

The Plaintiff having appealed from this judgment [413] to she Suddec Dawanny Adawlut, the appeal came on before Mr. *Ross*, Judge of the sald Court, on the 30th of *January* 1830, who after stating bhe conditional and absolute bills of sale to the Defendants, the death of, *Shah Shumsh-ood-deen*, and that after his destb his widow, *Mussumat Kadira*, (*Beeby Ismut*,) held possession of she villages mentioned in the two *Firmans* bill 1819, together with other property of the vdeosased as *Malikeh* or proprietress; that in 1819, the local agents knowing the villages mentioned in the two *Eirmane* to be *Wukf* property, appropriated to religious purposes, appointed the Plaintiff to their management as procurator, who instituted a suit against her for these villages and others acquired by the profits of them; and that having proved their appropriation to religious endowments, (*Wukf*,) be obtaiued a Decree, which Decree, as proof of the property being an appropriation, (*Wukf*,) was affirmed by the Sudder Dewanny Adawlut; and after stating nhe proceedings iustituted in ube present suit, he proceeded thus:—As the villages in dispute were of the numberrnenbicned in the two *Firmtine*, according to which *Firmen«*, on proof of the villages being *Wukf*, (appropriated,) the case No. 2,340 (*Mussumat Kadiro*, Appellant, against *Shah Shumsh-ood-deen*, Respondent,) was decided by this Oura on the 24th of *August* 1824, hsnee in this case two points demand consideretion t-e-

1st. Whether *Shah Shumsh-ood-deen*, the villages in question being *Wukf* (appropriated) property, had or hs.d not bbe right of alienating such *Wukf* (appropriated) property, either by *Bye-bil-wuffa* (conditional sale), by *Bye-msady* (absolute sale), or by any other sort of assignment. As to which he says, "The *Futwa* (law opinion) of the law-officers of this Court [414] makes this point clear and manifest, viz., that a *Mutwaly* (procurator) has no right to alienate *Wukf* (or appropriated) property by *Bye-bil-wufa* (conditional sale) or by any other kind of transfer."

2 M.I.A. 390=6 W.R. 3 (P.O.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd*).

2ndly. He says, "That frotn the 2nd of *February* 1810, the date 'of the *Ikrar-namah* (agreement bond) executed by *Shah Shumsh-ood-deen*, more than twelve years had elapsed; that *Mussumat Kadir*« his widow, as *Malikeh* (proprietress) held poesesaicn of the property that had been seized of the aforesaid *Shoh*, and that *Shah Kubeer-ood-desn*, in the month of *April* 1819, had been appointed *Mutwaly* (procurator), agreeably to ube orders of the locsl agents."

Under these circumstances, be states tbe question to be whether the sui] of the Plaintiff is or is not worthy of being entertained by the Court; and pronounces his opinion, that if Irom the daseo! the aeizin by aperson who believed the sellsrho have power to sell, audno usurpatiouor fraud waa imputable to the seller, hhe right of tbeperson seized would be well founded, agreeably to section iii. of Regulation II. of 1805, and.he states that section xiv, of Regulation TII. of 1793 would apply to bisesse; that the absolute sale of the 2nd of *February* 1810 was fully proved, and neither the Plaintiff nor any one for him, during tbe twelve years, demanded bis right, nor did Defendant admit it or promise payment, nordid the Plaintiff advauce his claim in any Court; that the Plaintiff did not appear to have been prevented by minority, having attained the age of majority in 1819, when be was appointed the superintezrdenuof the *Wukf* property, three years before the commencement of,the suit, and that with reference to section xiv, of Regulation III. of 1793, hls claim was beyond the limit of coguisanoe. [515] As in this case, however, Government wss neither Plaintiff. nor had the Appellants its sanction for instituting the suit, hence, in his judgment, section ii. of the Regulation II. of 1805 cannot be applied to this case, still, although the Government wss not Plaintiff, yet in consequence of the property iu question being *Wukf*, or appropriated property, and the Plaintiff appointed *Mutwaly* (procurator) by Government, for the management of the *Wukf* (appropriated) property, whicb is consecrated for the entertainment of travellers, be thought tbsre was reascu no question whether the provisions of section ii. Regulation II. could affect such a case or non: that up to the present period, no case of the kind had everbeen tried by the Court, consequently the passing of a final order in this case by one Judge did not appear expedient. It was therefore ordered, ;that the papers for a final order should be laid before the two other Judges of the Court.

Mr. *Turnbull*, another Judge of the Sudder Dewanny Adawlut, before whom the cause was brought, having differed in opinion from Mr. *Ross*, on the 11th of *February* ordered the papers to be laid before another Ju Accordingly it came before Mr. *Leices* and himself on the 18th of ruary 1830, wbo after stating their opi, that Mr. *Steer* had no power to decide the case singly in opposition. the opinion of

s M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=is», P.C.J. 206—(*Contd.*).

Mr. *Fleming*, bub that he ought eitber to have postponed tbeease till the return of Mr. *Fleming*, or if he thought the inquiry by Mr. *Fleming*, incomplete, to have recorded hia opinion, and referred tb oase to the final order of [illegible]otber Judge; that his' decisioe, [illegible]ded on the authenticity be *Ikrar-namah* of tbe 2nd *February* lelO, wbicu he pronounced to be authemie, without evidsnee, and of the verity of wbioh strong [416] auspieiona appeared, was indeed extraordinary: sinoe therefore the Decree of the Provincial Court could not be sanctioned, it became necesaary to inquire into the merits of the Plaintiff's claim, and wisb that view to consider, First, wbetber an inquiry in regard to the *Ikrar namah.* of the 2nd of *February* 1810, in order to remove the objection of the Respondent by calllng for evldence of its authenticity, was orwas not neceasary. As to which they say, "In oue opinion, an inquiry in regard to the instrument in quesdon is neither necessary nor banefiuial to tbe cause of she Defendant; for in the event of the instrument in question on inquiry proving valid and authentic, yet the sale by tbe late *Shah Shumsh-ood-deen* of the villages mentioned In the instrument in-question is altogether improper and Illegs}: for. the villages in question are proved to ha of the number of the *Wukf* or appropriated villages. In such a case the deceased *Shah* had no power by law to alienate them."

Beccndly. Whether the claim of the Plaintiff, oonsidering the lapse of twelve years from the date of the *Lkrar namah*, was cognizable by the Oourt, 00 this question tbelr optcicc was, "That independently of the nircumstanoe, that up to the present date the *Ikrar-namah* of *Bye-bat* (absolutesale) has not been proved in such wise as to change the aspect *oi* the first or *BY6" bil-wuffa* (conditional sale), and that there appears no necessity to take evidence in regard to its authenticity, in eonsiderasion of *Shah Shumsh-ood-deen* having no power to alienate the villages in dispute, yet the *Ikrar-namah* in question, even if it were proved ausbentic, could not bar the claim of she Appellant, becauee the Appellant was appointed by the Iooal agents to tbe officea of the *Mutwaly* (procurator) [417] and *Sijjada naehs«* (superior) of the *Khankah.* or monastery of *Sheikh Kubeer, Dervish* in 1819." It is obvious therefore, they say, that from the date of bis appointment only the superintendence of the *Wukf* (appropriated) villages, apperbaining to the *Khankah* in question, devolved to his care, and previous to that time he bad no concern whatever with that matter. In suoh a case, agreeably to the intentions of section xiv. of Regulation III of 1793, the claim of the Appellant in every way appears worthy of being entertained by the Court.

Thirdly, They say, "Although according to usage in cases of *Bye.., bil-wuffa* (conditional sale) it behoves that the purchase-money of *Bye-bil-wuffa* should be caused to be paid by the Plaintiff to the Defendant, after the

2 M.I.A. 390 = 6 W.R. 3 (P.C.) = 1 Suth. P.C.J. 100 = 1 Sar. P.C.J. 206—(*Contd.*).

latter shall have accounted for the *Wasilaut* (mesue profits) of the villages in dispute, yet as the estate in question was *la-khiraj* ozren] free, and a profitable one, and [has moreover been in the possession of the Respondent ever slnce sbe year 1806-7 up to the present time, a period of sixteen years, ib is presumable that in such a length of time the purchase-money (principal and interest) must have been realized by the Defendant from the *Mahal* (district) in question. For this reason, and also in consideration of the seizin of the Detendansie the property in question being illegal, and the payment notslying in tbe' Plaintiff, who is the *Mutwaly* (procurator) and superintendent, an ascertainment of the *Wasilaut* (mesne profits) is deemed unnecessary; but rather with a view of putting an end to the dispute, and she suffering of the parties, it is deemed proper that neither the purchase-money be caused to be paid by the Plaintiff to the Defendant, nor the [418] *Wasilaut* mousvbe demanded of, the Defendant by the Plaintiff."

The Court therefore decreed in favour of the Plaintiff's claim, reversing the deoisiotlof the *Patna* Court, and directed the costs of the parties in both Courts to be defrayed respectively by each.

Such being the determination of the Court of Appeal, their Lordsbips are to consider wbether tbat Courb has determined rightly. First, that villages co n sained in hhe royal grants were to be considered as *Wukf*, and therefore inalienable in any manner whatsoever. Secondly, that notwithstanding the lapse of time, tbe Plaintiff, in the character of *Mutwaly*, to which he had been appointed by Govemmene 'in' 1819, was entitled to recover those villages. Thirdly, that eshbe posseaaicn of them by the Defendant was illegal, and as the .Plainnlff was not tbe debtor of the Defendant, he was not bound to repay the money advanced. 'With respect to the determination that the Plsineiff ought not to have any account of the mesne profits, as the Plaintiff himself has made no complaint, it is unnecesaarv to eonsider it.

The question whether the property mentioned in the two royal grants was to be considered as *Wukf* or as a proprietary right was much diacuased in the above-mentioned ease of *Kubeer-ood-deen* (the present Plaintiff) against *Mussummaut Qadira*; and the opinions of bhe native law-officers taken in that cause being Iouud to be contradiotory, it became neceaaary to consula the *Futaoa*« of lawyers in cases formerly decided by the Court respecting *Wukf* endowments, and the decision of the 'Saaoer' Dewanny Adawlut of bbe 1st of *March* 1814, in the case of *Kulb Ali Hoossein* v. *Syf Ali*, together with a *Futwa* of a former *Kazi-ool-Rouzet* of the [419] Sudder Dewanny Ada t and of the *Moofti* of that Court, were; erred to.

The term of the *Firmans* of *Aulun Gheer* in that cause ran thus: "As it has come to the knowledge of His Majesty, that agreeably to a

3 M.I A. 390=6 W.R. 3 IF.C.)...1 Suth. P.C.J. 100..1 Sar. P.C.J. 206—(Contd.).

Sunud, furnished by the *Hakims*, certain *Mouzas* situate, &c., have been appropriated for the purpose of meeting the charges of *Fakeers* and students of the *Madrissa*, and the *Khankah* and *Musjid* of *Moolla Dervish Hoossein*, son of *Moolla Ghola* [illegible], and the aforesaid individual is hopeful [illegible] the royal munificence and favour, his Majesty's royal commands are, that in the event of the aforesaid *Mouzas* being in the occupation and enjoyment of that individual, the wbcleot their *Mouzas* shall continue as they formerly were at *Jumma* of 15,000 *dams* from (such a date), in tbe character of a *Maddad Mash* (aid for subsistence), according to the tenor of tbe grant; and in order that he may apply bhe produce of these lands to meet the charges of the students of his *Madrissa* end *Musjid*, and the present and future *Hakims*, the *Amils*, &c., are eujoiued to relinquish the *Mouza* 10 question to that person's occupation, to deem them *Maaf*, (exempt from tax,) and blotted with the pen in every respeob, and nob to require of him a fresh *Sunud*, annually. ShQUld that individual occupy anything in any cbher way, they are not to countenance him." Upon reading the *Firman*, the *Kazi-ool-Rouzat* and the *Moofti* gave bheir *Futwa* as Iollcws.: " As in the *Firman* it is written that the produce of the lands specified therein is to be applied to meet the charges of students of *Madrissa* and *Musiid* of *Moolla Dervish Hoossein*, and as it is not written that the said *Moolla* shall appropriate the produce to meet the charges Qf bis family and ohildren, or that he shall enjoy the [420] same with bta Iamily and ohildrea, it therefore appears to us that the lands in question have been paldes *Wukf* ic the oharaoter of *Maddad Mash*, and are notIleble to sale or gifb."

Agreeably to the above *Futwa*, the Judges of the Sudder Dewanny Adawlut decreed that the litigated lauda contained in the *Firman* in question were a *Wukf* endowment, and were not dtsposable by sale or gift; the grounds of which Judgment (it *is* said] are fully stated itr the Decree of that Court, under date *March* 1st, 1824.

Ib is tcbe observed, that the word *Wukf* wasocs memioeedin the *Firman*, and that the individual on wbose application the grant was made, *Moolla Booesei»*, was expressly named In the report of this case, (2 *Macnaghten*, 110.) it is said that the terms of.tbe *Firman* declared that the general superintendence of the resources should be confided to *Dervish Hoossein*, and should remain vested io him, his heirs, and succeg. sors; or other property to pious and charitable purposes is sufficient to constitute *Wukf*, without the express use of that term in the grant, and that the alienation of such property, from the purposes intended. is illegal.

After referring to this case, and the opinions of the law-officers, the Sudder Dewanny Adawlut, in the case of *Mussummaut Qadira* v. *Shah Kubeer-ood-deen* (3 Mac. Sud. Dew. R.,'407,) appear bo bave determined, that notwithstanding the use of the words "*Inam*" and "*Altamgha*," in the

2 M.I.A. 390=6 W.R. a (P.C.)=1 Suth. P.O.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

royal grants and the mention therein of the persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made as expressed in the petitions) for the purpose of maintaining [421] a charitable institution, the persons named were not to be considered proprietors; that the establishment (the *Khankah*) was the real donee, and the persons named were only *Mutwalies* of the *Khankah*; that a *Mutwaly* has no right to alienate, and consequently that the transfer by gift or otherwise by *Shah Shumsood-deen* was illegal.

This decision is in accordance with the doctrine laid down in the *Hidaya*, book xv., of *Wukf* or appropriation, *Hamilton's* translation, vol. ii., page 334, where it is said, "*Wukf*" in its primitive sense means "detention." In the language of the law, (according to *Haneefa*,) it signifies the appropriation of any particular thing, in such a way that the appropriator's right in it shall continue, and that the advantage of it go to some charitable purpose, in the manner of a loan. According to the two disciples, "*Wukf*" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that *Aboo Yoosaf* holds the appropriation to be absolute from the moment of its execution, whereas *Mahomed* holds it to be absolute only on the delivery of it to a *Mutwaly*, (or procurator,) and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term *Wukf*, in its literal sense, comprehends all that is mentioned, both by *Haneefa*, and by the two disciples.

Again (page 344) it is said, "Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers: the transfer is unlawful, because of [422] a saying of the Prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'"

If the decision in the case of *Kubeer-ood-deen* v. *Mussumat Kadira* was correct, it follows that the transfer in this case, whether conditional or absolute, by the same person (*Shumsh-ood-deen*) to the Defendant, was illegal: also, secondly, with respect to the lapse of time, the Plaintiff, not being the proprietor, had no right to sue for the recovery of the villages as his own; accordingly, he preferred his suit as *Sijjada-nashin*, having been appointed *Mutwaly* in 1819. Had he succeeded to the heir of his father to a proprietary right in the villages, he might have been barred by the lapse of twelve years, according to section xiv. of Regulation III of 1793; but having no right except as *Mutwaly*, he stood in a

very different situation. The superintendence of the *Wukf* villages devolved to hia care from the date of his appointment only. The *Mutwaly* is the procurator of the donor, which, in this case, was the sovereign; and it appears by Regulation XIX. of 1810, that it is the duty of every Government to provide, that the endowments pious and beneficial purposes be applied according to their real intention: the local agents are appointed to ascertain and report the names of trustees, managers and superintendents, whether under the designation of *Mutwaly* or any other, and all vacancies, and to recommend fit persons where the nomination devolves on the Government. That the Board of Commissioners may appoint such persons or make such other provision for the superintendence, management or trust as may be thought fit. The Plaintiff, therefore, upon his appointment as *Mutwaly*, became the authorized agent of the Government for the performance of the acknowledged [423] duty of the Government to protect the endowment from misapplication; for, as it is said in the opinion of the Mahomedan lawyers, "The endower and the *Mutwaly* are one and the same." The endowment in this case was a perpetual endowment, and the duty of the Government to preserve its application to the right use was a public and perpetual duty. By Regulation II. of 1805, section ii., it is provided, that the limitation of twelve years for the commencement of civil suits shall not be considered applicable to the commencement of any suits for the recovery of the public revenue, or for any public rights or claims whatever which may be instituted by or on behalf of the Government, with the sanction of the Governor-General in Council, or by direction of any public officer or officers who may be duly authorised to prosecute the same on the part of Government. The Plaintiff, who was neither heir nor personal representative of his father, in respect of *Wukf* property, had no right of action against the Defendant till his appointment in 1819, and the Defendant could acquire no right against the Government, whose procurator the Plaintiff was, at least until twelve years had elapsed from his appointment.

The endowment being a perpetual *Wukf*, and the alienation consequently illegal, and it not having been shown that the purchase-money was applied to the use of the *Khankah*, the Plaintiff cannot be required to account for it, even supposing the Defendant not to have been fully repaid by his long possession of the property.

Their Lordships are therefore of opinion, that the Judgment of the Sudder Dewanny Adawlut ought to be affirmed,

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