A82

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

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

VERSUS

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

AND

OTHER CONNECTED CIVIL APPEALS

COMPILATION ON THE ISSUE OF LIMITATION IN SUIT 5

BY DR. RAJEEV DHAVAN, SENIOR ADVOCATE

ADVOCATE ON RECORD:EJAZ MAQBOOL

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NOTE ON LIMITATION

1. The relevant statutory law of limitation operative at the time was the Indian Limitation Act 1908; and after 1963, the Limitation Act 1963 even though there is a similarity between the two legislations.

2. It is to be mentioned that Suit No. 5 was filed on behalf of the deities through its next friend, Plaintiff No. 3 on 01.07.1989. Pertinently, much before 1989, it was well within the knowledge of the said Plaintiff, who claims himself a worshiper, that the premises in issue was already under attachment and Suits No. 3 (by the Shebaits) and Suit No. 1 had already been filed. Thus, Suit No. 5 is barred by limitation in respect of both the plaintiffs in Suit 5.

A. PROVISIONS OF LIMITATION ACT, 1908:

The following provisions of the Limitation Act, 1908 are important for the purposes of defining the applicant, plaintiff, defendant, suit, trustee:

> *'**Section 2. Definitions:***
> *2(1) "applicant" includes any person from or through whom an applicant derives his right to apply.*
>
> *2(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued.*
>
> *2(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue.*
>
> *2(10) "suit" does not include an appeal or an application: and*
>
> *2(11) "trustee" does not include a Benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.'*

The essential purpose of the law of limitation is to ensure an end to litigation at a definitive time, subject to modifications and just exceptions. At the determination of the period of limitation, the right to such property shall be extinguished.

> ***'Section 3. Dismissal of suit, etc. instituted, etc. after period of limitation.***
> *Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and*

application made after the period of limitation prescribed therefore by the First Schedule shall be dismissed although limitation has not been set up as a defence.

Explanation. ---A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being would up by the Court, when the claimant first sends in his claim to the official liquidator.

Section 4. Where Court is closed when period expires.
Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

Section 5. Extension of period in certain case.
Any appeal or application for [a revision or] a review of judgment or for leave to appeal or any other application to which this section may be made applicable [by or under any enactment] for the time being in force may be admitted after the period of limitation prescribed therefore, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. ---The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.'

- Once time has begun to run, no subsequent disability or inability to sue stops, except under stipulated circumstances.

'Section 9. Continuous running of time.
Where once time has begun to run, no subsequent disability or inability to sue stops it:
Provided that where letters or administration to the estate of a creditor have been granted to his debtor, the running of

the time prescribed for a suit to recover the debt shall be suspended while the administration continues.'

- At the end of the period of limitation prescribed in the Act for instituting a suit for possession of property, the right to the property is extinguished.

'Section 28. Extinguishment of right to property.
At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished'

B. BACKGROUND TO SECTION 10:

A dramatic change in some aspects of the law of limitation occurred as a result of the decision of the Privy Council in Vidya Varuthi Thirtha v. Balusami Ayyar (1922) 48 IA 302 (See Volume A44 - Preliminary Note at Serial No. 1) which, though concerned with the alienation of property, had wider implications leading to statutory changes in 1929 which left managers of religious endowments (like shebaits and mutwallis) in the position of express trustees as per the amendment of Section.

'From the above review of the general law relating to Hindu and Mahommedan pious institutions it would prima facie follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a "trustee " 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.'

Vidya Varuthi (1922) at pg. 319

But also consider *B.K. Mukherjea* says that the property is not vested in the shebait or mutwalli *(See pg. 304, pr. 6.80)* and that the property was vested in Almighty God. *(See pg. 304, pr 6.79)*

- The relevant Articles of limitation before 1929 were as follows:

See B.K. Mukherjea pg. 299

Before 1908 - 1929

- ~~After 1922 and 1929~~ the relevant provision of limitation were:

134. 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.	Twelve Years	The date of the transfer. (The termination a quo amended in 1929 to read, "when the transfer becomes known to the plaintiff")
144. For possession of immovable property or any interest therein not hereby otherwise specially provided for	Twelve Years	When the possession of the defendant becomes adverse to the plaintiff.

- Before 1929 Section 10 of the Limitation Act read as follows:

> ***'Section 10. Suits against express trustees and their representatives.***
>
> *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 representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds shall be barred by any length of time.'*

- After 1929, Section 10 reads as follows:

> ***Section 10. Suits against express trustees and their representatives.***
>
> *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 representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an*

account of such property or proceeds shall be barred by any length of time.

Explanation- For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.'

Explanation added by the Indian Limitation (Amdt.) Act, 1929 (1 of 1929)

- Section 10 on a plain reading covers the following situations:

  Suits filed **against**:
  - a person in whom property has become vested in trust for a specific purpose,
  - legal representatives and assigns of such trustee;

  but does **not** cover:
  - an assign of such trustee for valuable consideration.

  The suit can be filed for the purpose of:
  - following in the hands of the trustee such property,
  - following in the hands of the trustee the proceeds of such property,
  - for an account of such property or proceeds.

  The **absence of the words 'by or against'** in the opening words of the Section is telling, and the Section clearly does not contemplate suits by a trustee against third parties.

  - See *Palaniandi Gramani Manickammal* v. *V. Murugappa Gramani*, AIR 1935 Mad 483 (page 485)

- Mr. Parasaran, Senior Advocate cited Subbaiya Pandaram vs Mahamad Mustafa Maracayar AIR 1923 PC 175 where adverse possession was permitted & property became a trust later

- After 1963, Section 10 read as follows:

Section 10. Suits against express trustees and their representatives.

Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of

following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Explanation.—For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof.'

- Additions were made by inserting Article 134A and 134B:

134A. To set aside a transfer of immovable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a value consideration.	Twelve Years	When the transfer becomes known to the plaintiff.
134B. By the manager of aHindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve Years	The death, resignation or removal of the transferor.

C. Suits on behalf of the idols or debutter property could only be filed by shebaits and by worshippers only upon default by the shebait

In *Bishwanath* v. *Sri Thakur Radha Ballabhi*, AIR 1967 SC 1044 (See Volume A67 – Compilation on Shebait at Serial No. 10) which has been relied upon by the Plaintiffs in Suit No. 5 to claim the status of perpetual minor for the idol, the Supreme Court has held that it is well settled that:

> "*(1) An idol of a Hindu temple is a juridical person; (2) when there is a Shebait, ordinarily no person other than the*

Shebait can represent the idol; and (3) worshippers of an idol are its beneficiaries, though only in a spiritual sense."

- After the insertion of Article 134A, worshippers could challenge any alienation by the shebait under that Article which as Justice BK Mukherjea put it

  "...in effect, rendered it possible for worshippers to take timely action"
  (e.g. Section 92 CPC) for setting aside alienation.

D. JUDICIAL DECISIONS ON LIMITATION AND MINOR DEITY

Although the deity is treated as a minor, this is not so for the purposes of limitation

(i) The weight of judicial precedent negates the proposition that the law of limitation does not apply to an idol and should apply mutatis mutandis to the Plaintiff No. 2.

- The observation in *Bishwanath* v. *Sri Thakur Radha Ballabhi*, AIR 1967 SC 1044 (at paras 10, 11) (See Volume A67 – Compilation on Shebait at Serial No. 10) that the deity is a perpetual minor not made in the context of limitation.
- The argument that the deity being a perpetual minor, the law of limitation would not apply was considered and rejected in
  - *Chttar Mal v. Panchu Lal ILR (1926) 48 All 348 (page 351):*

    "If the rule were enforced the property of a god would not fetch any money in the market when need arose to transfer it for the benefit of the temple where the idol may be installed."
  - *Damodar Das v. Lakhan Das (1909-10) 37 IA 147 (page 151)*
  - *Surendrakrishna Roy v. Sree Sree Ishwar Bhubaneswari Thakurani AIR 1933 Cal 295 (page 303) (confirmed by the Privy Council in appeal in AIR 1937 PC 185)*
  - *Radhakrishna Das v. Radharamana Swami AIR 1949 Ori. 1 (paras 14-15)*

- *Sarangadeva Periya Matam v. R. Goundar AIR 1966 SC 1603 (page 1606 at para 8)*
- *Chamelibai Vallabhadas & Ors. v. Ramchandrajee & Ors. AIR 1964 MP 167 (Para 17-24)* (See Volume A67 – Compilation on Shebait at Serial No. 8)
- *Sree Sree Ishwaree Bhubaneshwaree Thakurani v. Braja Nath De.1937 2 PC 447 (Page 457-458)*

(ii) The proposition that the law of limitation does not apply to an idol is contrary to basic principles of the law of limitation

- The object of the law of limitation, as described by the Supreme Court in *Pundlik Jalam Patil* v. *Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448 (paras 26-28)* is:
  "*Statutes of limitation are sometimes described as "statutes of peace". An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order.*"
- Limitation Act is a self-contained code, and scope and applicability of provisions cannot be extended by analogy or implication. (See *A.S.K. Krishnappa Chettiar v. S.V.V. Somiah AIR 1964 SC 227 (page 232 at para 13)).*
- Therefore, it follows that a right to claim in perpetuity, being contrary to the very object of the law of limitation cannot be read in unless it is specifically provided for by the legislature. The Limitation Act, 1908 specifies only one instance in Section 10 where a right to claim survives in perpetuity. This cannot be expanded by reading into the section what is not contemplated therein.

(iii) The onus is on the party claiming acquisition of title through adverse possession to establish that it was in fact in possession. There is no evidence to indicate that Muslims lost possession of the suit property after the communal riot on 27.03.1934. On the contrary, the records indicate that Muslims continued in possession of the suit property. Therefore, there is no question of

any right, whatsoever, having been acquired against the Muslims by adverse possession even after 1934.

- *Karnataka Board of Waqf v. Government of India & Ors. (2004) 10 SCC 779 (Para 11-12)*
- *Ravinder Kaur Grewal and Ors. v. Manjit Kaur and Ors. 2019 SCC OnLine SC 975 (Para 25)*

The Suit No. 5 filed by the idol and Janam Bhumi do not satisfy any limitation requirement in this case. Therefore, applying Section 28 of the Limitation Act, 1908, the rights, if any, of the *Shebait,* as well as the Deity, in the suit property stood extinguished on the date of filing of their respective suits.

E. The cases cited by Mr. Parasaran, Sr. Adv. on limitation have been examined below:

(i) ***Subbaiya v. Mahamad AIR 1923 PC 175***

This is a case to recover property alienated by trustee for the trusts or debts by creating a subsequent trust to reverse the sale. The Court did not accept the argument the advent of a new trustee could create a new period of limitation (pp177-8). Article 134 dealt with recovery of possession including mortgage transferred by a trustee. Article 144 dealt with possession of immoveable property not provided for. Both carried a limitation of 12 years which had already gone passed. Section 10 for following trust property was also not available because in this case it fell within the exception that alienation was for valuable consideration.

(ii) ***Chattra Kumari v. Mohan Bikram AIR 1931 PC 196***

This concerned a widow to a Rajah claiming under a will and lease suing for rent of mortgaged property. The defendant filed a suit claiming all of the Rajah's property. The main issue was whether the defendant's title was barred by the limitation of 12 years under Article 144 for possession of any property where limitation was not provided for. The Court concluded that this Article 144 would not apply but the residuary Article 120 which would apply and Section 10 was not attracted either. The Court held that the rent suit would succeed and the defendant's suit would fail. Rejecting the argument that there was a continuing trust in the defendant in place of the Rajah, the Court observed:

'The Indian law does not recognize legal and equitable estates: Juttendromohun Tagore v. Ganendromohun Tagore (1872) L.R. I.A. Sup. Vol. 47, 71 and Webb v. Macpherson (1903) L.R. 30 I.A. 238, 245, s.c. 5 Bom. L.R. 838. By that law, therefore, there can be but one "owner," and where the property is vested in a trustee, the "owner" must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882: see Sections 3, 55, 56, etc. The Act was only extended to Bengal in 1913, and it has been assumed at the bar that it would accordingly have no application to the present ease. Their Lordships are not satisfied that this is necessarily correct having regard to the saving clause at the end of a 1 of the Act, but they think that the question is of no importance in the present case, as the material provisions of the Act only embody the principles upon which the law has been administered in India from very early times. The trustee is, in their Lordships' opinion, the "owner" of the trust property, the right of the beneficiary being in a proper case to call upon the trustee to convey to him. The enforcement of this right would, their Lordships think, be barred after six years under Art. 120 of the Indian Limitation Act, and if the beneficiary has allowed this period to expire without suing, he cannot afterwards file a possessory suit, as until conveyance he is not the owner. It is clear that such a trust as is relied upon in the present case would not fall within Section 10 of the Indian Limitation Act, as it would be impossible to hold that the properties which vested in the appellant under the terms of the wills which have been proved were so vested for the specific purpose of making them over to the respondent.'

Thus fanciful claims by a supposed trustee as owner are not to be accepted.

(iii) ***Jagajit Singh v. Partab Bahadur AIR 1942 PC 47*** is a case directly on property in the hands of the Receiver under Section 145 of the Cr.P.C. The defendant appellant that he was the 'rightful proprietor' against the Raja of Kapurthala. This was also a case

where the Deputy Magistrate had consigned the case to the records. On limitation, the Court observed:

> *"With regard to the statutory period of limitation, Article 47 does not apply as there is no order of possession by the Magistrate under Article 145 Criminal Cr. P.C. as the suit is one for declaration of title, it seems clear that Article 142 and 144 do not apply, and their Lordships agree with the Chief Court that the suit is governed by Article 120.'*

On the issue of adverse possession the Court observed:

> *"... it is well established that adverse possession against an existing title must be actual and not constructive"*

(iv) In ***Yeshwant v. Walchand (1950) SCR 852*** (a case of alleged fraud), the Court warned against breaking up a right into different smaller rights (at 862-3)

> *" The right to apply for execution of decree, like the one before us is a single indivisible right, and not a composite right consisting of different smaller rights based on the decree holders remedies...To give such a meaning would be to split up the single right into parcels ... We would then be face to face with different periods of limitation as regards one and the same decree"*

The Court also reminded that (at p. 868)

> *" While the courts necessarily are astute in fraud checking or fighting fraud, it should be borne in mind that statutes of limitation are statutes of repose"*

(v) ***Srinivas v. Mahabir (1951) SCR 277*** concerned a suit for specific performance while the defendant claimed the consideration was a loan. The plaintiff was awarded a decree of the amount paid with interest. The Court allowed the alternative prayer because the defendant had admitted and relied on it as a defence. Relying on the Privy Council in Raja Mohun's case (1942-43) 70 IA 1, the Court held that any alternative plea should not prejudice the Respondent (at. 282-3).

(vi) ***Bhinka v. Charan Singh (1959) Supp, SCR 798*** deals with a situation concerning Section 145 of the Cr. P. C. and a claim by

the Zamindar under the UP Tenancy Act 1939. The Court discussing the import of Section 145 Cr.P.C., which Mr. Parasaran in the present case relied on the first paragraph on page 808, held that there could be possession if they were not in possession before on the date of the Section 145 Cr.P.C .

But he omitted to read the following on the illegality of the possession (on p. 808-9):

> *"If the appellants did not did not take possession of the disputed lands, did they retain possession ...The dichotomy between taking and retaining indicates that they are mutually exclusive apply to two different situations. The word 'taking' applies to a person taking possession of a land otherwise than in accordance with the provisions of the law while the word 'retaining' to a person taking possession in accordance with the provisions of the law but subsequently retaining the same illegally. So construed, the appellants' possession of the lands being illegal from the inception, they could not be described as persons retaining possession of the said lands in accordance with the provision of any law for the time being in force"'*

But, the Court went one step further (p.809)

> *"But the contention may be negative on a broader basis, Can it be said that the possession by virtue of an order of a Magistrate under the provisions of s. 145 of the Criminal Procedure Code is one in accordance with the provision of the law for the time being in force. It appears to us that the words 'possession in accordance with the law for the time being in force' in the context can only mean possession for the time being in force"*

What follows is that if the Nirmohi Akhara claimed possession in their Suit No. 3, they would have to establish a foundation for this to be legal possession. Without any such factual foundation, no relief in this regard can be super-added. This is in addition to the submission that no such claim for possession was even asked for.

(vii) ***Rukhmabai. Lal Laxminarayan (I959) 2 SCR 253*** concerned raising a new point based on facts and law without a foundation in the pleading in a joint family matter. While holding that the documents on which the right was claimed were sham, the Court observed that a new plea could not be raised if not raised before the District Court and the pleadings were not amended:

> *"The appellant did not take this plea in the written statement; nor was there any issue in reslect thereof, though as many as 12 issues were raised; nor does the judgment of the learned District Judge disclose that the appellant raised any such plea. For the first time the plea ...was raised before the High Court, and even then the argument was that the consequential relief should have been for partition...(which he should have asked for as ruled by the High Court) ...It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for this question should have been raised at the earliest point in time in which event the plaintiff could have asked for necessary amendment to comply with the provision of Section 42 of the Specific Relief Act. In the circumstances we are not justified in allowing the appellant to raise the plea before us"*

This is relevant for both the question of 'continuing wrong' (which was not raised) or possession (for the purposes of limitation) which was just a word in the plaint not grounded in any manner in the petition itself.

However, the Court allowed the plea of limitation to be raised because (at 286)

> *"no further facts ... would have to be proved in of this plea."*

Thus unequivocal foundation facts are needed in the original plaint to sustain a new plea.

The Court considered the application citing Sir Benod Mitter: (at p287)

> *"There can be no 'right to sue' until there is an of the right asserted in the suit its infringement or at least a clear and*

unequivocal threat to infringe that right , by the defendant against whom that suit is instituted"

The Court then observed (at 288) :

"The legal situation may be briefly stated thus: The right to sue under Section 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be cannot be considered to be a clear and unequivocal threat so as to compel him to file the suit. Whether a particular threat gives rise to a compulsory cause of action depends on the question whether that threat effectively invades or jeapordizes the said right"

It is thus clear that an unequivocal foundation has to be raised to support a relief which has, perforce, been raised in the High Court.

(viii) ***Raju Ram Maize Products v. Industrial Court of MP (2001) 4 SCC 492*** simply says that the time of limitation under the M.P. Industrial Relations Act 1960 of two years began when the cause of action was complete, and calculates this from specific dates. The Court observed that there was no recurring cause of action (pr 9, 10 and 11)

"9. ...Therefore, even taking that two years' period from the date of the dispute either taking the date on which when they were refused work when they made a demand that they should be allowed to do work with Dushyant Kumar or when they made a demand after the order made by the Labour Court on an interim application directing them to resume work or calling off the strike, the applications filed are beyond the period of limitation prescribed under Section 62 of the Act.

10. The concept of recurring cause of action arising in a matter of this nature is difficult to comprehend. In Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan1 it was noticed that a cause of action which is complete cannot be recurring cause of action as in the present case. When the workers

demanded that they should be allowed to resume work and they were not allowed to resume work, the cause of action was complete. In such a case the workers going on demanding each day to resume work would not arise at all. The question of demanding to allow to do work even on refusal does not stand to reason.

11. In that view of the matter, we think that the High Court and the Labour Court fell into an error in analysing and understanding the matter. In this view, we think the view taken by the Industrial Court to the extent that the cause of action had commenced at any rate on 1-3-1986 is correct. Reckoning from that date, the period of limitation of two years had been over by the time the applications were filed."

F. Conclusion:

a) Section 10 of the Limitation Act does not apply to this case.

b) Suit No. 5 could not have been filed when the deity was being well represented through its shebait and there is no grievance against the shebait whose removal has not been sought. There is no alienation pursued.

c) The defence of perpetual minor cannot help the Plaintiffs in Suit No. 5 for the reason that the deity was already represented by the shebiat and a suit can be filed by a worshiper, as a next friend, only when the shebait is found to have been acting adversely to the interest of the deity. However, no such allegation has been made by the next friend against the shebait.

d) It is settled law that a deity is not a minor for the purpose of limitation.

e) Therefore, under any circumstance, Suit 5 was not maintainable as there was no cause of action for filing of Suit No. 5, even otherwise, whichever provision of the Limitation Act is applicable, Suit No. 5 would be barred by limitation.

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shown to be the property of accused 2. P. Ws. 1, 2 and 4 admitted before the committing Court that the aruval M. O. 5 belonged to their household and that it was missing after the Sunday. Though they have withdrawn these statements too, we think they are almost certainly true. The aruval has its handle wound with rope and tied with cloth, and its identity could not have been mistaken by any person familiar with it. Briefly to summarise the evidence against accused 1 it shows that he was aware of the large sum of money in notes which the deceased had on his person and that he accompanied him when at about 2 a. m. he set out for the railway station. The deceased was not afterwards seen alive, and it is beyond doubt that he was murdered that night somewhere near Arrankuttai. The presence of the body in the tank was discovered on the following Wednesday and on Thursday accused 1 disappeared from the village. Until he incautiously wrote the letter Ex. FF from Rangoon his whereabouts were unknown. When he was arrested on board the ship at the Madras harbour by P. W. 46 he had in his possession a large sum of money not accounted for. Lastly an aruval belonging to the accused's household was found in the tank. We think that these circumstances afford sufficient corroboration of the truth of the admissible statements of accused 2 incriminating accused 1 to justify his conviction for murder. Against accused 2 we have these confessional statements which are rendered more cogent by the fact that they were made as a means to an end—to obtain help to conceal the body. It is also proved that money was extorted from him on the strength of these revelations. We have then the recovery of M. O. 5 through his instrumentality and of the money. We think that he too upon this evidence has been rightly convicted. We accordiygly confirm the convictions and sentences and dismiss the appeal.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. 1935 Madras 483

CURGENVEN AND CORNISH, JJ.

Palaniandi Gramani Manickammal — Appellant.

v.

V. Murugappa Gramani—Respondent.

Original Side Appeal No. 82 of 1933

Decided on 15th January 1935, from judgment of Chief Justice, D/- 8th May 1933.

(a) Religious Endowment—Private religious endowment—It can be converted in secular property only with consent of all male and female relations of founder interested in charity.

A private religious endowment can be converted into secular property only with the consent of all the male and female relations of the founder interested in the charity. [P. C 2]

(b) Religious Endowment—Person appointed to act as manager of endowment though not strictly trustee is for purposes of S. 10 Limitation Act, in position of express trustee—Limitation Act (as amended in 1929), S. 10.

Neither under the Hindu law nor in the Mohamedan system is any property 'conveyed' to a shebait or 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 manager with certain beneficial interest regulated by custom or usage. However for the purpose of S. 10, Lim. Act, a manager of a religious endowment is in the same position as an expresss trustee : 1934 *P C* 77 and 1922 *P C* 123, *Ref.* [P 485 C 1]

(c) Adverse Possession—Express Trustee cannot prescribe for title by adverse possession against his beneficiary—But stranger taking possession of same can acquire title by adverse possession—Trusts.

An express trustee cannot prescribe for a title by adverse possession against his beneficiary, and, of course, the trustee's legal representatives or assigns (without valuable consideration, are in no better position than the trustee himself. But the rule does not prevent a stranger to the trust, who takes possession of the trust property independently of the trustee, from acquiring title by adverse possession. [P 485 C 1, 2]

(d) Adverse Possession—Possession of property dedicated to idol adverse to manager of idol is adverse to idol—Religious Endowment.

Possession adverse to the manager of property dedicated to an idol is adverse to the idol, and will extinguish the idol's right to the property : 32 *Cal* 129 (*P C*) and 37 *Cal* 885 (*P C*), *Ref.* [P 486 C 1]

Ramaswami Ayyangar, *Srinivasa Varadachari* and *V. S. Ranga Chari*—for appellant.

V. C. Gopalaratnam and *C. Pattabhirama Ayyangar*—for Respondent.

Cornish, J.—The appellant is defendant 4 in the mortgage suit brought by the appellant in O. S. Appeal No. 87, of

1933. The mortgage was executed by one Appadurai Gramani, the father of defendants 1-4, and by defendants 1-3, and Appadurai also executed it on behalf of defendant 4 who was then a minor. The mortgage comprised a plot of land which Appadurai's father, Tanikachala, had dedicated to a private temple built by Thanikachala on the land. The first three defendants were ex parte. But defendant 4 defended the suit. In his written statement he raised the plea (inter alia) that the particular plot having been dedicated to charity could not be bound by the mortgage. The learned Chief Justice who tried the case permitted the plaintiff-mortgagee to file an additional statement wherein the plaintiff pleaded that Appadurai and his sons had acquired title to the plot by adverse possession and that they were therefore competent to mortgage it. The learned trial Judge found that a title by adverse possession had been acquired. The correctness of this finding is the subject of this appeal.

Tanikachalla made a will a few years before his death. This attempt to dispose of his property was objected to by his sons, and led to the matter being submitted to a panchayat. The panchayatdars made their award (Ex 4). The award recites that a garden of 6 cawnies had been dedicated to charity by Tanikachalla for the performance of puja at the temple which he had built there and at the samathi or tombs in the garden and for the feeding of 100 pandarams at Tirupporur, and that his sons had consented to the endowment. The award was given in March 1893. In May following Tanikachalla put up a stone in the garden with an inscription Ex. 3 (a) stating that he had built a temple and had made a private dharmam arrangement and that no member of his family had any right to alienate the property. In December 1893 he executed a registered deed of gift (Ex. 7). This deed recites:

"I have built a Kanniaka parameswara temple; and have been doing puja. To this temple I have made a gift."

And then it provides that he and his wife Manonmani were to have the conduct of the charity, viz. the puja at the temple and the feeding at Tirupparur, during their lifetime. It further recited:

"On our death, we shall be buried in the abovesaid garden and tombs built and puja shall be done to these tombs also, by Raju Gramani, the son by the third wife, whom we have appointed from among our sons in our last days, and if he happens to die without issue, such person as may be appointed by him from among the sons of my other sons shall conduct the abovesaid dharma Kainkaryams."

Tanikachalla died in May 1896, and Manonmani became entitled under the deed to the management of the endowment. His sons however whose consent to the dedication had been obtained in the panchayat award, lost little time in tearing up that treaty. In February 1897, they entered into a partition deed by which they divided up their father's properties, including the endowed garden, this last named piece of property being allotted to Appadurai. The mortgage, namely the suit mortgage, of this property was made in November 1922, more than 25 years after the partition. It has been suggested in the argument that it was competent to the family to put an end to what was a private family endowment, and that the partition must be regarded as effecting this result. If this contention is sound, there is an end of the case. But we think it cannot be maintained. Assuming that as a private religious endowment, it was one which could be converted into secular property, by the consensus of the whole family, this could only be done with the consent of all the male and female relations of the founder interested in the charity: (see Golapchandra Sarkar Sastri's Hindu Law, Edn. 7, p. 860). Manonmani, as the appointed manager of the endowment, was interested in the charity and her consent would be necessary to the termination of it. But there is no evidence that she consented to or was consulted upon the partition of the property. She was not a party to the partition deed, and all that she has done is to put her mark in witness of the execution of it by Appadurai and his two brothers. That will not be proof of her consent to the contents of the deed. The question then remains whether at the date of the suit mortgage Appadurai and his co-mortgagors had obtained a title to the endowed property by adverse possession.

It is clear from the document (Ex. 7), that there was a complete dedication of the land to the temple or to the idol

located therein. There was no conveyance in trust to any person on behalf of the idol. There was consequently no "trustee" in the strict sense of the word, appointed. The appointment made in the deed of Tanikachalla himself and of Manonmani and then of Raju, was the appointment of persons who were to act as managers of the endowment. The distinction between a person so appointed and a "trustee" has been pointed out by their Lordships in 44 Mad 831 (1) at p. 843, where they say:

> "Neither under the Hindu law nor in the Mahomedan system is any property "conveyed" to a shebait or 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 manager with certain beneficial interests regulated by custom or usage."

We think that the deed (Ex. 7) vested the legal estate in the idol. The only right with which the manager was invested was the right to manage the garden and to spend the balance of any profit derived from it on the puja and charity. However, for the purpose of S. 10, Lim. Act, a manager of a religious endowment is in the same position as an express trustee. This is the effect of the amendment introduced by way of an exception to S. 10 by the Indian Limitation (Amendment) Act of 1929. The Exception says:

> "For the purposes of the section any property comprised in a Hindu religious or charitable endowment, shall be deemed to be property vested in trust for a specific purpose, and the manager shall be deemed to be the trustee thereof."

The amended section was in force when this suit was brought, and therefore would be applicable to the suit: 1934 P C 77 (2). Under S. 10 no length of time will bar a suit against an express trustee or his legal representative, or assigns (not being assigns for valuable consideration) for the purpose of following the trust property in his or their hands. The rule is that an express trustee cannot prescribe for a title by adverse possession against his beneficiary, and, of course, the trustee's legal representatives or assigns (without valuable consideration) are in no better position than the trustee himself. But the rule does not prevent a stranger to the trust, who takes possession of the trust property independently of the trustee, from acquiring title by adverse possession. These propositions are indisputable. It has been contended that Appadurai was the legal representative, not of Manonmani in whom the management of the endowed property vested on Thanikachalala's death but of Thanikachala, the original manager or "trustee". There is no substance in this contention. There is no evidence that on Thanikachala's death Manonmani renounced the management. It is not to be assumed that she did. She was de jure manager. Whether she carried on the duties of the management in the brief interval between her husband's death and the partition of the property by her step sons there is no evidence to show, and there was not likely to be, any evidence after the lapse of so many years. Manonmani survived till 1918. Appadurai as a son and heir of Thanikachala might be his legal representative in respect of his separate property; but he had no locus standi to represent Thanikachala in respect of the endowed property vested in the idol and of which Manonmani was the appointed manager.

The substantial argument is that Appadurai must be regarded as having taken the property subject to the "trust" and that he was consequently in the position of a trustee de son tort. There can be no doubt that if Appadurai took the endowed land subject to the "trust" he would be subject to the disabilities of an express trustee, including the inability to acquire a title to the trust property by adverse possession. Thus, in 2 Q B 390 (3) Lord Esher said:

> "The cases seem to decide that where a person has assumed, either with or without consent, to act as trustee of money or other property, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee."

In the argument reliance has been placed on the statements in the partition deed that the puja at the tomb and in the temple would be performed by

1. Vidya Varuthi v. Baluswami Ayyar, 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
2. Mt. Allah Rakhi v. Shah Muhammad Abdur Rahim, 1934 P C 77=147 I C 887=61 I A 50=56 All 111 (P C).
3. Soar v. Ashwell, (1893) 2 Q B 390=42 W R 165=69 L T 585.

Appadurai and Raju Gramani. There is no mention made of the feeding of Pandarams at Tirupparur. And the conclusion which we have been invited to draw is that the brothers were undertaking the duties of the "trusteeship'. We think that these pious resolutions in the partition deed signified nothing. It is apparent from the evidence that beyond the father's annual ceremony—which is a duty common to Hindu sons—none of the charities, puja or feeding, instituted by Thanikachala were performed from the moment that Appadurai usurped possession of the endowed property. Neither he nor his brothers assumed to act as "trustee" of the property. On the contrary, their conduct shows that they took the earliest opportunity of making an end of the charities.

Turning to Appadurai's conduct with regard to the dedicated property taken by him on the partition, there is evidence that he mortgaged it in 1909 and again in 1914. In 1915 he filed his Insolvency Petition in which he included among his assets this same property, claiming 1/5th share in it, he having four sons then living. All these acts were quite inconsistent with his recognising any title to the property remaining in the idol or any right of Manonmani to manage the property. It is impossible to believe that Manonmani was not aware of the use to which Appadurai was putting the property. In our opinion the evidence establishes that his possession became adverse from the time of the partition deed, and accordingly a title by prescription had been obtained by him to the property long before the suit mortgage was executed. Possession adverse to the manager of property dedicated to an idol is adverse to the idol, and will extinguish the idol's right to the property: 32 Cal. 129 (4) and 37 Cal. 885 (5).

But it has been contended on the strength of 6 Ch 428 (6), that the presence of the inscribed stone (Ex. 3-a) in the garden is compatible with an intention to hold the property adversely to the idol. In that case a vendor had filed a bill for specific performance of a contract to purchase a house. The purchaser's objections to title had been overruled; but he then discovered on a wall of the property an inscription stating that the title was in the East India Company. It was held that the vendor had not a good title. The Lords Justices observed:

"When there is a boundary wall and that boundary wall remains undisturbed, and an inscription is allowed to remain in it as evidence, or as a statement to all the world that it is the boundary wall of the adjoining proprietor, it seems to us idle to suppose that any question of the statute of Limitations, or of adverse possession, or of cesser of possession, could properly arise."

The facts in the case before us are very different. There is evidence that the stone was removed from its original position in the garden when some of the land had been compulsorily acquired, and had been put up in another place. The circumstances that the stone continued to be set up in the garden appears to us to have no more significance than the circumstances that the tombs and the temple were left untouched. It is apparent from the other evidence that Appadurai and his brothers deliberately ignored it and its purpose.

We accordingly agree with the finding of the learned trial Judge that Appadurai had acquired a title to the property in question at the time of the suit mortgage, and we dismiss the appeal with costs.

C.R.K./K.S. *Appeal dismissed.*

4. Jagadindranath Roy v. Hemanta Kumari Debi, (1905) 32 Cal 129=31 I A 203=8 Sar 698 (P C).
5. Damodar Das v. Lakhan Das, (1910) 37 Cal 885=7 I C 240=37 I A 147 (P C).
6. Phillipson v. Gibbon, (1871) 6 Ch 428 at 433=40 L J Ch 406=19 W R 661=24 L T 602.

** A. I. R. 1935 Madras 486
(Full Bench)

BEASLEY, C. J., RAMESAM, MADHAVAN NAIR, CURGENVEN, CORNISH, BURN AND PANDRANG ROW, JJ.

Emperor

v.

M. Ramanuja Ayyangar—Accused.

Criminal Misc. Petn. No. 910 of 1934, Decided on 5th November 1934.

(a) **Letters Patent (Madras) Cl. 26—Judge allowing alleged inadmissible evidence—No objection taken either at time of giving evidence or when Judge referred to it in summing up to jury—There is no 'decision' on point of law—Word 'decision' does not cover cases where Judge has never applied his mind to the matter and pronounced opinion on it (Per *F. B.*; *Madhavan Nair and Curgenven, JJ., Contra*).

Per *Full Bench* (*Madhavan Nair* and *Curgenven, JJ., Dissenting*).—The word 'decision' in Cl. 26 should not be made to cover a case

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be said on behalf of the other view which has not already been said. We agree with the decision on this further ground. The ordinary meaning of "to pre-empt" is to purchase in preference to others, and pre-emption is the effect of the purchase. The vendee, if he is successful, does in fact pre-empt and is, therefore, properly spoken of as a person claiming pre-emption. Whereas "the right of pre-emption" is spoken of in other parts of the Act, in this particular sub-section the word used with reference to what is being claimed is simply pre-emption. We are further of opinion that this interpretation satisfies another test, namely, the true construction of section 10 where it is quite obvious that the expression "equal" or "inferior" right of pre-emption is used with reference to the vendee. It has been found that the plaintiff is related to one of the vendors and the husband of the other vendor within four degrees. The wajib-ul-arz filed shows that the property in question was obtained by one of the vendors and the husband of the other vendor from their fathers, respectively, who were own brothers. The appeal must be allowed and the suit decreed.

Appeal allowed.

MISCELLANEOUS CIVIL.

1925 December, 23.

Before Mr. Justice Dalal and Mr. Justice Boys.

CHITAR MAL (PLAINTIFF) *v.* PANCHU LAL AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 *(Indian Limitation Act), section 7; schedule I, article 144—Adverse possession—Idol—Alienation of property belonging to an idol.*

An idol is under no disability of the kind referred to in section 7 of the Indian Limitation Act, 1908; and if property

* Miscellaneous Case No. 668 of 1925.

belonging to it be alienated by the manager, adverse possession runs against the idol just as against any other person. *Damodar Das* v. *Lakhan Das* (1) and *Jagadindra Nath Roy* v. *Hemanta Kumari* (2), referred to.

THE facts of this case were as follows :—

Two brothers, Ram Narain and Jai Narain owned a house in a street in Ajmere in equal shares. Jai Narain made a gift of his share on the 9th of January, 1903, to the idol of Shri Chaturbhujji Maharaj installed in a temple in Ajmere. Under the deed of endowment he gave directions as to the use to be made of the income derived from the rent of half the house. The defendant Musammat Bishni is widow of a son of Ram Narain. On the 17th of April, 1905, the managers of the temple sold the gifted portion of the house to Musammat Bishni. On the 5th of December, 1918, plaintiff, son of Jai Narain who was dead at the time, sued for a declaration that the property in suit consisting of half the house formerly owned by his father was trust property; that the transfer of the said property to Musammat Bishni and her adopted son Panchu was null and void and that the property might be made over to the trustees of the temple of Shri Chaturbhujji after dispossession of the two defendants Nos. 1 and 2.

The defendants were Musammat Bishni, her adopted son Panchu and 11 other persons of the Agarwal-Marwari community of Ajmere who are described in the plaint as "panchas" of the Biradri (brotherhood) of the Agarwal-Marwaris of Ajmere. The allegation in the plaint of transfer to both Musammat Bishni and her adopted son was incorrect. The sale was made in favour of Musammat Bishni alone, the adoption having taken place subsequent to the date of sale.

(1) (1910) I.L.R., 37 Calc., 885. (2) (1904) 31 I.A., 203.

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The suit was instituted more than 12 years after the date of sale, so it was pleaded in paragraph 11 of the plaint that under the provisions of section 10 of the Limitation Act the bar of limitation was saved. This plea was decided against the plaintiff and the reference to us does not cover that point.

The plaintiff, having lost his case in two Courts in Ajmere, asked for a reference to the High Court under section 17 of the Ajmere Courts Regulation, No. I of 1877.

On this reference—

Dr. *Surendra Nath Sen*, for the applicant.

Dr. *M. L. Agarwala* and Munshi *Panna Lal*, for the opposite parties.

The judgement of the Court (DALAL and BOYS, JJ.), after setting forth the facts, thus proceeded :

The statement submitted by the learned Additional District Judge has referred to us the following questions for decision :—

(1) Whether the deed, dated the 17th of April, 1905, could constitute an alienation of the dedicated property (waqf) which was under the management of the Marwari faction of the *biradri* of Agarwals at Ajmere and thereby give rise to adverse possession.

(2) Whether respondent No. 1 could acquire any title to the said property.

(3) Whether in the circumstances of the present case respondent No. 1 could claim the benefit of the law of limitation, especially in view of paragraphs 1 and 2 of the written statement.

We shall take up issue No. 2 first, according to the sequence in which the case was argued by the plaintiff's learned counsel Dr. *Sen*. He argued that an idol suffered the disability of perpetual minority,

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so any suit by an idol at any period of time after the date of the transfer would be saved from the bar of limitation under the provisions of section 7 of the Limitation Act. He based his argument on a tentative opinion put forward by the learned author of a treatise on Hindu Law (Sastri's Hindu Law). At page 726, Chapter XIV of his book, 5th edition, the present editor of the book has made the suggestion in the following words :—

"As regards limitation it should be considered whether section 7 of the Limitation Act is not applicable to a suit to set aside an improper alienation by a sebait of the property belonging to a Hindu god. As the god is incapable of managing his property he should be deemed a perpetual minor for the purpose of limitation."

We were not referred to any ruling where this opinion may have been followed. With respect, it may be pointed out that in a transfer by a minor the question of a proper or improper alienation would not arise. Under the Contract Act a transfer by a minor would be void and not only voidable : *Mohori Bibee* v. *Dharmodas Ghose* (1). If the rule were enforced the property of a god would not fetch any money in the market when need arose to transfer it for the benefit of the temple where the idol may be installed. The learned editor himself has quoted in the book a pronouncement of their Lordships of the Privy Council in conflict with this view, *Jagadindra Nath Roy* v. *Hemanta Kumari* (2). In that case a suit for possession was brought by a sebait of an idol and the High Court of Calcutta held that the idol being a juridical person, capable as such of holding property, limitation started running against him from the date

(1) (1902) I.L.R., 30 Calc., 539. (2) (1904) 31 I.A., 203.

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of the transfer and so the suit by the sebait was time-barred. Their Lordships accepted this view as probably the true legal view when the dedication is of the completest kind known to the law (page 209, paragraph 3). They, however, held that limitation was saved because when the cause of action arose the sebait, to whom the possession and management of the dedicated property belonged, was a minor. So the right to bring a suit for the protection of the property was at the time vested in a minor and such a suit could be brought within three years of the majority of the sebait in whom the right to sue had been vested. This is clear authority for holding that the idol was not considered by their Lordships to be a minor in perpetuity. In a later ruling this point is made more clear. That ruling is also quoted by the editor of Sastri's Hindu Law with great fairness: *Damodar* v. *Lakhan Das* (1). The senior chela and rightful mahant of a math transferred half the property of the math to another chela. When the senior chela was succeeded by his disciple, the latter brought a suit for recovery of possession against the chela to whom his predecessor had transferred half the property. The suit was brought 12 years after the transfer and was held by their Lordships to be time-barred. They observed: "The learned Judges of the High Court have rightly held that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the mahant, but in the legal entity, the idol, the mahant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the *ekrarnama* the possession of the junior chela by virtue of the terms of that *ekrarnama* was adverse to the right of the idol and of the

(1) (1910) I.L.R., 37 Calc., 885.

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senior chela as representing that idol and that therefore the present suit was barred by limitation." (page 894). We have clear authority, therefore, in refusing to accept the plaintiff's argument.

[The judgement then proceeded to deal with the other two issues which are not material for the purpose of this report.]

For these reasons our answers to the questions put to us by the learned Additional Judge are :—

(1) That the transfer of the 17th of April, 1905, was an alienation which started adverse possession in favour of Musammat Bishni.

(2) That Musammat Bishni could acquire title to the property under the deed and by adverse possession.

(3) That by her admission of paragraphs 1 and 2 of the plaint Musammat Bishni was not estopped from putting forward a plea of limitation.

A copy of this judgement shall be sent to the court which made this submission and the costs consequent on the reference here shall be costs in the appeal out of which the reference arose. The costs will be payable by the plaintiff.

APPELLATE CIVIL

1926
January, 4.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Lindsay.

JAI NARAIN (DEFENDANT) *v.* JAFAR BEG AND ANOTHER (PLAINTIFFS).*

Acquiescence—Equitable doctrine of—Building on the land of another—Circumstances disentitling owner to claim demolition.

In order that the protection of the equitable doctrine of acquiescence may be successfully claimed, the following circumstances must subsist :—

The party claiming the benefit of the doctrine must have made a mistake as to his legal rights and must have

* Appeal No. 90 of 1924, under section 10 of the Letters Patent

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DAMODAR DAS . . . . . PLAINTIFF ; J. C.*

AND 1910

ADHIKARI LAKHAN DAS . . . . . DEFENDANT. *March* 2 ; *June* 7.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Debottar Estate—Adverse Possession—Limitation.

Where debottar property was vested in an idol and managed by the mahant, on whose death his two chelas, represented by the plaintiff and defendant, settled a disputed right to succession by an ikrarnama in 1874 under which each chela obtained possession of the share of debottar properties allotted to him :—

Held, in a suit brought in 1901 to eject the defendant from the properties allotted to him, that his possession thereof was adverse to the idol and also to the plaintiff, and that the suit was barred by limitation.

APPEAL from a decree of the High Court (June 6, 1905) reversing a decree of the Subordinate Judge of Cuttack (September 30, 1902) and dismissing the appellant's suit.

The suit was brought on July 17, 1901, by the mahant and shebait of the Sadabrata math or temple of the Thakur Sri Gopal Jiu at Bhadrak, in the district of Balasore, to eject the respondent from certain properties at Bibisarai, movable and immovable, set forth in the schedule to the plaint, and alleged by the plaintiff to be part of the debottar and marfatdari property of the idol, and as such dedicated to and required for the purposes of its worship and service.

It was further alleged by the plaintiff that Sriram Das, his predecessor, mahant and shebait of the Thakur and math at Bhadrak, on succeeding to the office of mahant, had in the course of a dispute and litigation with the defendant, who claimed to be the successor to the said office, entered into an agreement with the defendant whereby the said properties were to be held by the defendant as an adhikari or manager for purposes set forth in the ikrarnama executed by the said parties on November 3, 1874, and subordinate to the said Bhadrak math. And he submitted that the properties in dispute, being part of the debottar

* *Present* : LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

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property of the said Thakur, could not be validly assigned or dealt with by the mahant Sriram Das so as to affect the right of the Thakur, and that in any event no such arrangement could be operative beyond the lifetime of Sriram Das, and that upon his death the ikrarnama and the arrangements thereunder lapsed and became ineffective. He also alleged that the defendant was unfit for the post of an adhikari, and that owing to his habit of misappropriating the profits of the debottar properties he was not fitted to be in possession of them. His cause of action was stated to have accrued upon the death of his predecessor, Mahant Sriram Das, on the 5th Sraban, 1296, corresponding with July 18, 1889. The plaint prayed, inter alia, for a declaration that the disputed property was debottar as alleged, and that the ikrarnama was illegal and invalid, and for possession of the said property with mesne profits.

The respondent set up limitation as his defence, claiming that neither the plaintiff nor his predecessor had been in possession of the disputed property within twelve years prior to the institution of the suit. He denied that the plaintiff's predecessor had died on the 5th Sraban, 1296 (July 18, 1889), as alleged, and stated that he had been in adverse possession of the properties in suit from November 3, 1874, the date of the said ikrarnama, and that an absolute right had accrued to him, extinguishing the alleged rights of the plaintiff and his predecessor, Mahant Sriram Das.

The Subordinate Judge found that Sriram Das died on July 18, 1889, and that therefore the suit was not barred by limitation. As to the third issue, he found that the defendant had obtained possession under the ikrarnama, and that the onus lay upon him to shew how and when that possession became adverse to the mahant of the Bhadrak math, and that he had not so shewn. He held that there was no evidence of adverse possession. He gave the plaintiff a decree for possession of the disputed properties with mesne profits from the date of the suit, with costs.

The High Court reversed this decree. The material passage of its judgment is as follows :—

"If the plaintiff claims to be the successor of Sriram Das, he certainly cannot recover the Bibisarai math, for the

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ikrarnama provides that neither Sriram Das nor any of his heirs shall ever disturb the possession of the defendant in the Bibisarai math. On the other hand, if the plaintiff sues merely as the trustee of the idol, to whom the two maths in strict legal intendment belong, he is met by the plea of the defendant's adverse possession of twenty-seven years. We think there can be no doubt that the defendant held the disputed math adversely for more than twelve years even before the death of Sriram Das. This is apparent from Exhibits 10, 11, and 12, in which the defendant claimed in February, 1877, to hold the math by right of inheritance, though he admitted that possession was made over to him under the ikrarnama of 1874. Sriram Das died in July, 1889, more than twelve years after the above claim. Furthermore, it would appear from the Privy Council decision in the case of *Gnanasambanda Pandara* v. *Velu Pandaram* (1), that the plaintiff and his preceding shebaits are not in the position of the holders of life estates, and that the plaintiff is not entitled to contend that his right to sue accrued to him only on the death of Sriram Das, and that the possession of the defendant, which may have been adverse to Sriram Das, was not adverse to him. The decision of the Privy Council above alluded to is of higher authority than the ruling of this Court in *Arruth Misser* v. *Juggurnath* (2), on which the Subordinate Judge relies.

"Moreover, this Court in a comparatively recent case, *Nilmoni Singh* v. *Jagabandhu Roy* (3), has affirmed the principle laid down by their Lordships of the Privy Council in the decision above referred to, and has held that each succeeding manager or shebait of an idol does not get a fresh start, as far as the question of limitation is concerned, on the ground of his not deriving title from any previous manager. The ruling in this case is further direct authority for holding that the possession of the defendant has been all along adverse, and bars the plaintiff's claim, and the decision in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (4) also supports this view."

(1) (1899) L. R. 27 Ind. Ap. 69; I. L. R. 23 Madr. 271.
(2) (1872) 18 S. W. R. 439.
(3) (1896) I. L. R. 23 Calc. 536.
(4) (1878) I. L. R. 4 Calc. 327.

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A. M. Dunne, for the appellant, contended that the suit was not barred. The title to the properties was vested in the Thakur as debottar estate. Sriram Das as mahant was simply a manager thereof and had no title which he could validly assign. The terms of the ikrarnama did not purport to assign title or to confer on the respondent any rights beyond those of a manager of the debottar properties of the idol. The right so granted and the possession which followed were merely for the purposes of management subordinate to Sriram, and did not endure beyond the life of Sriram. There was no evidence of possession by way of title, adverse to the true owner, or unaffected by a trust in his favour with the duty of management. The onus was upon the respondent to shew how and when possession under the ikrarnama became adverse to the idol and to the appellant. Reference was made to *Gnanasambandha Pandara* v. *Velu Pandaram* (1) and *Nilmoni Singh* v. *Jagabandhu Roy*. (2)

The respondent did not appear.

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June 7.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a decision of the High Court of Calcutta, dated June 6, 1905, which overruled that of the Subordinate Judge of Cuttack, dated September 30, 1902.

The suit out of which the appeal arises was filed in the last-mentioned Court by the plaintiff appellant in his character as mahant of the math or temple of a Hindu deity at Bhadrak, in Balasore, and the object of the suit was to recover possession of certain properties situate at Bibisarai, in Jaipur, the suit being based upon the allegation that the properties were debottar property, dedicated to the worship and service of the plaintiff's Thakur, and held by the defendant as an adhikari in charge of what was said to be a subordinate math of Bibisarai.

The first Court decided in favour of the plaintiff. That decision was reversed on appeal by the High Court on the ground that the plaintiff's suit was barred by limitation. Their Lordships are of opinion that the learned judges of the High Court were right.

(1) L. R. 27 Ind. Ap. 69. (2) I. L. R. 23 Calc. 536.

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There is now no dispute as to any question strictly of fact. The former mahant was in possession of both maths and of the property annexed to them. He died leaving two chelas, between whom a controversy arose as to the right of succession to the maths and the property annexed to them. That controversy was settled by an arrangement embodied for the present purpose in an ikrarnama dated November 3, 1874, executed by Sriram Das, senior chela, in favour of the junior chela, described as Adhikari Lakhan Das, by which the math at Bhadrak was allotted in perpetuity to the elder chela and his successors, while the math at Bibisarai and the properties annexed to it were allotted to the younger chela and his successors, for the purposes connected with his math, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak math. The parties to the present suit stand in the place of the elder and younger chelas respectively.

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

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeared upon the hearing of the appeal, there will be no order as to costs.

Solicitors for appellant : *T. L. Wilson & Co.*

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1) 1 Cut 269
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PANIGRAHI AND NARASIMHAM JJ.

Radhakrishna Das — Appellant v. Radharamana Swami and another — Respondents.

A. F. A. D. No. 105 of 1943, Decided on 27th August 1948, from decree of Sub-Judge, Puri, D/- 8th May 1943.

(a) Hindu Law—Religious Endowment—Endowments in temples — Usual forms stated — Supplementary grants by other persons — When usually made stated.

Properties are usually endowed by Hindus for the performance of Pujas in a temple or for the performance of certain festivals therein or for the performance of Archanas to the deity in the name of the donor. In the first class of cases the endowment is utilised for conducting the necessary and vital part of worship and of the ritual in the temple. Ordinarily the Puja is not performed in the name of the donor and consequently supplemental grants are made for the purpose of the service being more efficiently performed. In the second class of cases where the grants are made for the purpose of Utsavas it is usual for others to supplement the funds either by making permanent grants of land or money or by yearly contributions towards the celebration of the festivals. In the third class of cases where the grants are made for performing Archanas in the name of the donor, either daily or on stated occasions, if the funds are not sufficient to meet the expenses, others will not come forward to supplement the resources. The Archana is intended solely for the benefit of the grantor: A. I. R. (2) 1915 Mad. 1003, *Ref.* [Para 8]

(b) Hindu Law — Religious sects—Vaishnabite sects—Origin and development traced. [Para 9]

(c) Hindu Law — Religious Endowment — Idol — Worship — Form of — Sankalpa for benefit of donor is not necessary preliminary unless grant is made for performing particular service.

Sankalpa for the benefit of the donor is not a necessary preliminary to the daily service of a deity unless the grant of land is specifically made for performing a particular service. Hence when the grant is devottar and is made for the service of the deity, there is no obligation on the manager to perform Sankalpa for the benefit of the donor, every day before offering "Bhog" to the deity. [Para 11]

(d) Hindu Law—Religious Endowment — Idol—Suit by next friend, for declaration of idol's right to revert to its original place of installation — Fact that next friend is disinterested is immaterial — Will of idol must be determined by Court in light of what is in best interest of idol — Civil P. C. (1908), O. 32, R. 1.

In a suit for a declaration that the alienation of the plaintiff deity and its installation elsewhere is against the will and the interest of the plaintiff deity and of its rights to revert to its original place of installation, the Court must determine whether it is the will of the deity to be so removed and whether it is in its interest to be so removed. It does not matter whether the "next friend" who brings the suit is wholly disinterested. [Para 12]

The will of the deity must be determined in the light of what is in the best interests of the idol. Where rival shebaits claim to represent the will of the deity in conflicting ways, the duty of determining what should be the will of the deity must ultimately devolve upon the Court. [Para 20]

Annotation: ('44 Com.) Civil P. C., O. 32, R. 1, N. 1.

(e) Hindu Law—Religious Endowment—Alienation — Estate of family idol can be alienated for legal necessity.

As a general rule, according to Hindu law, property given for the maintenance of religious worship is inalienable. But the manager of an endowment has the same powers as a guardian of an infant to incur loans for necessity and such loans will bind the idol's estate. Where the temple is a public temple the dedication may be such that the family itself could not put an end to it. But in the case of a family idol, the consensus of the whole family might give the estate another direction. The properties at one time devottar may by common consent of the whole family cease to be so and become secular property. It is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must in the nature of things be entrusted to some person as the shebait or manager. 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 properties, at least to as great a degree as the manager of an infant heir. The test is "the benefit of the idol". A shebait can borrow for legal necessity and for necessaries of the deity and bind the estate of the deity: *Case law relied on.* [Para 13]

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(f) Hindu Law — Religious Endowment—Idol—Legal status of — It is property and can be subject of gift—Right to be worshipped at particular place is intangible property — Idol can be subject of adverse possession and also acquire rights by adverse possession — Limitation Act (1908), S. 6, Art. 144.

There is no absolute prohibition against the gift of an idol. On the contrary, the gift of an idol under certain circumstances is considered a laudable act. [Para 13]

In the eye of law idols are property. Whether the idol can be regarded as movable or immovable property, the right to be worshipped at a particular place or by a person may be regarded as intangible property. A Thakur (idol) can be the subject of possession and adverse possession. The transfer of an idol under some circumstances cannot, therefore, be regarded as being opposed to law and may be upheld. [Para 13]

Idol is no doubt in a position of an infant as it can act only through a shebait or a manager. But he cannot be regarded as perpetual infant. Transactions by or against him will be governed by the Limitation Act. It is open to the shebait or any person interested in an endowment, to bring a suit to recover idol's property for devottar purposes. An idol can also acquire rights by adverse possession just as much as there can be adverse possession against the idol. An idol, therefore, is as much subject to the law of limitation as a natural person and cannot claim exemption on the ground that he is a perpetual infant. Consequently, the idol's right to be located at a particular place is not a continuing right. The right can be lost by adverse possession. *Case law relied on.* [Paras 14 & 15]

Annotation: ('42-Com.) Limitation Act, S. 6, N. 30; Arts. 142 and 144 N. 49.

(g) Limitation Act (1908), S. 23 — Continuing wrong — What amounts to, stated — Continuance of injurious effects and of legal injury, distinguished — Trespass amounting to complete ouster is not continuing wrong — Property of idol and idol itself taken possession of — It is not a continuing wrong.

If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance thereof, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. Where the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, a fresh action for the continuance lies in which recovery can be had for damages caused by the continuance of the tort to the date of the writ. Where the wrong consists in the omission of a legal duty, if the duty is to continue to do something, the omission constitutes a continuing wrong during the time it lasts. Where the wrong consists in an act or omission it must not be fleeting or evanescent like a slander uttered, but such as to produce a change in the condition of things which is a continual source of injury. There is a real distinction between continuance of a legal injury and continuance of the injurious effect of a legal injury. Thus, in the case of a bodily injury there is no continuing wrong as the injury ceases though the injurious effect may persist. In other words, there must not be a single wrongful act from which injurious consequences follow, but a state of affairs every moment's continuance of which is a new tort. The commonest examples of continuing wrong are found in interference with water supply and obstructions to rights of way and of light and air. Where adverse possession is claimed on the strength of the erection of a wall there is no continuing wrong within S. 23. The effect may continue but this does not extend the time of limitation. Where, therefore, a trespass amounts to a complete ouster the wrong is not a continuing one and successive actions will not lie on the principle of *interest rei publicae ut sitfinis litium*. The test in applying S. 23, is not whether the right is a continuing right but whether the wrong is a continuing wrong. Where the act or wrong is complete, S. 23 does not apply. [Para 16]

When the properties of the deity and the idol itself are taken possession of, the act which causes an encroachment of the idol's right is at once complete and there is no continuance of damage or wrong within the meaning of the statute. The effect of the damage may continue but this does not extend the time of limitation. When the wrong amounts to dispossession of the plaintiff then even although it may be a continuing wrong the plaintiff cannot recover possession after 12 years because under S. 28, he himself has got no right left which he can enforce. The real question is not whether the wrong is continuing or not, but whether the wrong amounts to a complete ouster of the plaintiff that is to his dispossession. *Case law relied on.* [Para 16]

Annotation: ('42-Com.) Limitation Act, S. 23, N. 2, 3 and 16.

(h) Civil P. C. (1908), S. 9 — Suit by worshipper against custodian of deity to locate it in particular place—Plaintiff not prevented from worshipping at place where deity is situated — Suit is not cognizable by Civil Court.

A suit by a worshipper, not based on any right to the property in the idol or to an office, against its custodians to locate it in a particular temple instead of in another, there being no allegation that the plaintiff is prevented from worshipping the idol at the latter temple, is not cognizable by the Civil Court : 32 Cal, 1072, *Rel. on.* [Para 19]

Annotation: ('44-Com.) Civil P. C., S. 9, N. 23, Pt. 8; N. 48, Pt. 5.

B. N. Das and S. Mohanty — for Appellant.

Sen Gupta and B. K. Pal — for Respondents.

Panigrahi J. — The circumstances leading to this litigation are not in controversy. The plaintiff, Thakur Sri Radharamna Swami, was admittedly the family idol of Ranganath Deb Goswami, defendant 2 in this case. The father of defendant 2 executed a 'kebala' dated 21st November 1909 transferring his shebayati right, the inam lands endowed for the service of the deity and the plaintiff idol itself to the Guru of the defendant 1 the then Mahant of Gangamatha Math at Puri, and put him in possession of the plaintiff deity. The Government of Madras restmed the inam grant on 4th November 1921 as it had been alienated, and the purpose of the grant had failed. Defendant 2 thereupon applied to the Government of Madras for handing over the net assessment of the village to him so that the seba puja of the deity may be continued. On objection being taken by Defendant 1, the alienee, the parties were referred to establish their rights in a civil Court and the collections from the village were directed to be kept in the Treasury as deposit pending the final adjudication of their title. Defendant 2 thereupon filed a suit, T. S. No. 98 of 1926, on or about 14th April 1926 against defendant 1 "for a decla-

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ration that the plaintiff Thakur had not been removed from the said Goswami Math to the said Gangamatha Math as was falsely stated in the above-mentioned 'Kebala' dated 21st November 1909." This suit was finally decided against defendant 2 on 27th September 1928, whereupon the Board of Revenue regranted the inam village of Jaggilipadaro to defendant 1. Defendant 1 has thus been in custody of the plaintiff idol and the inam village of Jaggilipadaro which constitutes the endowment of the deity, as well as the shebayati right of defendant 2, from 1909. The present suit was raised by one of the zamindars of Takkali in the district of Vizagapatam as the 'next friend' of the plaintiff-Thakur for a declaration that "the retention of the plaintiff-Thakur at the said Gangamatha Math by the said Madhab Das, and, after his death, by the defendant Radhakrushna Das, has been wrongful and is "a continuing wrong" and prayed for a decree directing the defendant Radhakrushna Das to restore the plaintiff-Thakur to its original place of consecration, namely, the said Goswami Math."

[2] The plaintiff's case is that the ancestors of defendant 2, Ranganath Deb Goswami, were formerly the Gurus of the Raj family of Athgado, residing in a house in Puri town known as the 'Goswami Math', In or about the year 1789, the then Raja of Athgado had the plaintiff-Thakur installed and consecrated as the Thakur of the Goswami family in a temple at the said Goswami Math with a view to ensuring the performance of its seba according to Vedic rites by the Goswamis in perpetual succession. In the same year, it is alleged, after the said consecration the Raja of Athgado made an endowment in favour of the plaintiff-Thakur of certain lands in village Jaggilipadaro in Athgado Taluk with a view to providing for the daily offerings to and the service of the plaintiff-Thakur. The plaintiff avers that the retention of the Thakur at the said Gangamatha Math is wholly wrongful, being contrary to the wishes and purpose of the founder, is sacrilegious and is a continuing wrong, that the plaintiff is entitled to be restored to the pagoda at Goswami Math, and to be worshipped there from day to day in its own way, according to the customary mode of worship of the said Goswami Math.

[3] The present 'next friend' of the plaintiff-Thakur claims to be the successor of the original founder of the endowment and as such is interested in the location of the plaintiff-Thakur at the proper place according to the purpose of the endowment, and asserts that it is the will of the plaintiff-Thakur to return to the pagoda at the Goswami Math and to be worshipped there according to the customary mode of the institution. The cause of action for the suit is stated to have arisen on or about the 21st November 1909, when the father of defendant 2 purported to transfer the idol, and is alleged to be arising from day to day thereafter. Defendant 1 in his written statement denied that the plaintiff-Thakur had been installed or consecrated by any Raja of Athgado or that the purpose of the endowment was that the plaintiff-Thakur should always remain in the Goswami Math. It is his case that defendant 2 transferred the inam lands of village Jaggilipadaro to the then Mahant of Gangamatha Math and delivered the plaintiff-Thakur as it was his family idol and capable of being removed. Since then the defendant's Guru, Madhab Das, located it in a separate temple in his Math and was performing its seba puja and janni jatra and meeting the expenses from the income of the lands in the village of Jaggilipadaro, and after his death, defendant 1 has been performing its seba puja and janni jatra. It is further alleged that the residential house of defendant 2 and his ancestors (who were married men) and in which they lived with their family and children is popularly known as the 'Goswami Math' and that the plaintiff-Thakur was located in a room allotted for its puja along with other idols. The father of defendant 2 was legally competent to transfer the lands for legal necessity and delivered the plaintiff Thakur so that its seba puja may be continued. Defendant 1's case therefore is that since 1909, his Guru, and after his death, defendant 1 are in possession of the plaintiff-Thakur in their own right for a much longer period than the statutory period of 12 years and, at any rate, he has acquired a right by adverse possession to the custody of the plaintiff-Thakur. Defendant 2 admits the allegations of the plaintiff *in toto* and says that he is willing and prepared to carry on the seva puja and worship of the plaintiff-deity according to strict Vedic rites, in conformity with the intention of the founder and the purpose of the institution in case the plaintiff-Thakur is restored to its proper place of consecration and worship.

[4] Several issues were framed by the trial Court, but those which arise for determination in this appeal are issues 2, 4, 7 and 8, namely the following:

"(1) Did any ancestor of the 'next friend' get the plaintiff installed and consecrated in Goswami Math and or make an endowment mentioned in para. 3 of the plaint:

(2) Is the suit barred by limitation;

(3) Is the retention of the plaintiff-idol wrongful, as alleged in para. 9 of the plaint;

(4) Is the suit bad under S. 42, 'Specific Relief Act'".

[5] The learned Munsif who tried the suit held, in an exhaustive judgment, that the Thakur was

the family idol of Goswami and that some ancestors of defendant 2 founded the deity and its worship and that the 'next friend', the Raja of Takkali, was not competent to bring the suit as his connection with the Athgado family had ceased and that the proper person to represent the will of the Thakur was the shebayat, and that the removal of the Thakur and the transfer of the shebayati right is not illegal and cannot now be questioned by the 'next friend' of the Thakur. He held that the retention of the plaintiff-idol was not wrongful and that, in any case, the suit was barred by limitation. He accordingly dismissed the suit.

[6] On appeal to the Court of the subordinate Judge, the judgment of the learned Munsif was reversed on the ground that the removal of the plaintiff-Thakur to the Gangamatha Math was a continuing wrong and that there could be no adverse possession over the idol and that the plaintiff was competent to maintain the suit and the plaintiff's suit was decreed as prayed for.

[7] Defendant 1, the Mahant of Gangamatha Math, therefore appeals. The principal contentions urged on his behalf are: that the plaintiff's 'next friend' has no interest of any kind in the idol or in the properties endowed and is not competent to file a suit as a disinterested next friend of the plaintiff-Thakur; that this is a collusive suit instigated by defendant 2 and has been brought to benefit him rather than the plaintiff idol. Secondly, that the suit is barred by limitation as there has been a complete ouster of the plaintiff's rights and defendant 1 has acquired by prescription the right to retain the idol and the endowment connected with it. And thirdly, that the idol should not be separated from the properties and the sebayati right. This suit being exclusively for the removal of the idol to the 'Goswami Math' will result in its being dissociated from the endowed properties which have been re-granted to defendant 1 after resumption by the Government of Madras. In order to appreciate the validity of the first ground taken by the appellant it is necessary to refer to Ex. 1 which is a certified copy of the Inam Register and the only document filed on behalf of the plaintiff. The inam purported to be a devadayam grant "for the daily offerings of the deity" and was to continue "so long as the service is performed." It recites that it was granted by one Brundaban Harischandra Deb in 1789 to Sri Radharamanaswami. The manager for the time being was one Brundaban Chandra Deb Goswami. The Inam Commissioner ordered that the inam should continue so long as the service is performed and the pagoda lasts, and Title Deed No. 2465 was issued on 17th November 1862. It does not appear from this register that the grantor was a Raja of Athgado estate or that he had installed the plaintiff-Thakur at Puri previous to the grant. The plaintiff's contention that one of his ancestors installed the deity at the Goswami Math and later made a grant of the village is not borne out by the entries in the Inam Register. Nor does the evidence that he heard it from his grand-mother about the installation and subsequent grant carry conviction. It has also been pointed out that the Athgado estate was sold by auction for arrears of tribute on 15th February 1854. The estate was at first declared to have been bought in by Government on the ground that the Khallikote Zamindar who was actually the highest bidder had not complied with the terms of the sale and paid in the prescribed deposit. Against this decision of Mr. Prendergast's, the then Collector, the Khallikote Raja appealed to Government and Government ordered that the amount of his bid be accepted and the taluk made over to him. "The old sanad was, as is usual, cancelled". See Ganjam District Manual, p. 17. In para. 2 of the plaint it is alleged that an ancestor of the present 'next friend' had the plaintiff-Thakur installed and consecrated as the Thakur of the Goswami family by the then ancestor of the defendant in a temple of pagoda at the said Goswami Math with a view to ensuring the performance of its seba according to Vedic rites by the Goswami of the said Math in perpetual succession. The argument on behalf of the respondent has proceeded on the same footing that the plaintiff-Thakur was the family idol of defendant 2. Nonetheless elaborate arguments were adduced both in the lower appellate Court and in this Court on the right of the 'next friend', as the donor of the deity and of the properties attached to the endowment, to control the management and regulate the worship of the plaintiff-Thakur. The case was further developed during arguments that the worship of the plaintiff-Thakur was not being performed by the appellant in accordance with the peculiar form of worship prevailing in the Goswami Math. The specific case for the respondent is that before the daily worship is commenced at the Goswami Math there should be a sankalpa invoking the blessings of the deity for the benefit of the Athgado Zamindar, and that this was the customary mode of worship which was not being followed by the appellant. This, however, was not the case put forward in the plaint. The only charge made against defendant 1 is contained in para. 9 of the complaint which is as follows:

"It is submitted that the retention of the plaintiff (plaint?) Thakur at the site of the Gangamatha Math is wholly wrong, being utterly contrary to the wishes of the founder and the purpose of the foundation, is a sacrilegious act, and is a continuing wrong. The plain-

tiff is entitled to be restored to the pagoda at the Goswami Math, to be worshipped there from day to day in its own way according to the customary mode of worship of the said Goswami Math."

[8] [After considering the evidence his Lordship proceeded:] Having regard to the pleading and the state of the evidence regarding the existence of the alleged custom, I am unable to agree with the finding of the learned Subordinate Judge that there is a failure in the performance of the customary mode of worship in the appellant's math and that it therefore constitutes a continuing wrong. It is not clear if the donor retained any interest or made the grant subject to any condition regarding Sankalpa or otherwise. Properties are usually endowed by Hindus for the performance of Pujas in a temple or for the performance of certain festivals in the temple or for the performance of Archanas to the deity in the name of the donor. In the first class of cases, the endowment is utilised for conducting the necessary and vital part of worship and of the ritual in the temple. Ordinarily, the Puja is not performed in the name of the donor and consequently supplemental grants are made for the purpose of the service being more efficiently performed. In the second class of cases where the grants are made for the purpose of Utsavas it is usual for others to supplement the funds either by making permanent grants of land or money or by yearly contributions towards the celebration of the festival. In the third class of cases where the grants are made for performing Archanas in the name of the donor, either daily or on stated occasions, if the funds are not sufficient to meet the expenses, others will not come forward to supplement the resources. The Archana is intended solely for the benefit of the grantor: *See* 28 M. L. J. 217: (A. I. R. (2) 1915 Mad. 1003), *Ambalavana Pandarasannadhi* v. *Sree Minakshi Sundareswara Devasthanam*. In the present case the grant having been made according to Ex. 1 for the daily offerings to the deity was an absolute and unconditional grant and was not one for Archana or for invoking blessings to the grantor. The "Kebala" which the father of defendant 2 executed in favour of the appellant's Guru makes no mention of any special form of worship associated with the deity. It recites:

"As you are a Hindu belonging to our sect of Brahmin-Vaishnavas and as it is expected that you can properly perform the Seva Puja of the said Thakur you and your successors should perform duly the Seva Puja of the said Thakur."

On the same day the vendor passed a receipt in which he says:

"Out of the consideration I keep with you Rs. 10,000 for clearing the dues of the mortgages in respect of the aforesaid property and having made over the deity, Radhamohan, mentioned in the 'Kebala'".

It is, therefore, clear, as the Sub-Judge remarked in his judgment in the appeal preferred by defendant 2 in 1928,

"that the Thakur was heavily indebted and the only property that was dedicated for its upkeep had been mortgaged by the plaintiff's father by an usufructuary mortgage for Rs. 10,000 and therefore he thought it most expedient to alienate the property and deliver the Thakur so that the rites and ceremonies attached to it might be properly performed. Such alienation cannot be assailed on any legal ground and it was evidently for an adequate consideration."

It is therefore clear that the so-called customary mode of worship peculiar to the Goswami Math is a pure myth and has not been substantiated.

[9] Another contention on behalf of the plaintiff-deity which found favour with the learned Subordinate Judge is that the alienee being a Sanyasi is incapable of conducting worship according to Vedic rites and, therefore, the plaintiff is entitled to insist on the due performance of its Puja by defendant 2 who is a married man. I am unable to appreciate this reasoning because there is no warrant for holding that the Mahant of Gangamatha Math is a Sanyasi. The Mahant does not describe himself as a Sanyasi, nor is there any evidence that he or his Guru was initiated into the Sanyasi order. There has been an unfortunate confusion in the lower Courts between an "ascetic" and a 'Sanyasi.' The only difference that I can find between defendants 1 and 2 is that the former is a perpetual Brahmachari or Virakta of the Vaishnab sect while the latter is a Gruhi or married man. Both worship deities, both perform the annual ceremonies of their Gurus or ancestors, and also perform other Vaidic Karmas. Sanyasi should have no Gods or temples. Their only vocation is the contemplation of the absolute truth and not the worship of any God. A Brahmachari or student, according to Golap Chandra Sarkar is of two descriptions, namely, Upakurvana or ordinary student and Naishtika or life-long student. The former became a house-holder in due course, while the latter was a student for life, devoted to the study of science and theology, felt no inclination for marriage, did not like to become a house-holder, and chose to life, as a perpetual student, the austere life of celibacy. There are persons belonging to certain religious sects of modern origin such as the Vaishnabs that do in some respect resemble life-long students and itinerant ascetics. They are connected with the well-known Maths or Mahants .... Most of the Vaishnabite Maths of Bengal, Bihar and Orissa were founded by Bengalee Brahmins and Kayasthas who were the disciples and followers of Chaitanya and they were not merely founded by celibates but by house-holders. The three Prabhus who are the chief spiritual preceptors or

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masters of this order are Chaitanya, who is believed to be the incarnation of Lord Krishna, Adwaitanand and Nityanand. Adwaitanand's descendants residing at Santipur are now chief spiritual preceptors along with the male and female descendants of Nityananda. Besides these three Prabhus, the Vaishnabs of this order acknowledge six Gosains as their original and chief teachers and founders, in some instances of the families now existing, to whom as well as to the Gokulashta Gosains, hereditary veneration is due. These six are : Rupa, Sanatan, Jeeva, Raghunath Bhat, Raghunath Das, and Gopal Bhat. They appear to have settled at Brundaban and Mathura. The post of spiritual Guide is not confined only to the Brahmins : some of the well-known Gosains belong to the Vaidya caste. Chaitanya, the founder of these cults, nominated Adwaitacharya or Adwaitanand and Nityanand to preside over the Bengal Vaishnabs, and Rupa and Sanatan over those of Mathura : *See* Wilson's works, Vol. I. It is said that defendant 1 claims descent through Gadadhar Prabhu and defendant 2 through Nityanand Prabhu who were both followers of Lord Chaitanya. A reference to Chaityanya Charitamruta and Baishnab Abidhana shows that Gadadhar who was also known as Pandit Prabhu Gadadhar Pandit and Godai, was the disciple of Pundarik Bidyanidhi who was himself a disciple of Advaitanand. Gadadhar came to Orissa along with Sri Chaitanya and lived the life of a perpetual Brahmachari till his death in 1533. Gangamudri was an Oriya lady and was a disciple of Gadadhar's branch. Gadadhar was a great scholar and wrote commentaries on the Gita. Besides he was a life-long associate of Lord Chaitanya and is regarded by the Vaishnabs as one of the Pancha Tatva. The appellant's Math is obviously named after Gangamudri, who was a Vaishnab herself and is known as the Gangamatha Math. The learned Munsif has correctly observed that the only difference between Gadadhar and Nityanand is that the former did not lead a married life and thus was an ascetic while the latter led a family life, but their cult was the same. This is borne out by the "Kebala" of the year 1909, in which the father of defendant 2 asserted that the Mahant belonged to the sect of Brahmin Vaishnav to which sect the transferor also belonged.

[10] Apart from the competency of defendant 1 to perform the worship of the plaintiff-Thakur it is asserted that the daily service is not being properly performed.

[11] According to the plaintiff's case there should be a Sankalpa as a necessary preliminary to the daily service of the deity. This was not the case set out in the plaint nor spoken to by the plaintiff's "next friend" as I have already observed. Nor is this insistence warranted by Hindu texts. The daily rites of worship are as follows according to the Hindu texts :

"The worshipper is directed to awake early in the morning and to purify himself. He is then to sweep the temple with a piece of cloth or with a broom made of specified materials. In the Yogini Tantra the devotee is promised spiritual bliss for a thousand years for every particle of dust raised by the sweepings. After sweeping comes the process of smearing (Upalepana). This, according to the same authority, has to be done with earth or cowdung. The next step is to remove the Nirmalya or the remains of the previous day's offerings of flowers. After this the devotee should present the deity with an offering of flowers; of Arghya or respectful oblation of rice, durva grass, flowers, etc., with water; of Pady or washing the feet as also of other articles necessary for washing the mouth and so on. A deity in short is conceived as a living being and is treated in the same way as a master of the house would be treated by his humble servant. The daily routine of life is gone through : the living image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, offering of food, and retirement to rest." *See* Saraswathi's Hindu Law.

It is, therefore, preposterous to suggest that the daily worship of the deity should be prefaced with a sankalpa for the benefit of the donor. A gift of land to a deity is extolled in the Shastras as 'productive of the greatest religious merit.' In the Mahabharat it is said that "the donor of land shines in Heaven so long as the land, which is the subject of gift, lasts." In the Varahapurna the bestower of a piece of land to Vishnu is promised fortune and prosperity for seven births, and it is also mentioned there that he who dedicates the field or the house for the enjoyment of Vishnu is released from all sins. A gift of land to an idol has, therefore, always been a favourite form of endowment with the Hindus and it is abhorrent to the Hindu notion of piety and religious merit to think that a dedication was made to the plaintiff-Thakur for inviting blessings to the donor. If the grant had been made to the Gosain for performing a particular service such as the invoking of daily blessings, the case would be different. In this case, the grant, being Devottar and having been made for the service of the deity, defendant 2, who is its manager, is under no obligation to perform sankalpa every day before offering 'bhog' to the deity.

[12] The plaintiff's 'next friend' has failed to prove that there has been a departure in the customary mode of worship of the plaintiff-deity in the Gangamatha Math and that there has been in consequence a "continuing wrong" against the plaintiff-idol. The contention on behalf of the appellant that the plaintiff's 'next friend' has no interest in the suit or in the location of the plaintiff-Thakur and that the present suit is merely a device to get back the Thakur to defendant 2's house with a view ultimately to

claiming the properties attached to the endowment, is not without force. But since the suit is instituted professedly for the benefit of the plaintiff-Thakur I have to examine the alleged rights of the Thakur to revert to its original place of installation and also to determine whether it is the will of the Thakur to be so removed. If it is in the interest of the Thakur that he should be removed to defendant 2's house, it does not matter whether the 'next friend' is wholly disinterested in having brought this suit.

[13] The second and the most important point raised on behalf of the appellant is the question of limitation. The appellant's case, in brief, is that an idol belonging to a family is transferable and an alienation is recognised by law. Alternatively, if the transfer is void adverse possession would run, from the date of transfer of possession of the idol, not only against the endowed properties but also against the idol itself. There is no doubt that, as a general rule according to Hindu law, property given for the maintenance of religious worship is inalienable. This was decided in an early Vyavastha given in volume 2 of MacNaughton's "Precedents of Hindu Law" p. 305, citing the text from the S. M. T. Bhagawat :

"He who seizes the subsistence of the gods or of priests, whether given by himself or another, is born a reptile in ordure for a million of million years."

See also 45 C.W.N. 665, *Sri Sri Ishwar Lakshi Durga* v. *Surendra Nath Sarkar*, and I. L. R. 1944 (1) Cal. 139, at p 162 : (A.I.R. (30) 1943 Cal. 613) *Surendra Narayan Sarbadhikari* v. *Bholanath Roy Choudhuri*. But the manager of an endowment has the same powers as a guardian of an infant to incur loans for necessary purposes and such loans will bind the idol's estate. If this were not so, the estate of the idol might be destroyed or wasted and its worship discontinued for want of necessary funds to preserve and maintain them. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of a family idol the consensus of the whole family might give the estate another direction, 4 I. A. 52 : (2 Cal. 341 (P. C)), *Kunwar Darganath* v. *Ramchunder*. *See also Tulsidas* v. *Siddhnath* reported in 20 C. L. J. 315 (n) : (9 I. C. 650) where it was held that properties at one time devottar may by common consent of the whole family cease to be so and become secular property, and 21 M.L.J. 588 : (11 I C 633), *Appu Pathar* v. *Sree Kurumba*; 7 C.L.R. 278, *Doorga* v. *Sheo Proshad* and 27 Mad. 435 : (14 M.L.J. 105), *Vidyapurna* v. *Vidyanidhi*. Reliance has been placed on the judgment of Banerji J. in *Khetter Chunder* v. *Haridas* reported in 17 Cal. 557. In this case, a family idol belonging to a Ghosh family had been made over to the grandfather of the plaintiff by a deed of gift as the owner of the idol could not carry on the worship out of the proceeds arising out of the devottar lands. It was argued that the deed of gift was invalid as it purported to give away an idol which could not be the subject of transfer, and Banerji J. lent the weight of his authority to the statement that there is no absolute prohibition against the gift of an idol. An idol is not mentioned as an unfit subject of gift by Hindu lawyers in their enumeration of what are and what are not fit subjects of gift—See Colebrook's Digest Book 2, Chap. 4—but on the contrary the gift of an idol under certain circumstances is considered a laudable act. It was also held that the deed of gift was really an arrangement with a view to carry on the worship of the idol regularly from generation to generation and that it was for the benefit of the idol. It was further held that such an arrangement is valid in law and binding upon succeeding sebayats. As was observed by the Judicial Committee in *Prosunno Kumari Debya* v. *Gulabchand* 14 Beng. L. R. 450: (2 I. A. 145 P. C.) and later confirmed in 4 I. A. 52 : (2 Cal. 341 P. C.), *Kunwar Durganath* v. *Ramchunder*, it is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must in the nature of things be entrusted to some person as the sebayat 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 properties, at least to as great a degree as the manager of an infant heir. Another point raised in the case was that the effect of the arrangement was to convert an endowment for the spiritual benefit of the family of the original founder into one for the benefit of the family of the plaintiff. Banerji J. repelled this contention in these words:

"We do not think that that was so. Having regard to the terms of the deed of 1254 and to the fact that the idol with its endowed property was made over to the plaintiff's predecessors, we think that according to Hindu notions the worship of the idol would still be for the benefit of the original founder's family from a spiritual point of view".

In *Rajeshwnr Mullick* v. *Gopeshwar Mullick* reported in 35 Cal. 226: (7 C. L. J. 315) the right to alienate the office of the sebayat by will was negatived on the ground that the office of a sebayat endured only for his life and his will comes into operation only after his death, but the right of alienation was clearly recognised. In 6 Bom. 298, *Mancha Ram* v. *Pran Shanker*, the fact that the alienation was to a person in the line of succession and capable of performing the worship of the idol was regarded as a justi-

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fication for the alienation. The test, as Mitra J. put it in *Rajeshwar Mullick* v. *Gopeshwar Mullick*, (35 Cal. 226: 7 C. L. J. 315), is "the clear benefit of the Thakur". In 36 Cal. 975 : (3 I. C. 76), *Nirod Mohini* v. *Shibadas*, an alienation by an arpannama in favour of the maternal uncle of the sebait was upheld as he seemed to have more interest in the worship of the idol than any one else. In *Sreenath Devivasikhamani* v. *Karutha*, reported in 21 M. L. J. 129 : (9 I. C. 150), the debts of the Pandarasannidhi incurred for the purpose of certain festivals celebrated in the Math were held to be for a necessary purpose. It is therefore clear that a sebayat can borrow for legal necessity and for necessaries of the deity and bind the estate of the deity. The alienation in the case before us has been upheld by the previous judgment of the year 1928 to have been for legal necessity. It is not clear from the 'kebala' whether the transfer of the idol to defendant 1, was by way of gift as all the endowed properties belonging to the deity were sold, or whether a price was fixed for the image itself. In the eye of law idols are property, as was held in *Subbaraya Gurukkal* v. *Chellappa Mudali*, in 4 Mad. 315. A distinction has been made by the Calcutta High Court that being a juridical person, the idol is not movable property though it is property for which a suit is governed by Art. 120, Limitation Act (*See* 38 Cal. 284 : 7 I. C. 475) *Bali Panda* v. *Jadumani*). Whether the idol can be regarded as movable or immovable property is not necessary to be determined but the right to be worshipped at a particular place or by a person may be regarded as intangible property. In 42 Cal. 455: (A. I. R. (2) 1915 Cal. 161), *Mahamaya Devi* v. *Hari Das Haldar*, the right of sebayatship in the Kalighat Temple was mortgaged and it was argued that the office of sebayat being extra commercium inasmuch as it is a religious office stamped with a trust, is inalienable. Mookerji J. observed that the plaintiff being a mortgagee not of immovable but of intangible property was entitled to foreclose his mortgagor quite as much as a mortgagee of chattels. In 16 I. A. 187: (17 Cal. 8 P. C.). *Goswami Giridhariji* v. *Ramlallji*, the image of Dauji Thakur had been transferred from its original place of consecration to a new temple. Their Lordships of the Judicial Committee observed:

"If the fact was that the Thakur Dauji had been in the custody of and his worship been regulated by another sebayat than the plaintiff for a sufficient time, the plaintiff might be barred. There has been no possession of the temple adverse to the Thakur Dauji, and no possession of the Thakur adverse to the plaintiff".

A Thakur can be the subject of possession and adverse possession. The transfer of an idol under some circumstances cannot, therefore, be regarded as being opposed to law and may be upheld.

[14] The appellant's contention is that if the alienation in 1909 is valid, as I have held it to be, limitation would commence to run from the date of alienation. If conversely the alienation is void possession of the appellant would become adverse from the date of his possession under the sale deed. The plaintiff-respondent's case on this point is that the deity being a juristic person has a will of its own which can be expressed through his sebayat and has a right to remain at the place where he is installed. This argument is founded upon the observation of the Judicial Committee in *Dauji Thakur's case* cited above, in which their Lordships observe: "The Dauji must elect whether to change his habitation or to change his sebayat." A very much similar observation was made in the later case, *Pran Nath Mullick* v. *Pradyumna Kumar Mullick* in 52 I. A. 245: (A. I. R. (12) 1925 P. C. 139) Lord Shaw, delivering the judgment of the Board, observed:

"The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable demonstration of the worship of the idol by the sebayat it be thought that a family idol should change its location, the will of the idol itself expressed through his guardian must be given effect to. This is in accordance with what would appear to be the sound principle of the possession and it is further in accord with the authority of the subject...*a fortiori* it is open to an idol acting through his guardian, the sebayat, to conduct its worship in its own way at its own place, always on the assumption that the acts of the sebayat expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who are the servants and pay homage to it."

Mr. Sen Gupta, learned counsel for the plaintiff-Thakur, also referred us to *Balipanda* v. *Jadumani* reported in 38 Cal. 284: (7 I C 475) in which a suit by the Thakurs themselves to be removed from the custody of the defendants, to the custody of the plaintiffs other than themselves. Relying on these two cases, Mr. Sen Gupta further develops his point and urges that the right of the Thakur to remove itself is a continuing right as the Thakur is an infant and that S. 23, Limitation Act, will govern the case. In support of his contention reference has been made to *Hukumchand* v. *Maharaja Bahadur*, 60 I.A. 313 : (A. I. R. (20) 1933 P. C. 193) ; *Brojendra Kishore* v. *Bharat Chandra*, 22 C.L.J. 283 : (A.I.R. (3) 1916 Cal. 751) and *Sarat Chandra Mukherji* v. *Nirode Chandra*, A.I.R. (22) 1935 Cal. 405 : (156 I. C. 390). The plaintiff's right according to him is a continuing right; consequently the retention of the plaintiff-Thakur by the defendant is a continuing wrong, and a fresh cause of action is said to arise *de die in diem*. He has relied upon the analogous cases of damges for false imprisonment, restitution of conjugal rights, and acts of trespass. This argument, in my opinion, involves certain assumptions which are

unsustainable. An idol is no doubt in the position of an infant as it can act only through a sebayat or a manager. But no authority has been cited to us for the proposition that he is to be regarded as a perpetual infant, so that transactions by or against him will not be governed by the Limitation Act. The second assumption made by Mr. Sen Gupta is that a continuing wrong is the antithesis of a continuing right. As this is the substantial argument on behalf of the plaintiff-respondent, I propose to deal with it in some detail.

[15] The doctrine that an idol is a perpetual minor is an extravagant doctrine as it is open to the sebayat, or any person interested in an endowment, to bring a suit to recover the idol's property for devottar purposes, *see* 37 I. A. 147 : (37 Cal. 885 P. C.), *Damodar Das* v. *Lakhan Das*. In this case, the two chelas of a deceased Mahant divided the properties by ikrarnama and the junior chela took possession under the ikrarnama of the properties situate at Bibi Sarai in Jajpur, while the senior chela remained in possession of the properties of the deity at Bhadrak as Mahant of the Math. The Judicial Committee held that from the date of the ikrarnama possession of the junior chela by virtue of the terms of the ikrarnama was adverse to the right of the idol and of the senior chela as representing that idol, and that, therefore, the suit was barred by limitation. *See also* 60 Cal. 54 : (A.I.R. (20) 1933 Cal. 295) *Surendra Krishna* v. *Bhubaneswari Thakurani*. An idol can also acquire rights by adverse possession just as much as there can be adverse possession against the idol. *See Anand Chandra* v. *Brojalal*, 50 Cal. 292 : (A.I.R. (10) 1923 Cal. 142). Where property is vested in the juridical person an act of alienation by the sebayat is a direct challenge to the title of the idol and a suit by the idol or the manager of the idol on behalf of the idol for recovery of possession must be brought within 12 years from the date of alienation: 1 Pat. 475 : (A.I.R. (9) 1922 Pat. 243) *Mahant Ramrup Gir* v. *Lal Chand Marwari* ; *Chidambara Natha Thambiran* v. *Nallasiva Mudaliar*, reported in 41 Mad. 124 : (A.I.R. (5) 1918 Mad. 464); *Pandurang Balaji* v. *Dnyanu* reported in 36 Bom. 135 : (12 I. C. 926) and 37 Cal. 885 : (37 I.A. 147 P. C.) *Damodar Das* v. *Lakhan Das*. An idol, therefore, is as much subject to the law of limitation as a natural person and cannot claim exemption on the ground that he is a perpetual infant. Nor is a Hindu deity to be regarded as a minor for all purposes. In I.L.R. (1937) 1 Cal. 84, *Anantakrishna* v. *Prayag Das*, it was held that the rule under S. 68, Contract Act, that a person who supplies necessaries to a minor is entitled to be reimbursed from the minor's estate does not apply to the case of a temple. Ameer Ali J. sounded a note of warning against carrying the analogy of a deity to a minor being carried too far and observed :

"Their practical incidents differ. For instance, in the case of a minor he is being protected and his property saved so that he can enjoy it to the full upon attaining majority. In the case of a deity no such thing can happen, he is a major, he is born major, there is no future time at which he can become major and then enjoy the property. He is not incapable, he is under no inherent disability; on the other hand, he is all powerful."

An idol cannot, therefore, claim exemption from the law of limitation : *see* 60 Cal. 54 : (A.I.R. (20) 1933 Cal. 295) *Surendrakrishna Roy* v. *Ishree Sree Bhubneswari Thakurani*, later confirmed in 64 I.A. 203 : (A.I.R. (24) 1937 P. C. 185) *Bhubaneswari Thakurani* v. *Brojanath Dey*. Mr. Sen Gupta's argument that the plaintiff's right to be located at its temple in the Goswami Math is a continuing right on account of the incapacity of the idol to act on its own behalf, must fail.

[16] The next point in his argument is that the appellant's act is a wrong to the deity and every day of his retention of the deity is a continuing wrong. Section 23, Limitation Act, provides that :

"in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

"If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance thereof in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*" —Clark and Lindsell on Torts.

Where the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, a fresh action for the continuance lies in which recovery can be had for damages caused by the continuance of the tort to the date of the writ. And it may be added where the wrong consists in the omission of a legal duty, if the duty is to continue to do something, the omission constitutes a continuing wrong during the time it lasts, as in *Bai Sari* v. *Sankla Hirachand*, 16 Bom. 714 and *Binda* v. *Kaunsilia*, 13 All. 126 : (1891 A. W.N. 18). Where the wrong consists in an act or omission it must not be fleeting or evanescent like a slander uttered, but such as to produce a change in the condition of things which is a continual source of injury. There is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury. Thus, in the case of a bodily injury there is no continuing wrong as the injury ceases though the injurious effect may persist, In other words, there must not be a single wrongful act from which injurious consequences follow, but a state of affairs every moment's continuance of

which is a new tort. The commonest examples of continuing wrongs are found in interference with water supply and obstructions to rights of way and of light and air. Where adverse possession is claimed on the strength of the erection of a wall there is no continuing wrong within S. 23. The effect may continue but this does not extend the time of limitation—See Rustomji's Law of Limitation, Vol. I, where all the cases are summarised. Where, therefore, trespass amounts to a complete ouster the wrong is not a continuing one and successive actions will not lie on the principle of *interest reipublicæ ut sit finis litium*. As Mr. Mayne in his work on Damages puts it :

"A fair rule in such cases would be to give the plaintiff such damages as would compensate him for the losses sustained up to the time of verdict, and to pay him for putting the land in its original state."

Where a man suffers in respect of one and the same right, whether of the person, property, or reputation, as the case may be, then if the act is not a continuing act but one over the consequences of which, when done, the doer has no further control, the cause of action is one and after recovery in an action for damage first accruing, no further action can be brought. In a case of trespass, the cause of action accrues when the trespass is committed. When the properties of the deity and the idol itself were taken possession of, the act which causes an encroachment of the plaintiff's right was at once complete and there is no continuance of damage or wrong within the meaning of the statute. The effect of the damage may continue but this does not extend the time of limitation. In *Harrington* v. *Corporation of Derby*, (1905) 1 Ch. 205 : (74 L. J. Ch. 219), Buckley J., observed :

"The words ('continuance of injury or damage') do not mean or refer to damage inflicted once and for all which continues unrepaired but to a new damage recurring day by day in respect of an act done, it may be once and for all at some prior time, or repeated, it may be, from day to day."

The test in applying S. 23 is not whether the right is a continuing right but whether the wrong is a continuing wrong: *See* A. I. R. (17) 1930 Bom. 61 : (54 Bom. 4) *Krishnajee* v *Annajee*; 20 Cal. 906 *Chukkenlal Roy* v. *Lolit Mohan Roy*; 26 Mad. 410, *Raja of Venkatagiri* v. *Isakkapali Subbiah;* 2 Pat. 391 : (A. I. R. (10) 1923 Pat. 475), *Md. Fahimul Haque* v. *Jagat Ballab Ghosh*. Where the act or the wrong is complete, S. 23 is inapplicable : *Ashutosh* v. *Corporation of Calcutta*, reported in 28 C. L. J. 494 : (A. I. R. (6) 1919 Cal. 807). Complete usurpation of possession and occupation and consequent dispossession of the owner of the land is a wrong which is complete from the moment of dispossession. It is not a continuing trespass of the character contemplated in S. 23: A. I. R. (26) 1939 Nag. 145: (182 I. C. 613), *Evangelical German Mission* v. *Ramsahaigir*. In *Kusheshwar Jha* v. *Umakant Jha* reported in A. I. R. (29) 1942 Pat. 188 ; (197 I. C. 818), it was laid down that there was no perpetual right of suit under S. 23 whether a wrong be continued or not when the trespass itself gives rise to rights extinguishing any right of suit. When the wrong amounts to dispossession of the plaintiff then even although it may be a continuing wrong the plaintiff cannot recover possession after 12 years because under S. 28, Limitation Act, he himself has got no right left which he can enforce. The real question is not whether the wrong is continuing or not, but whether the wrong amounts to a complete ouster of the plaintiff that is to his dispossession. In view of these decisions it must be held that the plaintiff's cause of action arose when the transfer was effected in 1909. Whether Art. 48B or 49 or 120 is applicable or whether the residuary Art. 144 applies to the present suit, the cause of action for that suit arose in 1909 and the plaintiff's suit is barred by limitation.

[17] Reliance was also placed by Mr. Sen Gupta on two Privy Council decisions reported in 52 I A. 245: (A. I. R. (12) 1925 P. C. 139), *Pran Nath Mullick* v. *Pradyumna Kumar Mullick*, and 60 I. A. 313 : (A. I. R. (20) 1933 P. C. 198), *Hukumchand* v. *Maharaja Bahadur Singh*. In the first of these cases, there was no question of limitation and Mr. Sen Gupta relies on the passage in which their Lordships observed that Hindu family idols are not property in the crude sense and that such ideas appear to be in violation of the sanctity attached to the idol whose legal entity and rights as such the law of India has long recognised. The argument before the Board was that a family idol was no better than a mere moveable chattel. Their Lordships held that such an argument is neither in accord with the true conception of the authorities nor with principle. Referring, however, to the decision of Banerji J., in *Khetter Chunder* v. *Haridas*, 17 Cal. 557, their Lordships held that the transfer of the idol was justified as the interests of the worshippers of the idol were concerned. In the judgment of the High Court in the same case reported in *Pradyumna Kumar* v. *Pramatha Nath*, 27 C. W. N. 684 at p. 690: (A. I. R. (10) 1923 Cal. 708) Richardson J., laid down the true rule when his Lordship said :

"What is probably true is that for certain purposes at any rate the office of manager or sebayat of the deity may be regarded as property and the office will carry with it all such rights as properly pertain there, including the right to the custody of the image. In a loose way, therefore, the gift or transfer of the office may perhaps be spoken of as a gift or transfer of the image of the deity."

In the other Privy Council decision where the

Swetambari sect of Jains placed 'Charans' in three of the shrines, the Digambaris, the rival sect, refused to worship and S. 23, Limitation Act, was held to be applicable. It should, however, be observed that there was no interference with the right of the Digambaris to worship. The proposed gate-way was no obstruction to the Digambaris' right of access to the hill. There was therefore no ouster—Digambaris' right of access or of worship. Cases of continuing nuisance such as those reported in *Rajrup Koer* v. *Abdul Hussain*, 6 Cal. 394 : (7 I. A. 240 P. C.) and in *Sarat Chandra* v. *Nirode Chandra*, A. I. R. (22) 1935 Cal. 405 : (156 I. C. 390) are not cases of ouster or dispossession of the right or property of the person complaining and can therefore have no application to the facts of this case.

[18] Lastly, a reference was made to the *Sahidgunj case*, *Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar*, reported in 67 I. A. 251 : (A. I. R. (27) 1940 P. C. 116), where the question was whether a mosque had a *locus standi* in judicio; and the very argument that is advanced in this case was repelled by their Lordships of the Judicial Committee, the argument being that in view of the infancy of the plaintiffs the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. The case cannot, therefore, be of any assistance to the plaintiff.

[19] I have, therefore, no hesitation in holding that if this suit were to be regarded as one to enforce the right of the deity to be located at the Goswami Math, it would be barred by limitation, either under Art. 120. (*Balipanda* v. *Jadumani*, 38 Cal. 284: (7 I. C. 475)), or under Art. 144. If, on the other hand, it is to be regarded as a suit by a worshipper, not based on any right to the property in the idol or to an office, against its custodians to locate it in a particular temple instead of in another, there being no allegation that the plaintiff is prevented from worshipping the idol at the latter temple, the suit is not cognizable by the civil Court. *See* 32 Cal. 1072: (2 C. L. J. 590), *Loke Nath Misra* v. *Dasrathi Tewari*.

[20] The last point urged on behalf of the appellant is that he has acquired the sebayati right by virtue of the transfer of 1909 and the will of the deity regarding its habitation can only be conveyed through the appellant. This argument, to my mind, is more fanciful than legally sound. The will of the Thakur must be determined in the light of what is in the best interests of the idol. Where rival sebayets claim to represent the will of the deity in conflicting ways, the duty of determining what should be the will of the Thakur must ultimately devolve upon the Court. We have given our anxious consideration to what would be the most suitable arrangement in the circumstances of the present case. All the endowed properties have become vested in the appellant by reason of the re-grant made by the Government of Madras and any change of location of the deity must necessarily result in the separation of the endowed properties from the deity. Defendant 2 is no doubt willing, and indeed anxious, to have the custody of the Thakur restored to his temple. But we consider that he is the least desirable person to be placed in charge of the deity, having regard to the fact that his father, as the sebayat, brought about the alienations and finally the transfer of the idol itself. Defendant 2 himself supported a suit, falsely alleging that the idol was still in the temple in the year 1928. In the present suit also he has made statements which are hardly consistent with truth. We cannot, therefore, countenance any desire on the part of the Thakur to be restored to the Goswami Math and to be left in the custody of defendant 2. Nor will it be in the best interest of the Thakur to dissociate it from the endowment. This itself would be a ground, apart from other considerations of limitation and adverse possession, for rejecting the plaintiff's claim : *See* 7 Cal. L. R. 276, *Durga* v. *Shiv Prasad*.

[21] In the result we hold that the plaintiff's suit is barred by limitation and must fail. The second appeal is allowed and the judgment and decree of the learned Munsif is restored, with costs throughout. Counsel's fee in this Court will be Rs. 250. The costs will be borne by the plaintiff's 'next friend' the Zamindar of Tekkali.

Narasimham J.—I agree.

R.G.D. *Appeal allowed.*

A. I. R. (36) 1949 Orissa 11 *[C. N. 2.]*

RAY C. J. AND PANIGRAHI J.

Krishna Ballav Ghosh — Decree-holder—Appellant v. *Sashimukhi Bose — Judgment-debtor—Respondent.*

A. F. A. O. No. 1 of 1947, Decided on 30th August 1948, from order of Dist. Judge, Cuttack Sambalpur, D/- 6th December 1946.

(a) Civil P. C. (1908), S. 115 — Conversion of appeal into revision—Lack of jurisdiction or illegality or material irregularity in exercise of jurisdiction must be shown.

Where the appellant desires the Court to consider his appeal which is found to be not maintainable, as revision he must establish that the order complained against, suffers from either lack of jurisdiction or some illegality or irregularity of a material character in exercise of jurisdiction. [Para 6]

Annotation: ('44-Com.) Civil P. C., S 115 N 19.

(b) Civil P. C. (1908), O. 21, R. 63—Scope—Circumstances may arise under which suit under R. 63 may not be necessary.

Whether an adverse order in a claim case under O. 21, R. 58 is conclusive against the claimant, is a

Thereafter all that S. 49 (3) provides is that the Collector may proceed straight off to determine compensation under S. 11, the reason for this being that all the other steps necessary for determining compensation under S. 11 have already been taken in the presence of the parties.

(21) Lastly it is urged that vesting is also contemplated in two stages and that shows that successive notifications can be issued under S. 6 following one notification under S. 4 (1). Section 16 provides for taking possession and vesting after the award has been made. Section 17 provides for taking possession and consequent vesting before the award is made in case of urgency. We fail to see how these provisions as to vesting can make any difference to the interpretation of Ss. 4, 5-A and 6. Section 16 deals with a normal case where possession is taken after the award is made while S. 17 (1) deals with a special case where possession is taken fifteen days after the notice under S. 9 (1). Vesting always follows taking of possession and there can be vesting either under S. 16 or under S. 17 (1) depending upon whether the case is a normal one or an urgent one. What we have said with respect to S. 17 (1) and S. 17 (4) would apply in this matter of vesting also and if the matter is of urgency the Government can always issue two notifications under S. 4, one relating to land urgently required and covered by S. 17 (1) and the other relating to land not covered by S. 17 (1). The argument based on these provisions in S. 16 and S. 17 can have no effect on the interpretation of Ss. 4, 5-A and 6 for reasons which we have given when dealing with Ss. 17 (1) and 17 (4). We are, therefore, of opinion that the High Court was right in holding that there can be no successive notifications under S. 6 with respect to land in a locality specified in one notification under S. 4 (1). As it is not in dispute in this case that there have been a number of notifications under S. 6 with respect to this village based on the notification under S. 4 (1), dated May 16, 1949, the High Court was right in quashing the notification under S. 6 issued on August 12, 1960 based on the same notification under S. 4 (1).

(22) The petition had also raised a ground that the notification under S. 6 was vague. However, in view of our decision on the main point raised in the case we express no opinion on this aspect of the matter.

(23) The appeal, therefore, fails and is hereby dismissed with costs.

GJ/RSK/D.V.C. Appeal dismissed.

AIR 1966 Supreme Court 1603 (V 53 C 318)

(From Madras*)

23rd September 1965

K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Sarangadeva Periya Matam and another, Appellants v. Ramaswami Goundar (dead) by legal representatives, Respondents.

Civil Appeal No. 544 of 1963.

(A) Limitation Act (1908), Art. 144, S. 28 —Possession of immovable properties — Suit by math or person representing it — Limitation—Absence of a de jure or de facto mathadhipathi — Running of limitation is not suspended — Office of mathadhipathi — Nature of — Title of math to suit lands extinguishing in 1927 — Plaintiff acquiring title by prescription — Plaintiff in possession till 1950, when dispossessed by math — Suit for possession against Math filed in 1954 held within time.

Under Art. 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed mathadhipathi, he may institute the suit on its behalf; if not, the de facto mathadhipathi may do so, and where, necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Art. 144 is not suspended by the absence of a legally appointed mathadhipathi; clearly, limitation would run against it where it is managed by a de facto mathadhipathi, and it would run equally if there is neither a de jure nor a de facto

*(See Second Appeal No. 518 of 1957, dated 16-7-1959—Mad.)

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mathadhipathi. (1904) ILR 28 Bom 215 and AIR 1935 PC 44 and (1893) ILR 18 Bom 507, Applied. (Para 6)

A mathadhipathi is the manager and custodian of the institution. The office carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties. During the tenure of his office, the mathadhipathi has also large beneficial interests in the math properties. But by virtue of his office, he can possess and enjoy only such properties as belong to the math. If the title of the math to any property is extinguished by adverse possession, the rights of all beneficiaries of the math in the property are also extinguished. On his appointment, the mathadhipathi acquires no right to recover property which no longer belongs to the math. If before his appointment limitation under Art. 144 has commenced to run against the math, the appointment does not give either the math or the mathadhipathi a new right of suit or a fresh starting point of limitation under that Article for recovery of the property. AIR 1922 PC 123 and AIR 1954 SC 282, Applied. (Para 7)

Where on the death of a mathadhipathi in 1915 and in absence of a legally appointed mathadhipathi, by operation of Art. 144 read with S. 28 of the Limitation Act, 1908 the title of the math (lessor) to the suit-lands became extinguished in 1927 and the plaintiff (lessee) acquired title to the lands by prescription and continued in possession till 1950 when dispossessed by the math, the suit for possession filed by the plaintiff in 1954 was within time though the delivery of possession by plaintiff in 1950 was found to be voluntary. The absence of a legally appointed mathadhipathi did not prevent the running of time under Art. 144 (Paras 9, 10)

(B) Limitation Act (1963). Art. 96 — Suit against endowment for recovery of possession — Plaintiff acquiring title by prescription — Starting point of limitation is date of appointment of manager of endowment — Art 96 is not a legislative recognition of law existing before 1929 (Para 9)

(C) Religious and charitable Endowments — Math — Absence of legal necessity — Mathadhipathi has no power to grant perpetual lease of math properties at a fixed rent — Transfer of Property Act (1822), S 105 (Obiter). (Para 3)

Cases Referred: Chronological Paras

(1955) (S) AIR 1955 Andh 212 (V 42): 1954-2 Mad LJ (Andh) 228, Kameswara Rao v. Somanna 4

(1954) AIR 1954 SC 282 (V 41): 1954 SCR 1005, Commr., Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Srirur Mutt 7

(1949) AIR 1949 Cal 199 (V 36): ILR (1949) 2 Cal 263, Monmohan Haldar v. Dibendu Prosad Roy 5

(1941) AIR 1941 Mad 449 (V 28): ILR (1941) Mad 599 (FB), Venkateswara v. Venkatesa 4, 5, 9

(1935) AIR 1935 PC 36 (V 22): ILR 14 Pat 327, Srischandra Nandy v. Baijnath Jugal Kishore 4

(1935) AIR 1935 PC 44 (V 22): 62 Ind App 47, Mahadeo Prasad Singh v. Karia Bharti 6

(1925) AIR 1925 PC 139 (V 12): 52 Ind App 245, Pramatha Nath Mullick v. Pradhyumna Kumar Mullick 5

(1925) AIR 1925 Cal 140 (V 12): ILR 51 Cal 953, Administrator-General of Bengal v. Balkissen Misser 5, 8

(1922) AIR 1922 PC 123 (V 9): 48 Ind App 302, Vidya Varuthi Thirtha v. Balusami Ayyar 7

(1917) AIR 1917 Mad 706 (1) (V 4): 4 Mad LW 369, Manikkam Pillai v. Thanikachalam Pillai 4

(1916) AIR 1916 PC 202 (V 3): 43 Ind App 113, Meyappa Chetty v. Supramanian Chetty 4

(1904) ILR 32 Cal 129: 31 Ind App 203 (PC), Jagadindra Nath Roy v. Hementa Kumari Debi 4, 5

(1904) ILR 28 Bom 215: 5 Bom LR 932, Babajirao v. Luxmandas 6

(1900) 27 Ind App 136: ILR 27 Cal 943 (PC), Radhamoni Debi v. Collector of Khulna 4

(1893) ILR 18 Bom 507, Vithalbowa v. Narayan Daji 6

(1821) 5 B and Ald 204: 106 ER 1167, Murray v. East India Co. 4

Mr. A. V. Viswanatha Sastri, Senior Advocate, (M/s. S. S. Javali and R. Ganapathy Iyer, Advocates, with him), for Appellants; M/s. R. K. Garg, S. C. Agarwal, D. P. Singh and M. K. Ramamurthi, Advocates of M/s. Ramamurthi and Co., for Respondents.

The following Judgment of the Court was delivered by

BACHAWAT, J.: Shri Sarangadeva Periya Matam of Kumbakonam was the inamholder of lands in Kannibada Zamin, Dindigul Taluk, Madurai District. In 1883, the then mathadhipathi granted a perpetual lease of the melwaram and kudiwaram interest in a portion of the inam lands to one Chinna Gopiya Goundar, the grandfather of the plaintiff-respondent on an annual rent of Rs. 70. The demised lands

are the subject-matter of the present suit. Since 1883 until January 1950, Chinna Gopiya Goundar and his descendants were in uninterrupted possession and enjoyment of the suit lands. In 1915, the mathadhipathi died without nominating a successor. Since 1915, the descendants of Chinna Gopiya Goundar did not pay any rent to the math. Between 1915 and 1939 there was no mathadhipathi. One Basavan Chetti was in management of the math for a period of 20 years from 1915. The present mathadhipathi was elected by the disciples of the Math in 1939. In 1928, the Collector of Madurai passed an order resuming the inam lands, and directing full assessment of the lands and payment of the assessment to the math for its upkeep. After resumption, the lands were transferred from the "B" Register of inam lands to the "A" Register of ryotwari lands and a joint patta was issued in the name of the plaintiff and other persons in possession of the lands. The plaintiff continued to possess the suit lands until January 1950 when the math obtained possession of the lands. On February 18, 1954, the plaintiff instituted the suit against the math represented by its present mathadhipathi and an agent of the math claiming recovery of possession of the suit lands. The plaintiff claimed that he acquired title to the lands by adverse possession and by the issue of a ryotwari patta in his favour on the resumption of the inam. The Subordinate Judge of Dindigul accepted the plaintiff's contention, and decreed the suit. On appeal, the District Judge of Madurai set aside the decree and dismissed the suit. On second appeal, the High Court of Madras restored the judgment and decree of the Subordinate Judge. The defendants now appeal to this Court by special leave. During the pendency of the appeal, the plaintiff-respondent died and his legal representatives have been substituted in his place.

(2) The plaintiff claimed title to the suit lands on the following grounds: (1) Since 1915 he and his predecessors-in-interest were in adverse possession of the lands, and on the expiry of 12 years in 1927 he acquired prescriptive title to the lands under S. 28 read with Art. 144 of the Indian Limitation Act, 1908; (2) By the resumption proceedings and the grant of the ryotwari patta a new tenure was created in his favour and he acquired full ownership in the lands; and (3) in any event, he was in adverse possession of the lands since 1928. and on the expiry of 12 years in 1940 he acquired prescriptive title to the lands under S 28 read with Art. 134-B of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the plaintiff should be accepted, and it is, therefore, not necessary to consider the other two grounds of his claim.

(3) In the absence of legal necessity, the previous mathadhipathi had no power to grant a perpetual lease of the math properties at a fixed rent. Legal necessity is neither alleged nor proved. But the mathadhipathi had power to grant a lease which could endure for his lifetime. The lease of 1883, therefore, endured during the lifetime of the previous mathadhipathi and terminated on his death in 1915. Since 1915, the plaintiff and his predecessors-in-interest did not pay any rent to the math, and they possessed the lands on their own behalf adversely to the math. Before the insertion of Art. 134-B in the Indian Limitation Act, 1908 by Act I of 1929, the suit for recovery of the lands from the defendants would have been governed by Art. 144. The controversy is about the starting point of limitation of a suit for the recovery of the math properties under Art. 144. Did the limitation commence on the date of the death of the previous mathadhipathi, or did it commence on the date of election of the present mathadhipathi?

(4) On behalf of the appellants, Mr. Ganapathy Iyer contended that the right to sue for the recovery of the math properties vests in the legally appointed mathadhipathi and adverse possession against him cannot run until his appointment. In support of his contention, he relied upon the minority judgment of a Full Bench of the Madras High Court in Venkateswara v. Venkatesa, ILR (1941) Mad 599: (AIR 1941 Mad 449 (FB)). Kameswara Rao v. Somanna, (S) AIR 1955 Andhra 212 and Manikkam Pillai v. Thanikachalam Pillai, AIR 1917 Mad 706 (1). He argued that this view has received legislative sanction in Art 96 of the Indian Limitation Act, 1963. He relied upon the following observations in Jagadindra Nath Roy v. Hementa Kumari Debi, (1904) ILR 32 Cal 129 at p. 141 (PC), "the possession and management of the dedicated property belongs to the sebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the sebait and not in the idol." Relying on Murray v. East India Co., (1821) 5 B and Ald 204 at p. 207 and Meyappa Chetty v. Supramanian Chetty, 43 I. A. 113 at p. 120: (AIR 1916 PC 202 at p. 205), and several decisions under Arts. 120 and 110 of the Indian Limitation Act, 1908, he submitted that the cause of action does not accrue and time does not commence to run unless there is someone who can institute the suit. Relying

on Radhamoni Debi v. Collector of Khulna, (1900) 27 Ind App 136 (PC), and Srischandra Nandy v. Baijnath Jugal Kishore, ILR 14 Pat 327: (AIR 1935 PC 36), he contended that before possession can be adverse there must be a competitor who by due vigilance could avoid the running of time.

(5) Mr. Garg on behalf of the respondents contended that adverse possession commenced to run against the math on the death of the mathadhipathi who granted the lease and the operation of the Limitation Act is not affected by the fact that there was no legal manager of the math. In support of his contention, he relied upon the majority judgment of the Full Bench of the Madras High Court in Venkateswara's case, ILR (1941) Mad 599: (AIR 1941 Mad 449) (FB), Lalmohan Haldar v. Dibbendu Prosad Roy, ILR (1949) 2 Cal 263: (AIR 1949 Cal 199) and Administrator-General of Bengal v. Balkissen Misser, ILR 51 Cal 953 at pp. 957-960: (AIR 1925 Cal 140 at pp. 142-143). Relying on Pramatha Nath Mullick v. Pradhyumna Kumar Mullick, 52 Ind App 245 at p. 250: (AIR 1925 PC 139 at p. 140), he submitted that a math, like an idol, has a juridical status with the power of suing and being sued. He argued that in the absence of a legally appointed mathadhipathi, a de facto manager could institute a suit for recovery of the math properties, and the beneficiaries of the endowment could take appropriate steps for the recovery, and, in any event, the mere absence of machinery for the institution of the suit would not suspend the running of limitation.

(6) We are inclined to accept the respondents' contention. Under Art. 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. See Babajirao v. Luxmandas, (1904) ILR 28 Bom 215 (223). It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed mathadhipathi, he may institute the suit on its behalf; if not, the de facto mathadhipathi may do so, see Mahadeo Prasad Singh v. Karia Bharti, 62 Ind App 47 at p. 51: (AIR 1925 PC 44 at p. 46), and where necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Art. 144 is not suspended by the absence of a legally appointed mathadhipathi; clearly, limitation would run against it where it is managed by a de facto mathadhipathi. See Vithalbowa v. Narayan Daji, (1893) ILR 18 Bom 507 at p. 511, and we think it would run equally if there is neither a de jure nor a de facto mathadhipathi.

(7) A mathadhipathi is the manager and custodian of the institution. See Vidya Varuthi Thirtha v. Balusami Ayyar, 48 Ind App 302 at pp. 311, 315: (AIR 1922 PC 123 at pp. 126, 128). The office carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties. During the tenure of his office, the mathadhipathi has also large beneficial interests in the math properties, see Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Srirur Mutt, 1954 SCR 1005 at pp. 1018-1020: (AIR 1954 SC 282 at pp. 288-289). But by virtue of his office, he can possess and enjoy only such properties as belong to the math. If the title of the math to any property is extinguished by adverse possession, the rights of all beneficiaries of the math in the property are also extinguished. On his appointment, the mathadhipathi acquires no right to recover property which no longer belongs to the math. If before his appointment limitation under Art. 144 has commenced to run against the math, the appointment does not give either the math or the mathadhipathi a new right of suit or a fresh starting point of limitation under that Article for recovery of the property. In the instant case, the present mathadhipathi was elected in 1939 when the title of the math to the suit lands was already extinguished by adverse possession. By his election in 1939 the present mathadhipathi could not acquire the right to possess and enjoy or to recover properties which no longer belonged to the math.

(8) In Jagadindra Nath Roy's case, (1904) ILR 32 Cal 129 (PC), the dispossession of the idol's lands took place in April 1876. The only shebait of the idol was then a

minor, and he sued for recovery of the lands in October 1889 within three years of his attaining majority. The Privy Council held that the plaintiff being a minor at the commencement of the period of limitation was entitled to the benefit of S. 7 of the Indian Limitation Act, 1877 (Act XV of 1877) corresponding to S. 6 of the Indian Limitation Act, 1908, and was entitled to institute the suit within three years of his coming of age. This decision created an anomaly, for, as pointed out by Page, J. in ILR 51 Cal 953 at p. 958: (AIR 1925 Cal 140 at pp. 142-143), in giving the benefit of S. 7 of the Indian Limitation Act, 1877 to the shebait, the Privy Council proceeded on the footing that the right to sue for possession is to be divorced from the proprietary right to the property which is vested in the idol. We do not express any opinion one way or the other on the correctness of Jagadindra Nath Roy's case, (1904) ILR 32 Cal 129 (PC). For the purposes of this case, it is sufficient to say that we are not inclined to extend the principle of that case. In that case, at the commencement of the period of limitation there was a shebait in existence entitled to sue on behalf of the idol, and on the institution of the suit he successfully claimed that as the person entitled to institute the suit at the time from which the period is to be reckoned, he should get the benefit of S. 7 of the Indian Limitation Act, 1877. In the present case, there was no mathadhipathi in existence in 1915 when limitation commenced to run. Nor is there any question of the minority of a mathadhipathi entitled to sue in 1915 or of applying S. 6 of the Indian Limitation Act, 1908.

(9) For these reasons, we hold that the time under Art. 144 of the Indian Limitation Act, 1908 commenced to run in 1915 on the death of the mathadhipathi, who granted the lease, and the absence of a legally appointed mathadhipathi did not prevent the running of time under Art. 144. We therefore, agree with the answer given by the majority of the Judges to the third question referred to the Full Bench of the Madras High Court in Venkateswara's case, ILR (1941) Mad 599 at pp. 614-615, 633-634: (AIR 1941 Mad 449 at pp. 455-456, 461). We express no opinion on the interpretation of Art. 134-B of the Indian Limitation Act, 1908 or Art. 96 of the Indian Limitation Act, 1963. Under Art. 96 of the Indian Limitation Act, 1963, the starting point of limitation in such a case would be the date of the appointment of the plaintiff as manager of the endowment, but this Article cannot be considered to be a legislative recognition of the law existing before 1929.

(10) We hold that by the operation of Art. 144 read with S. 28 of the Indian Limitation Act, 1908 the title of the math to the suit lands became extinguished in 1927, and the plaintiff acquired title to the lands by prescription. He continued in possession of the lands until January, 1950. It has been found that in January, 1950 he voluntarily delivered possession of the lands to the math, but such delivery of possession did not transfer any title to the math. The suit was instituted in 1954 and is well within time.

(11) In the result, the appeal is dismissed with costs.

DJ/SG/D.V.C. Appeal dismissed.

AIR 1966 Supreme Court 1607 (V 53 C 319)

(From Punjab: AIR 1963 Punj 345)

P. B. GAJENDRAGADKAR, C. J., K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Ram Parshad, Appellant v. State of Punjab, Respondent.

Civil Appeal No. 530 of 1964, dated 7-2-1966.

(A) Bank of Patiala Regulation and Management Order (1954), Cl. 1 (b) — Date of commencement — Though published at later date, order came into operation from February 27, 1954, when it was made. AIR 1963 Punj 345, Affirmed. (Para 1)

(B) Constitution of India, Art. 357 (2) — Bank of Patiala Regulation and Management Order (1954), Cl. 4 (1) (iii), Rules under, Bank of Patiala (Staff) Rules (1954) — Validity — Expression 'except as respects things done' in Art. 357 (2) — It must receive liberal and extensive construction — Provisions of Order including that of Cl. 4 (1) (iii) and Rules made thereunder relate to matters of day-to-day affairs and administration of Bank and come within purview of saving clause in Art. 357 (2) and continued in operation even after period specified in the Article. Craies on 'Statute Law', 6th Edn., p. 415 and Foster v. Pritchard, (1857) 26 LJ Ex. 215, Ref. (Interpretation of Statutes) (Civil P. C. (1908), Preamble — Interpretation of Statutes). (Paras 22, 23, 24)

(C) Patiala State Regulations (1930), Rr. 1 and 4 — Prescribed authority has power to change rules in Regulations — Extension of rules by Maharaja in 1941 to employees of State Bank of Patiala — Extension by Maharaja being an executive act could be changed by similar executive act. (Para 31)

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PRIVY COUNCIL.

SREE SREE ISHWAREE BHUBANESHWAREE THAKURANI

v.

BRAJA NATH DE.

P. C.*
1937

Feb. 4, 5, 8, 9;
April 8.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Limitation—Adverse possession—Joint possession of shebâit *and his brother—Half-share of brother, whether can be held adversely to idol.*

By a deed executed in 1888, two brothers, R and B, dedicated certain properties to a domestic Deity and provided that the right of *shebâiti* should go to their male heirs by primogeniture.

In 1896 they conveyed additional properties to themselves as *shebâits*.

In 1901, R died leaving two sons P and S, the latter an infant.

In 1904, in a suit by S by his mother as next friend against B, P and their sons, by consent a preliminary decree was made setting aside the deeds of 1888 and 1896 and giving B a moiety of the property and P and S together the other moiety leaving P and S to apply for division of their share.

The Deity was not made a party to the suit.

The final decree was made in 1906.

In the division the *thâkurbârhi* and a house built for the *shebâit* fell to the share of P and S and they continued to reside in it.

In 1918, S, having attained majority, brought a suit for administration of his father's will and for division between him and his brother, P.

P in this suit pleaded that the property was *debottar*.

A preliminary decree was made for the division of the properties in equal shares between P and S, subject to an allowance for the maintenance of the Deity.

P mortgaged his share in 1922 and he died in 1924 leaving two sons M and J.

In 1928 M, as *shebâit*, instituted the present suit in the name of the Deity for a declaration that the Deity was entitled to the properties comprised in the deeds of 1888 and 1896.

Held: (*i*) On the construction of the deeds, that there was an absolute dedication of the *thâkurbârhi* and the house built for the *shebâit* and a charge on the rest of the properties comprised in the deeds for the worship of the Deity.

(*ii*) That S had acquired a title to a half of the *thâkurbârhi* and the *shebâit's* house by adverse possession.

The possession of S for 12 years from 1904 was jointly with P, but S was not affected by any fiduciary disability attaching to P and there was nothing to prevent his possession of his half being adverse to the Deity.

**Present:* Lord Russell of Killowen, Lord Macmillan and Sir John Wallis.

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1937

Sree Sree Ishwaree Bhubaneshwaree Thakurani v. *Braja Nath De.*

APPEAL (No. 13 of 1935) from a decree of the High Court in its Appellate Jurisdiction (May 13, 1932) which varied a decree of the Court in its Original Jurisdiction (December 19, 1930).*

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

Rashid for the appellant. On the true construction of the deeds of 1888 and 1896 the properties comprised in them vests absolutely in the Deity. As regards adverse possession by Satya, referring to s. 10 and Art. 144 of the Limitation Act, Braja and Pulin were always in possession as *shebâits*. Satya merely resided with Pulin. Pulin was a *shebâit* and limitation cannot run against a *shebâit*. [Reference was made to Mulla's Hindu Law (8th ed.), pp. 492-495.]. A *shebâit* cannot give title. Adverse possession would run from the death of the *shebâit*. *Mahanth Ram Charan Das* v. *Naurangi Lal* (1). There is no distinction between a *mohanta* and a *shebâit*. Where there are two co-owners, one cannot be in adverse possession to the other. *Bhairabendra Narain Roy* v. *Rajendra Narain Roy* (2). Pulin was in possession as *shebâit*. The Deity was in possession through him. Satya was in possession as co-owner with Pulin. *Jogendra Nath Mukherjee* v. *Rajendra Nath Bhattacherjee* (3).

Dunne, K. C., and *Pugh* for respondent No. 1, Braja. The first respondent's position is that he is a *shebâit*. He is in possession of half the house. He is unwilling to act against the Deity. He is ready to carry out the order of the Court. He desires to avoid taking any part in a contest between members of the family.

Wallach for respondents Nos. 3 to 6, the mortgagees. The deeds do not vest the mortgaged properties in the Deity. On the question of limitation, it is assumed against me that Pulin, from whom I got my mortgage,

*(1932) I. L. R. 60 Cal. 54.
(1) (1933) I. L. R. 12 Pat. 251; L. R. 60 I. A. 124.
(2) (1923) I. L. R. 50 Cal. 487.
(3) (1922) 26 C. W. N. 890.

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was a trustee and that limitation would not run against him. There is nothing to show that Pulin was a *shebâit*. There is no evidence to show that he took possession as trustee or accepted trusteeship. Pulin and Satya had an undivided interest. Half of that was mortgaged. Limitation would apply in the case of Satya. It cannot be said that limitation would run in the case of one half and not the other. *Jogendra Nath Mukherjee* v. *Rajendra Nath Bhattacherjee* (1). Art. 142 of the Limitation Act is the one that would apply.

De Gruyther, K. C., and *Pringle* for the respondent No. 2, Satya. The construction of the deeds by the learned Chief Justice is wrong. He has made them good in part and bad in part. Taking the documents here as a whole, the grant is for the benefit of the family.

As regards limitation, rightly or wrongly, the deeds were cancelled in 1904 and there was a partition. Satya is in no sense a *shebâit*. He claimed a fourth share in the suit. Clearly after that not only Satya, but Pulin and Braja could have set up adverse possession even though Braja was a *shebâit*. Under s. 10 of the Limitation Act, property must be vested in trust for a specific purpose. Referring to Art. 134, the question is whether there was an entrustment of anything. There was an amendment of s. 10 in 1929. The words "deemed to be entrusted" were introduced and sub-ss. (*a*), (*b*) and (*c*) were added. In 1904 the established law was that if the *shebâit* was present, the Deity was sufficiently represented. In *Kanhaiya Lal* v. *Hamid Ali* (2), the point was different from the one here. The amendment of the Act came into force on January 1, 1929. The mortgages here were executed in 1922 and 1924. The suit was instituted on January 22, 1929. Pulin was in possession of his share and on behalf of Satya from 1904. Prior to 1929 a *shebâit* was not a trustee. After 1929, by the

(1) (1922) 26 C. W. N. 890.

(2) (1933) I. L. R. 8 Luck. 351 ; L. R. 60 I. A. 263.

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amendment of s. 10, he is a trustee. Mohini, relying on the amendment, brought this suit alleging that Pulin was a trustee and that there would be no limitation. He is wrong. The amendment could not revive the right which was already lost.

Rashid replied on the question of construction of the deeds and on the question of limitation. On the latter question, Pulin was 21 years of age when he took charge as *shebâit* in 1901. A *shebâit* and a *mohanta* are on the same footing as regards alienation. *Ponnambala Desikar* v. *Periyanan Chetti* (1). Pulin must be considered to be Satya's grantee. Prescription cannot run in favour of Satya till after Pulin's death. *Corea* v. *Appuhamy* (2); *Nirman Singh* v. *Lal Rudra Partab Narain Singh* (3). Pulin's possession was fiduciary and taints Satya's. Satya could plead adverse possession after partition between him and Pulin but that was within 12 years.

Pringle, in reply, to the cases cited by Rashid in his reply, cited *Gangaprosad Chaudhury* v. *Kuladananda Roy* (4).

The judgment of their Lordships was delivered by

LORD MACMILLAN. On May 5, 1888, Rakhal Chandra De, since deceased, and his brother Braja Nath De, the first respondent, executed a deed of dedication of certain properties in the environs of Calcutta in favour of a female domestic Hindu Deity, who, by her *shebâit* Mohinee De is the present appellant. On April 5, 1896, the same two brothers as individuals by deed of sale sold and conveyed to themselves as *shebâits* of the Deity certain land in the district of Hooghly. The main question in the appeal relates to the efficacy of the deed of dedication of 1888.

Before proceeding to deal with this question it is desirable to narrate certain events which intervened

(1) (1936) I. L. R. 59 Mad. 809; L. R. 63 I. A. 261.
(2) [1912] A. C. 230.
(3) (1926) I. L. R. 48 All. 529; L. R. 53 I.A. 220.
(4) (1925) 30 C. W. N. 415.

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between the granting of the deed in 1888 and the raising of the present action. Rakhal Chandra De, one of the grantors of the deed, died in 1901, leaving two sons, Pulin and his half-brother Satya, the latter then an infant. In 1904, in a suit brought by Satya, by his mother as his next friend, against his uncle Braja Nath De and others, a consent order was pronounced setting aside the deed of dedication of 1888 and the deed of sale of 1896, ordering the properties therein comprised to be divided into two equal shares and finding Pulin and Satya jointly entitled to one moiety and Braja Nath De entitled to the other moiety, with liberty to Pulin and Satya to apply for partition of their moiety between them. The final decree for partition between Pulin and Satya on the one hand and Braja Nath De on the other hand was pronounced in 1906. The idol was not a party to the suit. It was submitted by eminent counsel who appeared in the case that inasmuch as the idol was a private one the dedication could competently be set aside by consent of all the members of the family. Authority was cited for this view and it was apparently accepted by the Court as being then good law.

In 1917 Satya came of age and in the following year he brought a suit for partition as between himself and Pulin. In this suit Pulin, notwithstanding that he had been a party to the consent order of 1904, maintained that the properties were still *debattar* and subject to the dedication to the idol. A preliminary decree for partition was pronounced in this suit but no final decree has yet been passed. Pulin next in 1922 mortgaged his half share in certain of the properties for Rs. 28,000 to persons of the name of Ray and in 1924 he executed a further mortgage for Rs. 25,000 in favour of some other persons named Mandal. In that year Pulin died leaving two sons Mohinee and Jaminee. Subsequently in 1928, in execution of a money decree which had been obtained against Pulin in 1919, his share of the properties was

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sold subject to the mortgages in favour of the Rays and the Mandals and was purchased by one Ganapati Chatterji.

The mortgagees having instituted suits for the realisation of their securities, the appellant Mohinee, Pulin's son, claiming to be the *shebâit* of the idol, retorted by raising the present action in the name of the idol claiming that the idol was entitled to all the properties comprised in the deed of dedication of 1888 and the deed of sale of 1896. The defendants to the suit include Braja Nath De, Satya and the mortgagees under the mortgages granted by Pulin. Buckland J., before whom the case came in the first instance, found in favour of the plaintiff, now the appellant, granting a declaration of her title to the properties in suit, a decree for quiet possession and consequential injunctions. This judgment was reversed on appeal and in lieu thereof the appeal Court (Rankin C. J. and Costello J.) held that the plaintiff was entitled absolutely to only one equal half share in the *thâkurbârhi* and *shebâit's* house at 30, Beniapukur Road, Calcutta, that Satya had acquired by limitation a title to the other half of these subjects and that as regards the other properties in suit (other than the property at 45, Elliot Road, the claim to which was given up) the plaintiff was entitled to a charge thereon "for her upkeep, "worship, expenses and ceremonies in connection "therewith." Various consequential directions followed including a reference to the Registrar to inquire and report as to what would be a sufficient sum to meet the annual expenses of the upkeep and worship of the plaintiff idol and of the ceremonies in connection therewith as provided in the deed of 1888.

The learned Chief Justice in his judgment deals with the effect of the consent order of 1904 and states that he is not prepared to hold, on the strength of a well-known passage in the judgment of this Board in *Konwar Doorganath Ray* v. *Ram Chunder Sen* (1), that there is in Hindu law any warrant for the

(1) (1876) I. L. R. 2 Cal. 341(347); L. R. 4 I. A. 52(58).

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proposition that at any particular time by consent of all the parties then interested in the endowment a dedication in favour of a private idol may be set aside and he finds in addition in the present case special reasons why the consent decree of 1904 should not be held to have validly terminated the *debattar* character of the properties. Their Lordships are not called upon to consider this question, for none of the respondents at their Lordships' bar maintained that the consent order precluded the present appellant from raising the issue of the continued validity of the endowment and their Lordships, therefore, say nothing upon the subject. They take note of the matter only as one episode in the somewhat chequered legal history of the endowment.

The two grounds on which the judgment of the appeal Court was challenged before their Lordships related to the interpretation placed upon the deed of dedication by the appeal Court and to the plea of limitation upheld in favour of Satya.

As to the first of these matters the learned Judge of first instance states that " it has not been argued that "there was no valid dedication or that the idol was "not effectively endowed with the properties in suit by "the deed of 1888." In the appeal Court, however, the defendants were allowed to raise the question of the construction of the deed of dedication. It is fully dealt with in the judgment of the learned Chief Justice and must now in turn be considered by their Lordships.

The material provisions of the dedication deed are conveniently summarised by the learned Chief Justice in the following passage from his judgment :—

> The deed of 1888 opens by describing how Lal Chand and Kala Chand [the uncle and father of the grantors Rakhal and Braja] established the Deity in their life time, how they prospered, how they bought land on Royd Street and in Entally, how with the income of all the said lands and with the money earned by them they used to cause daily and special *shebâs* to be performed, Brahmins and poor persons to be fed and festivals to be observed. It then recites that Lal Chand died, that Kala Chand purchased land on Elliot Road, that he continued the *shebâ* and festivals as before, that he intended to build a house on the land in Entally for the location of the *thâkurânees* and for the residence of the *shebâits* and to make the house and the lands specified in the schedule *debattar*, but that he died before carrying

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out his intention; that after his death Rakhal "with the income of all the "said lands" caused the *shebá* to be performed and people to be fed as before; that when Braja had attained majority, the two brothers had been carrying on the *shebá, etc.*, as before. The deed then recites that Rakhal and Braja had built a house for the location of the *thâkurs* and the residence of the *shebâits* on the Entally land; and states that for the continuance in perpetuity of the *shebás* and the feeding of Brahmins, *etc.*, in perpetuity they grant the properties in the schedule to the auspicious lotus feet of the *thâkurânees* as *debattar*. They make provision for the *shebâiti* right to go to their male heirs by primogeniture; they provide that the *shebâits* should keep accounts and that other heirs shall be competent to inspect the accounts. There is a provision for the removal from office of a *shebâit* acting improperly, and a provision to exclude females from the *shebâiti*. There is a provision in certain circumstances for *shebâits* to be appointed by deed. It is provided that the *shebâits* are to employ two *durwâns* and a *mâli* and other servants for the purposes of the *shebá* and a *tahsildâr* for keeping accounts, collecting rents, *etc.*, as well as a *pujâri* to perform the worship. Then come the passages upon which the present question must turn. Out of the income is first of all to be reserved sufficient money for taxes and repairs to the *thâkurbarhi* and the existing house at Entally; then out of the said income the *shebâits* are to cause the daily and other worship to be performed and "at an outlay of "reasonable expense" shall entertain Brahmins, feed the poor. The deed proceeds "The *shebâits* shall purchase Government securities, that is "Company's papers, with the surplus annually left after meeting the "prescribed expenses". It provides that when a large amount of money gradually accumulates in this manner, they shall cause tenanted houses to be built on the lands specified in the schedule and take measures for improvement and increase of the income of the *debattar* properties. So far, therefore, the deed contemplates that there shall be a surplus and that this surplus shall be invested so as to increase.

In the next page in the deed the *shebâits* are given a right to reside in the house in which the Deities are located and as far as practicable, other heirs may reside in the house. Then comes the only clause which operates to give an ultimate destination to the accumulating funds; the *shebâits* are directed "to build with the said money additional masonry building, house, *etc.*, on "the *debattar* lands and give them for the convenience of residence and "habitation of our heirs. If in the course of time the number of heirs "becomes large, the nearer heirs shall reside in this house as far as "practicable." The remaining passages in the deed are important in so far as they disclose that the tenants on the scheduled lands are mere tenants-at-will, which means that so far as occupied, the property was *busti* property. It states that the value of the properties granted as *debattar* is Rs. 47,000.

In the "schedule of properties" annexed to the deed the first item is the land in Entally of over six *bighâs* in extent, on which the *thâkurbârhi* stands, occupying 14 *cottâs* and the tenanted house occupying about one *cottâ*; the remainder of the Entally land is let to temporary tenants or in other words is *busti* property. The two other properties described in the schedule are the Elliot Road property and the Royd Street property, the former over four *bighâs* in area and the latter over five *cottâs*.

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The effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as *shebâit* and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property. In view of the privileges attached to dedicated property it has not infrequently happened, as the Law Reports show, that simulate dedications have been made and a close scrutiny of any challenged deed of dedication is necessary in order to ascertain whether there has been a genuine divestiture by the settlor in favour of the idol. The dedication, moreover, may be either absolute or partial. The property may be given out and out to the idol or it may be subjected to a charge in favour of the idol.

The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will.

Har Narayan v. *Surja Kunwari* (1).

It is also of importance to consider the extent of the property alleged to be dedicated in relation to the expense to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases, or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes it may not be protected by the dedication.

Their Lordships have read the deed of dedication with these considerations in mind and they have been much assisted by the careful analysis to which its provisions have been subjected by the learned Chief Justice. They have no difficulty in agreeing with his conclusion that the deed effectively dedicated to the

(1) (1921) I. L. R. 43 All. 291 (293); L. R. 48 I.A. 143 (145-6).

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service of the idol the *thâkurbârhi*, or building in which the idol is located, at 30, Beniapukur Road, on the Entally land and also the *shebâit's* house there, subject only to the question, to be dealt with later, of Satya's claim under the Limitation Act.

But different considerations apply with regard to the remaining properties comprised in the deed of dedication and deed of sale. In the first place throughout the deed of dedication the observances prescribed are repeatedly referred to as those originally in use to be performed and their Lordships agree with the learned Chief Justice that on a fair reading of the deed as a whole it was not intended that the ceremonies and expenditure should increase indefinitely with the growing income yielded by the properties. See *Surendro Keshub Roy* v. *Doorgasoonderi Dossee* (1). From the nature and situation of the properties and the directions given for their development it must have been clearly contemplated that the income derived from them would be a growing one and must exceed the expenditure required for the prescribed ceremonies and charities. It is significant that in 1922 and 1924 Pulin was able to raise on mortgage Rs. 53,000 on the security of parts only of the properties. In these circumstances the directions as to the disposal of the surplus income become of much importance. Now the clause dealing with the ultimate surplus directs that it shall be applied in the building of additional premises " for the convenience of residence and "habitation of our heirs ". This destination, it will be observed, is not in favour of the *shebâits*, but is really in substance a gift in favour of the settlors' heirs generally—

For the reasons thus summarised their Lordships find themselves in agreement with the conclusion which the learned Chief Justice reaches—

> that the only construction which it is possible in law to put upon the deed of 1888, notwithstanding the language of certain passages therein, is that there is a charge for the upkeep, worship and expenses of the idol, and

(1) (1892) I. L. R. 19 Cal. 513 (531); L. R. 19 I. A. 108 (127-8).

that the idol cannot claim to have an absolute interest in any portion of the property which is governed by the provision that tenanted houses should be built on the land for the increase of the income of the trust. It is, I think, otherwise with the *thâkurbârhi* and the *shebâit's* house on 30, Baniapukur Road.

The property conveyed by the deed of sale of 1896 cannot be differentiated in any material respect and must go with the property comprised in the deed of dedication (apart from the *thâkurbârhi* and *shebâit's* house).

It only remains to consider whether the High Court rightly decided that Satya had acquired by limitation a title to one-half of the *thâkurbârhi* and *shebâit's* house. Pleas of limitation were advanced in the Courts below also on behalf of the respondent Braja Nath and the mortgagees deriving right through Pulin, but these were repelled, the Chief Justice holding that the office of *shebâits* held by Braja and Pulin disabled them from possessing adversely to the idol. As this decision was not made the subject of appeal, their Lordships are absolved from the necessity of discussing the topic.

Satya, however, was in a different position from his half-brother and his uncle. As the learned Chief Justice points out, Satya was never a *shebâit* of the idol and therefore never was under any fiduciary disability in the matter of possessing adversely to the idol. When he was three years old, his father being dead, his mother repudiated the deed of dedication and by the consent decree of 1904 one-half of the property alleged to have been dedicated was declared to belong jointly to Pulin and Satya. From 1904 onwards for at least 12 years Satya openly and without any fraudulent collusion enjoyed continuous possession of his share of the *thâkurbârhi* and *shebâit's* house on the basis that the consent order of 1904 was effective and that the property was not subject to dedication. It is so found by the learned Chief Justice in the Court below both on evidence and on admission and their Lordships accept the finding. True, the possession of Satya for the 12 years from 1904 was jointly with Pulin,

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but Satya was not affected by any fiduciary disability attaching to Pulin and there was nothing to prevent his possession of his half being adverse to the appellant idol. Their Lordships accordingly see no reason to disturb the finding of the High Court in favour of Satya.

The result is that their Lordships will humbly advise His Majesty that the appeal be dismissed and the decree of the High Court dated May 13, 1932, and filed September 3, 1932, be affirmed. The appellant must pay to the respondent Satya Charan De his costs in the appeal and to the other respondents one set of costs among them.

Solicitors for appellant: *Nehra & Co.*

Solicitors for respondent No. 1: *Barrow, Rogers & Nevill.*

Solicitors for respondent No. 2: *A. J. Hunter & Co.*

Solicitors for respondents Nos. 3 to 6: *Douglas Grant & Dold.*

C. S.

there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under S. 173."

This Court, however, has not said that if a police officer takes merely one or two of the steps indicated by it, what he has done must necessarily be regarded as investigation. Investigation, in substance, means collection of evidence relating to the commission of the offence. The Investigating Officer is, for this purpose, entitled to question persons who, in his opinion, are able to throw light on the offence which has been committed and is likewise entitled to question the suspect and is entitled to reduce the statements of persons questioned by him to writing. He is also entitled to search the place of the offence and to search other places with the object of seizing articles connected with the offence. No doubt, for this purpose he has to proceed to the spot where the offence was committed and do various other things. But the main object of investigation being to bring home the offence to the offender the essential part of the duties of an Investigating Officer in this connection is, apart from arresting the offender, to collect all material necessary for establishing the accusation against the offender. Merely making some preliminary enquiries upon receipt of information from an anonymous source or a source of doubtful reliability for checking up the correctness of the information does not amount to collection of evidence and so cannot be regarded as investigation. In the absence of any prohibition in the Code, express or implied, I am of opinion that it is open to a Police Officer to make preliminary enquiries before registering an offence and making a full scale investigation into it. No doubt, S. 5A of the Prevention of Corruption Act was enacted for preventing harassment to a Government servant and with this object in view investigation, except with the previous permission of a Magistrate, is not permitted to be made by an officer below the rank of a Deputy Superintendent of Police. Where, however, a Police Officer makes some preliminary enquiries, does not arrest or even question an accused or question any witnesses but merely makes a few discreet enquiries or looks at some documents without making any notes, it is difficult to visualise how any possible harassment or even embarrassment would result therefrom to the suspect or the accused person. If no harassment to the accused results from the action of a Police Officer how can it be said to defeat the purpose underlying S. 5A ? Looking at the matter this way, I hold that what Mathur did was something very much short of investigation and, therefore, the provisions of S. 5A were not violated. Since no irregularity was committed by him there is no occasion to invoke the aid of the curative provisions of the Code.

IG/V.S.B. Appeal allowed.

AIR 1964 Supreme Court 227 (V 51 C 22)
(From Madras)*
7th March, 1963

K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

1. A. S. K. Krishnappa Chettiar (In C. A. No. 104 of 1961) 2. C. T. C. T. Chidambaram Chettiar (In C. A. No. 105 of 1961) 3. Meenakshi Achi and another (In C. A. No. 106 of 1961). 4. VR. A. U. Umayal Achi (In C. A. No. 107 of 1961), Appellants v. 1. S. V. V. Somiah @ Navniappa Chettiar and another (In C. A. No. 104 of 1961) 2. N. SV. V. Nachiappa Chettiar and another (In C. A. No. 105 of 1961) 3. Somasundaram @ Nachiappa Chattiar and another (In C. As. Nos. 106, 107 of 1961), Respondents.

Civil Appeals Nos. 104 to 107 of 1961.

Limitation Act (1908), Ss. 15 (1), 19 Art. 182 — Applicability — S. 15 (1) is restricted to a case where execution is stayed by injunction or order — Defendant adjudged insolvent — Scheme of composition providing for payment to creditors within four years — Scheme accepted by insolvency court — Such acceptance does not operate as stay of execution of decree for period of four years or as injunction — To refer to liability resting on some one else is not to acknowledge one's own liability within S. 19 — AIR 1939 All 66 and AIR 1944 Lah 190 (FB), Overruled.

The Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to courts and must, therefore, be regarded as an exhaustive Code. It is a piece of adjective or procedural law and not of substantive law. Rules of procedure, whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary implication. They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by necessary implication. It would, therefore, not be correct to apply any of the provisions of the Limitation Act to matters which do not strictly fall within the purview of those provisions. The provisions of Ss. 3 to 28 of the Limitation Act cannot be applied to situations which fall outside their purview. These provisions do not adumbrate any general principles of substantive law nor do they confer any substantive rights on litigants and, therefore, cannot be permitted to have greater application than what is explicit or implicit in them.

(Para 13)

*(See A. A. O. Nos. 480, 454, 478 and 479 of 1954, D/- 5-7-1956—Mad).

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The plaintiff obtained a decree against defendant No. 1 and defendant No. 2. The plaintiff filed execution application but the execution proceedings proved infructuous because the first defendant was adjudicated an insolvent on February 27, 1945. On September, 9, 1946 a composition of the debts due from the insolvent and his son, the second defendant, was arrived at. To the deed of composition the second defendant was also a party though he was not adjudicated an insolvent. Under the composition arrangement, the entire property of the defendants was to vest in four trustees. The deed provided for the payment of the reduced amount by the trustees to different creditors from the income of the properties or by sale or mortgage of those properties within four years from April 14, 1947. The composition scheme was accepted by the Insolvency court and the adjudication of the first defendant as insolvent was annulled by the court on December 19, 1946. The last execution application was dismissed on 19-9-1946. The fresh execution petition was filed on 13-6-52.

Held that S. 15 (1) was restricted in its application to a case where the execution of a decree had been stayed by an injunction or an order. By no stretch of imagination could it be said that the acceptance by the insolvency court of the composition operated as a stay of execution of the decree for the period of four years referred to in the deed or as an injunction. Further, the second defendant was not a party to the insolvency proceedings and could, therefore, not have been entitled to the benefit of the order of the court accepting the scheme of composition. Suspension of limitation in the circumstances obtaining in the case was neither explicit nor implicit in S. 15. Hence the execution petition was barred by time. AIR 1941 Bom 203 and AIR 1933 Cal 508 Distinguished; AIR 1939 All 66 and AIR 1944 Lah 190 (FB), Overruled. (Paras 10, 13)

On 19-4-1949 Vakil of the second defendant wrote a letter to the trustees in which he required the trustees to pay out of the funds in their hands dividends due to the various creditors under the Composition scheme :

Held that though there was a personal liability on the defendants under the decree, their liability which was created by the composition deed was only on properties in which they had, consequent on the creation of a trust under the composition deed, only a beneficial interest. This new liability had to be discharged by the trustees in whom the legal title to the property vested. Thus there were two different sets of persons who were liable, the defendants and the Trustees and their respective liabilities were distinct. What the defendant No. 2 had referred to in the letter was the liability of the Trustees arising under the terms of the deed of composition and could be enforced only against them. To refer to a liability resting on someone else is not to acknowledge one's own liability within the meaning of the word in S. 19. The defendant No. 2 had not even indirectly referred to the decree much less to the liability arising under it. In the circumstances this letter did not extend the period of limitation. AIR 1961 SC 1236, Distinguished. (Para 15)

Cases Referred : Courtwise Chronological Paras

('61) AIR 1961 SC 1236 (V 48) : 1962-1 SCR 140, Shapoor Freedom Mazda v. Durga Prosad Chamaria 15

('16) AIR 1916 PC 96 (V 3) : ILR 43 Cal 660, Nrityamoni Dassi v. Lakhan Chandra Sen 11

('39) AIR 1939 All 66 (V 26) : ILR (1939) All 103, Badruddin Khan v. Mahyar Khan 13

('41) AIR 1941 Bom 203 (V 28) : ILR (1941) Bom 435, Govindnaik Gurunathnaik v. Basawannewa Parutappa 11

('07) ILR 35 Cal 209 : 12 Cal WN 326, Lakhan Chandra Sen v. Madhusudan Sen 11

('33) AIR 1933 Cal 508 (V 20) : 37 Cal WN 184, Pulin Chandra Sen v. Amin Mia Muzaffar Ahmed 11, 13

('44) AIR 1944 Lah 190 (V 31) : ILR (1945) Lah 8 (FB), Managing Committee Sundar Singh Malha Singh Rajput High School, Indaura v. Sundar Singh Malha Singh Sanatan Dharma Rajput High School Trust 13

Mr. A. V. Viswanatha Sastri, Sr. Advocate, (Mr. R. Gopalakrishnan, Advocate with him), for Appellant (In all the Appeals); Mr. K. N. Rajagopal Sastri, Sr. Advocate (Mr. M. S. Narasimhan, Advocate, with him), for Respondent No. 1 (In all the Appeals).

The following Judgment of the Court was delivered by

MUDHOLKAR, J.

This appeal and civil appeals Nos. 104, 106 & 107 of 1961 arise out of execution proceedings in four different suits but as they involve a common question they were heard together by the High Court and by us. That question is whether the execution applications out of which these appeals arise are within time.

(2) We propose to treat C. A. No. 105 of 1961 as a typical case. The relevant facts thereof are briefly these :

(3) In O. S. No. 46 of 1943 one Ramanathan Chettiar instituted a suit against one Venkatachalam Chettiar in the court of the Subordinate Judge of Devakottai, for the recovery of a sum of Rs. 10,285/- due on promissory note dated November 20, 1942 with inter-

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rest thereon. He eventually obtained a decree for the full claim. In so far as the second defendant is concerned, he was made liable for the decretal amount to his extent of the interest in the joint family property of himself and his father. The plaintiff assigned the decree in favour of Chidambaram Chettiar, who is the appellant in C. A. No. 105 of 1961. He filed an execution application but the execution proceedings commenced by him proved infructuous because the first defendant was adjudicated an insolvent on February 27, 1945. On September 9, 1946 a composition of the debts due from the insolvent and his son, the second defendant, was arrived at. To the deed of composition the second defendant was also a party though he was not adjudicated an insolvent. Under that deed the creditors, including the four appellants before us agreed to take 40% of the dues, except one creditor who was to be paid a little more. The defendants, it may be mentioned, had extensive money-lending business in Burma and the bulk of their property was situate in that country. Under the composition arrangement, the entire property of the defendants, both in India and in Burma was to vest in four trustees, one of whom was the insolvent, that is, the first defendant to the suit. Two of the trustees were the present appellant, Chidambaram Chettiar and Krishnappa Chettiar, appellant in C. A. No. 104 of 1961. The fourth trustee was an outsider. The total indebtedness of the defendants, as ascertained on the date on which the composition was effected was Rs. 216077-4-8 but it was reduced under the arrangement to Rs. 86430-13-3. There are four schedules to the composition deed. Schedule A sets out the names of the creditors and the amounts due to them, Schedule B sets out the properties of the defendants and Schedules C and D set out the properties at Leiwo and Meola respectively in Burma. The deed provides for the payment of the reduced amount by the trustees to different creditors from the income of the properties or by sale or mortgage of those properties within four years from April 14, 1947. The deed further provides for the extension of this time limit "according to exigencies and necessity at the discretion of the first two trustees" i. e., the first defendant and the appellant and Chidambaram Chettiar. The arrangement also provides for payment of interest at 5 annas per mensem in respect of the amounts due on the decrees and 4 annas per mensem in respect of other outstandings as from April 14, 1947. The composition contemplated the realisation of the dues of the creditors from the income or sale or mortgage of the Burma property, in the first instance. Clause 10 which deals with this matter runs as follows :

"In case the properties of Burma firm are not sufficient to pay the amounts set apart as payable to the creditors at 40 per cent the individual Nos. 1 and 2 Trustees shall sell the properties in British India and set out in the schedule herein and from out of the sale proceeds distribute the amount to the creditors. Similarly, after the 40 per cent amounts have been paid and if there should be any amount of deficiency for the payment of the 60 per cent amount payable to Krishnappa Chettiar as described in para 6 supra, even for that also, the individual Nos. 1 and 2 Trustees shall sell the aforesaid British India properties and pay the aforesaid Krishnappa Chettiar the entire balance amount."

The composition deed contains various other terms out of which it would be relevant to set out only the following two :

"Clause 8 : Until 40 per cent of the amount is paid to the creditors as aforesaid, the said Trustees, shall be at the time of disbursement of the dividend, pay from the 1st Chitirai of the year Sarvajith for the annual expenses of the family, a sum of Rs. 600 per annum to individual No. 4 Trustees Venkatachalem Chettiar and a sum of Rs. 300 per annum to his son Nachiappa Chettiar for the aforesaid expenses.

Clause 16 : After the annulment of the order of adjudication herein, the aforesaid Venkatachalem Chettiar, shall in respect of transfer, etc. of management of the properties mentioned in C and D schedules, execute a general power of attorney in favour of individual Nos. 1 and 2 trustees and have the same registered."

(4) The composition scheme was accepted by the Insolvency Court and the adjudication of the first defendant as insolvent was annulled by the court on December 19, 1946.

(5) Due to political changes in Burma only very little was realised out of the Burma assets within the period of four years prescribed in the composition deed. The trustees who were empowered to extend the time did not extend it. The appellants, therefore, turned to the Indian assets and sought execution of their decrees against them. Two contentions were raised on behalf of the defendants. One was that the Indian assets could not be sold until the assets in Burma were completely exhausted and the other was that the execution applications were barred by time.

(6) In O. S. No. 46 of 1943 the last execution application was dismissed on September 19, 1946 (E. P. No. 109 of 1946). No execution petition was filed thereafter till the present petition (E. P. No. 117 of 1952). This was filed on June 13, 1952. Similarly in the remaining three appeals also execution applications with

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which we are concerned were filed more than three years after the dismissal of the previous execution applications. It may be mentioned that originally the appellant as well as appellants in the other appeals had sought the execution of their respective decrees for the full amount. But they amended their petitions later on pursuant to the orders of the court and restricted their claims to 40 per cent of the amounts due under their decrees. The appellant Chidambaram filed an affidavit along with the execution petition and set out the following grounds in support of his contention that the execution application was within time.

"The trustees were able to realise some of the assets of the defendants in Burma and to pay a dividend of 10 per cent to the creditors. I was paid a sum of Rs. 562-4-0 by way of dividend for this decree on 10th August, 1949. As the rest of the Burma assets of the defendant could not be realised by the trustees on account of the Civil War in Burma and the land legislations passed there and as there was no prospect of their being realised in the near future myself and A. S. K. Krishnappa Chettiar aforesaid as managing trustees under the said composition offered to extend the period of management by one year provided the defendants would consent to their Indian assets being realised and distributed among the creditors. But the defendants were not willing thereto and hence we thought fit not to extend the period of our management. We have filed a petition in I. A. No. 87 of 1951 in the said I. P. No. 1 of 1945 to have the said composition scheme set aside and the 1st defendant readjudged as insolvent. The said petition is pending.

(7) I am advised that as the said composition arrangement has failed on account of the assets of the defendants not being realised and the debts discharged within the four year period mentioned therein I am in law and in equity entitled to recover the entire amount due to me under this decree by executing it.

(8) The said composition provides for a maintenance allowance of Rs. 600 and Rs. 300 annually being given to the 1st and 2nd defendant respectively at the time of distribution of the dividends. In respect thereof a notice was issued by the 2nd defendant on 19th April, 1959 (sic) to myself and A. S. K. Krishnappa Chettiar aforesaid wherein there is an acknowledgment of liability in respect of the several debts mentioned in the said composition. Further the trustees have acting under the authority given to them by the defendants under the said composition paid me Rs. 562-4-0 on 10th August 1949 by way of dividend for this decree and have duly entered the same in the accounts maintained by them. Moreover I could not execute the decree during the four years from 14th April 1947 or any extended period during which the trustees had to manage, realise and distribute the assets of the defendants. There is therefore no question of limitation".

Similar grounds were set out in the affidavits filed by the other appellants also.

(7) It may be mentioned that in each of the execution applications relief was claimed only against the second defendant because in insolvency petition No. 87 of 1951 filed by some of the creditors the first defendant, was re-adjudicated an insolvent by the court on August 3, 1954. The execution application was, as already stated, opposed by the second defendant firstly on the ground that the composition arrived at between him and his father on the one hand and the creditors on the other was still in force, that the arrangement was irrevocable and operated as a complete discharge of the liability of the defendants for all time. The second ground was that the execution application was barred by time. The precise pleas of the second defendant regarding limitation were as follows :

(a) that the adjudication of his father as an insolvent and the pendency of insolvency proceedings against him would not affect limitation in so far as he was concerned;

(b) that the receipt by the appellant and other creditors of certain amounts as dividends in August, 1949 would not extend the period of limitation for execution proceedings;

(c) that the acknowledgment relied upon is "wholly wrong, misconceived and untenable".

(8) According to him there was no acknowledgment of liability of any kind in the notice referred to in the affidavit much less the liability of the second defendant to discharge the decree which had in fact become extinguished and effaced by reason of the composition arrived at on September 9, 1946.

(9) In the course of the arguments before the executing court it was urged on behalf of the appellants in these appeals that the four years within which the trustees were required to realise the Burma properties and pay off the debts of the creditors must be regarded as a period during which the execution of the decrees was stayed and that consequently on the principles underlying S. 15 of the Indian Limitation Act, 1908, that period should be deducted from computing the period of limitation for preferring execution applications. The Subordinate Judge before whom the execution applications were filed upheld this contention & held that the execution applications were within time. He also held that the composition arrived at between the parties operated as an adjustment of the decree on the date on which that composition was effected or from

the date on which the adjudication was arrived at and that though the composition could not be certified to the executing court under O. XXI, R. 2 C. P. C. within the time permitted by law, it could be certified even now at the instance of the decree-holder because it was open to the decree-holder to certify an adjustment at any time he liked. According to the learned Subordinate Judge, the adjustment precluded each of the appellants from executing his decree for a period of four years from April 14, 1947 and, therefore, the execution applications were within time. The High Court, however, disagreed with the Subordinate Judge on both the grounds and holding that the execution petitions were barred by time allowed the appeals. It may be mentioned that neither of the two courts below has considered the contention of the appellants in these appeals that the letter dated April 19, 1949 sent by the second defendant to two of the trustees operated as an acknowledgment of their liability or that dividends paid to the appellants by the trustees in August, 1949 operated to extend the time of limitation.

(10) Mr. Viswanatha Sastri who appears for the appellants in these appeals has raised only two contentions. The first is that the principle underlying S. 15 (1) of the Limitation Act is applicable to a case of this kind and that, therefore, the execution applications are within time. The second is that at any rate the letter dated April 19, 1949, written by the second defendant to the trustees operates as an acknowledgment of liability under S. 19 of the Limitation Act and, therefore, saves the limitation in respect of all the execution applications except the one out of which C. A. No. 104 of 1961 arises. According to Mr. Sastri the composition of a decretal debt does not amount to an adjustment or satisfaction of a decree until the acts required to be done thereunder have been performed. Here the composition scheme required payment of 40 per cent of the decretal debts by the trustees to the creditors. According to him, until that condition was fulfilled the original decree cannot be said to have been satisfied. Since the decrees herein involved could not be regarded as having been satisfied they are still alive. Then, according to Mr. Sastri, where a composition scheme prescribes the period during which a condition has to be performed till the expiry of the period or performance of the condition the operation of the decrees must be deemed to have been stayed. For, during this period it would be incompetent to the decree-holders to execute their decrees. Such period could therefore be deducted by applying the principles underlying S. 15 (1) of the Limitation Act from computing the period of limitation for filing a fresh execution application. He concedes that here the composition scheme not having been certified to the execution court the defendants would not have been able to resist an execution application if made within the period of four years specified in the deed of composition. But the composition being binding on the appellants, they would have laid themselves open to suits for damages at the instance of the defendants if they had proceeded to execute their decrees within this period. Section 15 (1) of the Limitation Act runs thus :

"15 (1) : In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded".

It is clear from its terms that it is restricted in its application to a case where the execution of a decree has been stayed by an injunction or an order. By no stretch of imagination can it be said that the acceptance by the insolvency court of the composition operated as a stay of execution of the decrees for the period of four years referred to in the deed or as an injunction. Further, the second defendant was not a party to the insolvency proceedings and could, therefore, not have been entitled to the benefit of the order of the court accepting the scheme of composition.

(11) In support of his contention that the principles underlying S. 15 (1) are applicable to a case like the present one, Mr. Sastri has strongly relied on the decision in Govindnaik Gurunathnaik v. Basawannewa Parutappa, ILR (1941) Bom 435 : (AIR 1941 Bom 203). There, Beaumont C. J., has observed at p. 437 (of ILR Bom) : (at p. 204 of AIR) :

"Section 15 of the Act recognizes the principle that in computing the period of limitation prescribed for an application for the execution of a decree, any period during which the execution of the decree has been stayed must be excluded; and it would certainly seem right to apply a similar principle to applications in a suit which has been stayed; in terms, however, the section does not apply. The only authority on the point, to which we have been referred, and which was referred to in the lower Courts, is Pulin Chandra Sen v. Amin Mia Muzaffar Ahmed, AIR 1933 Cal 508".

Saying that this decision had stood for some years and had not been dissented from, the learned Chief Justice observed :

"I would rather base the appellant's case on the ground that the right to apply for a final decree was suspended during the period in which the suit was stayed. Such a principle was applied by the Calcutta High Court

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in Lakhan Chandra Sen v. Madhusudan Sen ILR 35 Cal 209 affirmed by the Privy Council in Nrityamoni Dassi v. Lakhan Chandra Sen, ILR 43 Cal 660 : (AIR 1916 PC 96)."

It would thus appear that the learned Chief Justice based his decision really on S. 14 of the Limitation Act. In both the cases referred to by the learned Chief Justice the provision of S. 14 of the Limitation Act were applied.

(12) In Pulin Chandra Sen's case, AIR 1933 Cal 508 the facts were these : The next friend of a minor instituted a suit upon a mortgage but died after the preliminary decree was passed. No new next friend was, however, appointed in his place. The minor made an application for passing a final decree within 3 years after attaining majority, but three years after the period of grace fixed by the preliminary decree. The High Court, while holding that though the erstwhile minor was not entitled to claim the benefit of S. 6 of the Limitation Act held that the execution application must be regarded as within time since it had been made within three years from the date when the right to apply accrued to him on his attaining majority. No doubt, this is a case where in effect the court has applied the principles underlying S. 6 though it was clearly of opinion that S. 6 in terms did not apply. There is no discussion of the point at all and, therefore, we do not think that this is a decision which needs to be considered.

(13) The next two decisions relied on are Badruddin Khan v. Mahyar Khan, ILR (1939) All 103 : (AIR 1939 All 66) and Managing Committee Sundar Singh Malha Singh Rajput High School, Indaura v. Sundar Singh Malha Singh Sanatan Dharma Rajput High School Trust, ILR (1945) Lah 8 : (AIR 1944 Lah 190) (FB). In both these cases the court applied what according to it were the general principles underlying S. 15 of the Limitation Act, though the facts of these cases do not strictly fall within the purview of that section. The question is whether there is any well-recognized principle whereunder the period of limitation can be regarded as being suspended because a party is prevented under certain circumstances from taking action in pursuance of his rights. The Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to courts and must, therefore, be regarded as an exhaustive Code. It is a piece of adjective or procedural law and not of substantive law. Rules of procedure, whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary implication. They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by necessary implication. It would, therefore, not be correct to apply any of the provisions of the Limitation Act to matters which do not strictly fall within the purview of those provisions. Thus for instance, period of limitation for various kinds of suits, appeals and applications are prescribed in the First Schedule. A proceeding which does not fall under any of the articles in that schedule could not be said to be barred by time on the analogy of a matter which is governed by a particular article. For the same reasons the provisions of Sections 3 to 25 of the Limitation Act cannot be applied to situations which fall outside their purview.

These provisions do not adumbrate any general principles of substantive law nor do they confer any substantive rights on litigants and, therefore, cannot be permitted to have greater application than what is explicit or implicit in them. Suspension of limitation in circumstances of the kind obtaining in these appeals is neither explicit nor implicit in S. 15 upon which reliance is placed on behalf of the appellants. We are, therefore, unable to accept the first argument of Mr. Sastri.

(14) Coming to the second argument of Mr. Sastri it would be useful to reproduce the relevant portion of the letter dated April 19, 1949, on which reliance is placed :

"The properties of our client's family and his father, Venkatachalem Chettiar's share of properties have vested in you in the capacity of Trustees as per the composition scheme of arrangement effected on 9th September, 1946 and you are managing the same, and you have to pay Rs. 300 per annum to our client from 1st Chitrai of Sarvajit year (14th April, 1947) for his family expenses as provided in the scheme of composition and you have paid Rs. 300 and for the year Sarvajit and have obtained a receipt therefor from my client. You have not paid the sum of Rs. 300 due for the year Sarwadhari to our client though he demanded you many times. As it is learnt that individual No. 2 out of you, are raising non-maintainable objections and the sum of Rs. 300 due for the year Virodhi, still remains to be paid, I have been given instructions to demand the total amount of Rs. 600 payable for the aforesaid years. So you should pay the amount to my client and obtain a receipt therefor within one week after the receipt of this notice. Further you have till now collected Rs. 17,500 as per the scheme of arrangement and though you have received the amount long time ago, you have not paid to the creditors their dividend amounts, you are bound by law and equity to pay interest to the aforesaid amounts. You are hereby informed that as you have not paid to the creditors the dividend amounts my client is put to a heavy

loss and that you are bound to bear all the losses that may be caused thereby and make good the losses: you should immediately pay off the creditors the dividends and in default my client will have to launch proceedings against you and seek reliefs through Court".

(15) This letter was written by the vakil of the second defendant to the Trustees damanding payment of the maintenance allowance due to the second defendant. The second object of this letter was to require the trustees to pay out of the funds in their hands dividends due to the various creditors under the composition scheme. Mr. Sastri contends that this letter contains a definite admission of the jural relationship between the defendant on the one hand and the creditors on the other—i. e., the relationship of the creditor and, debtor and, therefore, this is an admission of liability under the decrees. Relying upon the decision of this Court in Shapoor Freedom Mazda v. Durga Prosad Chamaria, (1962) 1 SCR 140 : (AIR 1961 SC 1236), he says that the essential requirement for sustaining a plea of acknowledgment under S. 19 of the Limitation Act is that the statement on which it is sought to be founded must relate to a subsisting liability, indicate the existence of jural relationship and must be intended, either expressly or impliedly, to admit that jural relationship. Where such jural relationship is admitted expressly or impliedly, he contends, that the mere fact that the precise nature of the liability is not mentioned would not prevent the acknowledgment from falling within S. 19. That was a case in which the mortgagor had written to his creditor a letter to the following effect :

"My dear Durgaprasad,

Chandni Bazar is again advertised for sale on Friday the 11th inst. I am afraid it will go very cheap. I had a private offer of Rs. 2,75,000 a few days ago but as soon as they heard it was advertised by the Registrar they withdrew. As you are interested why do you not take up the whole. There is only about 70,000 due to the mortgagee—a payment of 10,000 will stop the sale.

Yours sincerely,
Sd/ J. C. Galstaun.

The question to be considered was whether this amounted to an acknowledgment of the mortgagee's right. This Court held that it did amount to an acknowledgment and observed thus :

"It is thus clear that acknowledgment as prescribed by S. 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate, the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally, courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions, contained in S. 19, and there is really no substantial difference between the parties as to the true legal position in this matter".

In our opinion, this case is not of assistance to the appellants. In the appeals before us though there was a personal liability on the defendants under the various decrees, their liability which was created by the composition deed was only on properties in which they had, consequent on the creation of a trust under the composition deed, only a beneficial interest. This new liability had to be discharged by the trustees in whom the legal title to the property vested. Thus there were two different sets of persons who were liable, the defendants and the Trustees and their respective liabilities were distinct. What the defendant No. 2 has referred to is the liability of the Trustees arising under the terms of the deed of composition and could be enforced only against them. To refer to a liability resting on someone else is not to acknowledge one's own liability within the meaning of the word in S. 19. The defendant No. 2 has not even indirectly referred to the decree much less to the liability arising under any of them. In the circumstances we must hold that this letter does not extend the period of limitation. For these reasons we uphold the decision of the High Court and dismiss each of these appeals.

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with costs. There will, however, be only one hearing fee.

IG/DHZ Appeals dismissed.

AIR 1964 Supreme Court 234 (V 51 C 23)

(From Bombay)*

2nd May, 1963

P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Raghunath Keshava Kharkar, Appellant v. Ganesh alias Madhukar Balakrishna Kharkar and others, Respondents.

Civil Appeal No. 98 of 1962.

(a) Provincial Insolvency Act (1920), S. 67 — Devolution of property on undischarged insolvent — Insolvent obtaining absolute discharge — Suit for recovery of property thereafter — Suit held maintainable subject to conditions laid down by S. 67 — F. A. Nos. 897 of 1951 and 66 of 1952, D/- 7-3-1957 (Bom), Reversed.

On consideration of the scheme of the Act, it is clear that an insolvent is entitled to get back any undisposed of property as surplus when an absolute order of discharge is made in his favour, subject always to the condition that if any of the debts provable under the Act have not been discharged before the order of discharge, the property would remain liable to discharge those debts and also meet the expenses of all proceedings taken under the Act till they are fully met. (Para 27)

It may also be added that there is nothing in the Act which takes away the right of the insolvent to sue in courts after he has been granted a discharge, for he then becomes a free man. In such a situation he would certainly be entitled to sue in court for recovery of his undisposed of property, if it is in the possession of a third party, after his discharge and such property cannot for ever remain vested in the court or receiver. All that justice requires is that in case the conditions of S. 67 have not been fulfilled such property should be subject to those conditions. (Scheme of the Act and case law fully discussed.) (Paras 17, 27)

Therefore, an insolvent on whom property devolves when he is an undischarged insolvent can maintain a suit for the recovery of the property after his absolute discharge. (The order of the trial court that notice should be given to the receiver in insolvency application to consider if he wanted the property to be made available for distribution amongst creditors was also held correct.) F. A. Nos. 897 of 1951 and 66 of 1952, D/- 7-3-1957 (Bom), Reversed. (Para 27)

(b) Succession Act (1925), S. 74 — Will by Hindu — Construction — Bequest in favour of wife that she should enjoy income from property during her life time as owner — Property to go over to adopted son after death of wife — Wife held given only limited estate.

A Hindu, by a will executed before 1894, gave certain immovable property to his wife and provided that during her life time, she shall enjoy, as owner, only the income therefrom in any manner she may like. It was further provided in the same will that the property would go to the son to be adopted by her, after her death.

Held that the will conferred only a life estate to her and also that the clauses were in consonance with the prevailing practice in those times. (Para 33)

(c) Civil P. C. (1908), O. 22 Rr. 4, 11 — Suit by reversioner by recovery of property after death of widow — Several alienees made defendants — Suit dismissed in appeal to High Court — High Court permitting appeal to Supreme Court — Death of one of alienee respondent — Legal Representatives not brought on record — Delay in application — Application dismissed by High Court and also by Supreme Court — Held interests of alienees being separate and independent whole of the appeal did not abate. (Para 35)

Cases Referred : Courtwise Chronological Paras

('33) AIR 1933 All 449 (V 20) : ILR 55 All 503, Rup Narain Singh v. Har Gopal Tewari 22

('26) AIR 1926 Bom 366 (V 13) : 28 Bom LR 554, Sayad Daud v. Mohomed Sayad 20

('36) AIR 1936 Cal 434 (V 23) : ILR (1937) 1 Cal 127, Arjun Das Kundu v. Marchia Telini 24

('34) AIR 1934 Lah 809 (V 21) : ILR 16 Lah 392, Diwan Chand v. Manak Chand 23

('37) AIR 1937 Lah 87 (V 24) : ILR 17 Lah 775, Kanshi Ram v. Hari Ram 25

('41) AIR 1941 Mad 345 (V 28) : 1940 Mad WN 19, Surayya v. Mangayya 21

('44) AIR 1944 Nag 28 (V 31) : ILR (1944) Nag 14, Parsu v. Balaji 26

(1890) 25 QBD 262 : 59 LJ QB 409, Cohen v. Mitchell 18

Mr. S. S. Shukla, Advocate, for Appellant; Mr. A. V. Visvanatha Sastri, Senior Advocate (Mr. G. B. Pai, Advocate and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and

*(See First Appeals Nos. 897 of 1951 and 66 of 1952, D/- 7-3-1957—Bom.)

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Civil Appeal No. 7764 of 2014

Ravinder Kaur Grewal v. Manjit Kaur

2019 SCC OnLine SC 975

In the Supreme Court of India

(BEFORE ARUN MISHRA, S. ABDUL NAZEER AND M.R. SHAH, JJ.)

Civil Appeal No. 7764 of 2014

Ravinder Kaur Grewal and Others ..... Appellant(s);

v.

Manjit Kaur and Others ..... Respondent(s).

With

Special Leave Petition (Civil) Nos. 8332-8333 of 2014

Radhakrishna Reddy (D) Through Lrs. ..... Petitioner(s);

v.

G. Ayyavoo and Others ..... Respondent(s).

Civil Appeal No. 7764 of 2014 and Special Leave Petition (Civil) Nos. 8332-8333 of 2014

Decided on August 7, 2019

The Judgment of the Court was delivered by

ARUN MISHRA, J.:— The question of law involved in the present matters is quite significant. Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of Limitation Act, 1963 (for short, "the Act") for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person? In other words, whether Article 65 of the Act only enables a person to set up a plea of adverse possession as a shield as a defendant and such a plea cannot be used as a sword by a plaintiff to protect the possession of immovable property or to recover it in case of dispossession. Whether he is remediless in such a case? In case a person has perfected his title based on adverse possession and property is sold by the owner after the extinguishment of his title, what is the remedy of a person to avoid sale and interference in possession or for its restoration in case of dispossession?

2. Historically, adverse possession is a pretty old concept of law. It is useful but often criticised concept on the ground that it protects and confers rights upon wrongdoers. The concept of adverse possession appeared in the Code of Hammurabi approximately 2000 years before Christ era. Law 30 contained a provision "If a chieftain or a man leaves his house, garden, and field .... and someone else takes possession of his house, garden and field and uses it for three years; if the first owner returns and claims his house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it." However, there was an exception to the aforesaid rule: for a soldier captured or killed in battle and the case of the juvenile son of the owner. In Roman times, attached to the land, a kind of spirit that was nurtured by the possessor. Possessor or user of the land was considered to have a greater "ownership" of the land than the titled owner. We inherited the Common Law concept, being a part of the erstwhile British colony. William in 1066

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consolidated ownership of land under the Crown. The Statute of Westminster came in 1275 when land records were very often scarce and literacy was rare, the best evidence of ownership was possession. In 1639, the Statute of Limitation fixed the period for recovery of possession at 20 years. A line of thought was also evolved that the person who possesses the land and produces something of ultimate benefit to the society, must hold the best title to the land. Revenue laws relating to land have been enacted in the spirit to confer the title on the actual tiller of the land. The Statute of Wills in 1540 allowed lands to be passed down to heirs. The Statute of Tenures enacted in 1660 ended the feudal system and created the concept of the title. The adverse possession remained as a part of the law and continue to exist. The concept of adverse possession has a root in the aspect that it awards ownership of land to the person who makes the best or highest use of the land. The land, which is being used is more valuable than idle land, is the concept of utilitarianism. The concept thus, allows the society as a whole to benefit from the land being held adversely but allows a sufficient period for the "true owner" to recover the land. The adverse possession statutes permit rapid development of "wild" lands with the weak or indeterminate title. It helps in the Doctrine of Administration also as it can be an effective and efficient way to remove or cure clouds of title which with memories grow dim and evidence becomes unclear. The possessor who maintains and improves the land has a more valid claim to the land than the owner who never visits or cares for the land and uses it, is of no utility. If a former owner neglects and allows the gradual dissociation between himself and what he is claiming and he knows that someone else is caring by doing acts, the attachment which one develops by caring cannot be easily parted with. The bundle of ingredients constitutes adverse possession.

3. We have heard learned counsel appearing for the parties at length and also the Amicus Curiae, Shri P.S. Patwalia and Shri Huzefa Ahmadi, senior counsel. Various decisions of this Court and Privy Council and English Courts have been cited in which the suit filed by the plaintiff based on adverse possession has been held to be maintainable for declaration of title and protection of the possession or the restoration of possession. Nature of right acquired by adverse possession and even otherwise as to the right to protect possession against unlawful dispossession of the plaintiff or for its recovery in case of illegal dispossession.

4. Before dilating upon the issue, it is necessary to refer the decision in *Gurudwara Sahab* v. *Gram Panchayat Village Sirthala*, (2014) 1 SCC 669 in which this court has referred to the decision of the Punjab and Haryana High Court in *Gurudwara Sahib Sannauli* v. *State of Punjab* since reported in (2009) 154 PLR 756, to opine that no declaration of title can be sought by a plaintiff on the basis of adverse possession inasmuch as adverse possession can be used as a shield by a defendant and not as a sword by a plaintiff. This Court while deciding the question gave the only reason by simply observing that there is "no quarrel" with the proposition to the extent that suit cannot be based by the plaintiff on adverse possession. Thus, this point was not contested in *Gurudwara Sahib* v. *State Gram Panchayat Village, Sirthala* (supra) when this Court expressed said opinion.

5. It is pertinent to mention here that before the aforesaid decision of this court, there was no such decision of this court holding that suit cannot be filed by a plaintiff based on adverse possession. The views to the contrary of larger and coordinate benches were not submitted for consideration of the Two Judge Bench of this Court which decided the aforesaid matter.

6. A Three-Judge Bench decision in *Sarangadeva Periya Matam* v. *Ramaswami Gondar (Dead) by Lrs.*, AIR 1966 SC 1603 of this Court in which the decision of Privy Council in *Musumut Chundrabullee Debia* v. *Luchea Debia Chowdrain*, 1865 SCC OnLine PC 7 had been relied on, was not placed for consideration before the division bench deciding *Gurudwara Sahib* v. *Gram Panchayat, Sirthala*.

7. Learned Amicus pointed out that in *Sarangadeva Periya Matam* v. *Ramaswami Goundar (Dead) by Lrs.* (supra) the plaintiff was in the possession of the suit land until January 1950 when the 'mutt' obtained possession of the land. On February 18, 1954, plaintiff instituted the suit against the 'mutt' for "recovery of possession" of the suit land o based on an acquisition of title to land by way of "adverse possession". A Three-Judge Bench of this Court has held that the plaintiff acquired the title by his adverse possession and was entitled to recover the possession. Following is the relevant discussion:

> "1. Sri Sarangadevar Periya Matam of Kumbakonam was the inam holder of lands in Kannibada Zamin, Dindigul Taluk, Madurai District. In 1883, the then mathadhipathi granted a perpetual lease of the melwaram and kudiwaram interest in a portion of the inam lands to one Chinna Gopiya Goundar, the grandfather of the plaintiff-respondent on an annual rent of Rs. 70. The demised lands are the subject-matter of the present suit. Since 1883 until January 1950 Chinna Gopiya Goundar and his descendants were in uninterrupted possession and enjoyment of the suit lands. In 1915, the mathadhipathi died without nominating a successor. Since 1915, the descendants of Chinna Gopiya Goundar did not pay any rent to the math. Between 1915 and 1939 there was no mathadhipathi. One Basavan Chetti was in management of the math for a period of 20 years from 1915. The present mathadhipathi was elected by the disciples of the Math in 1939. In 1928, the Collector of Madurai passed an order resuming the inam lands and directing the full assessment of the lands and payment of the assessment to the math for its upkeep. After resumption, the lands were transferred from the "B" Register of inam lands to the "A" Register of ryotwari lands and a joint patta was issued in the name of the plaintiff and other persons in possession of the lands. The plaintiff continued to possess the suit lands until January 1950 when the math obtained possession of the lands. On February 18, 1954, the plaintiff instituted the suit against the math represented by its present mathadhipathi and an agent of the math claiming recovery of possession of the suit lands. The plaintiff claimed that he acquired title to the lands by adverse possession and by the issue of a ryotwari patta in his favour on the resumption of the inam. The Subordinate Judge of Dindigul accepted the plaintiff's contention and decreed the suit. On appeal, the District Judge of Madurai set aside the decree and dismissed the suit. On second appeal, the High Court of Madras restored the judgment and decree of the Subordinate Judge. The defendants now appeal to this Court by special leave. During the pendency of the appeal, the plaintiff-respondent died and his legal representatives have been substituted in his place.
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> 2. The plaintiff claimed title to the suit lands on the following grounds : (1) Since 1915 he and his predecessors-in-interest were in adverse possession of the lands, and on the expiry of 12 years in 1927, he acquired prescriptive title to the lands under s. 28 read with Art. 144 of the Indian Limitation Act, 1908; (2) by the resumption proceedings and the grant of the ryotwari patta a new tenure was created in his favour and he acquired full ownership in the lands; and (3) in any event, he was in adverse possession of the lands since 1928, and on the expiry of 12 years in 1940 he acquired prescriptive title to the lands under s. 28 read with Art. 134-B of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the plaintiff should be accepted, and it is, therefore, not necessary to consider the other two grounds of his claim.
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> 6. We are inclined to accept the respondents' contention. Under Art. 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The

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math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. See *Babajirao* v. *Laxmandas*, (1904) ILR 28 Bom 215 (223). It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed mathadhipathi, he may institute the suit on its behalf; if not, the de facto mathadhipathi may do so, see *Mahadeo Prasad Singh* v. *Karia Bharti*, 62 Ind App 47 at p.51 and where, necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Art. 144 is not suspended by the absence of a legally appointed mathadhipathi; clearly, limitation would run against it where it is managed by a de facto mathadhipathi. See *Vithalbowa* v. *Narayan Daji*, (1893) I.L.R 18 Bom 507 at p.511, and we think it would run equally if there is neither a de jure nor a de facto mathadhipathi.

10. We hold that by the operation of Art. 144 read with s. 28 of the Indian Limitation Act, 1908 the title of the math to the suit lands became extinguished in 1927, and the plaintiff acquired title to the lands by prescription. He continued in possession of the lands until January 1950. It has been found that in January 1950 he voluntarily delivered possession of the lands to the math, but such delivery of possession did not transfer any title to the math. The suit was instituted in 1954 and is well within time.

(emphasis supplied)"

8. In *Balkrishan* v. *Satyaprakash*, (2001) 2 SCC 498, decided by a Coordinate Bench, the plaintiff filed a suit for declaration of title on the ground of adverse possession and a permanent injunction. This Court considered the question, whether the plaintiff had perfected his title by adverse possession. This Court has laid down that the law concerning adverse possession is well settled, a person claiming adverse possession has to prove three classic requirements i.e. *nec - nec vi, nec clam* and *nec precario*. The trial court, as well as the First Appellate Court, decreed the suit while the High Court dismissed it. This Court restored the decree passed by the trial court decreeing the plaintiff suit based on adverse possession and observed:

"6. The short question that arises for consideration in this appeal is: whether the High Court erred in holding that the appellant had not perfected his title by adverse possession on the ground that there was an order of a Tahsildar against him to deliver possession of the suit land to the auction purchasers.

7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three "neck" - nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate in continuity in publicity and in extent. In *S.M. Karim* v. *Bibi Sakina*, [1964] 6 SCR 780 speaking for this Court Hidayatullah, J. (as he then was) observed thus:

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

14. In *Sk. Mukbool Ali* v. *Sk. Wajed Hossein*, (1876) 25 WR 249 the High Court held:

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"Whatever the decree might have been, the defendant's possession could not be considered as having ceased in consequences of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the statute of limitation from running."

15. In our view, the Madras High Court correctly laid down the law in the aforementioned cases.

17. From the above discussion, it follows that the judgment and decree of the High Court under challenge cannot be sustained. They are accordingly set aside and the judgment and decree of the First Appellate Court confirming the judgment and decree of the trial court is restored. The appeal is accordingly allowed but in the circumstances of the case without costs."

(emphasis supplied)

9. In *Des Raj* v. *Bhagat Ram (Dead) by Lrs.*, (2007) 9 SCC 641, a suit filed by the plaintiff for declaration of title and also for a permanent injunction based on adverse possession. The Courts below decreed the suit of the plaintiff on the ground of adverse possession. The same was affirmed by this Court. This Court considered the change brought about in the Act by Articles 64 and 65 vis-à-vis to Articles 142 and 144. Issue No. 1 was framed whether the plaintiff becomes the owner of the suit property by way of adverse possession? This Court has observed that a plea of adverse possession was indisputably be governed by Articles 64 and 65 of the Act. This Court has discussed the matter thus :

"20. A plea of adverse possession or a plea of ouster would indisputably be governed by Articles 64 and 65 of the Limitation Act.

22. The mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. But the intention on the part of the plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the defendants-appellants themselves had earlier filed two suits. Such suits were filed for partition. In those suits the defendants-appellants claimed themselves to be co-owners of the plaintiff. A bare perusal of the judgments of the courts below clearly demonstrates that the plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the plaintiff over the suit land, therefore, was, thus, known to the appellants. They allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action, therefor, would be a continuous one. But, it is equally well-settled that pendency of a suit does not stop running of 'limitation'. The very fact that the defendants despite the purported entry made in the revenue settlement record of rights in the year 1953 allowed the plaintiff to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly goes to show that even prior to institution of the said suit the plaintiff-respondent had been in hostile possession thereof.

24. In any event the plaintiff made his hostile declaration claiming title for the property at least in his written statement in the suit filed in the year 1968. Thus, at least from 1968 onwards, the plaintiff continued to exclusively possess the suit land with a knowledge of the defendants-appellants.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but at least from 1968. If that be so, the finding of the High Court that the respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

28. We are also not oblivious of a recent decision of this Court in *Govindammal* v.

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R. Perumal Chettiar, (2006) 11 SCC 600 wherein it was held: (SCC p. 606, para 8)

> "In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case."

31. We, having regard to the peculiar facts obtaining in the case, are of the opinion that the plaintiff-respondent had established that he acquired title by ousting the defendant-appellants by declaring hostile title in himself which was to the knowledge of his co-sharers."

(emphasis supplied)

10. In *Kshitish Chandra Bose* v. *Commissioner of Ranchi*, (1981) 2 SCC 103 a three -Judge Bench of this Court considered the question of adverse possession by a plaintiff. The plaintiff has filed a suit for declaration of title and recovery of possession based on Hukumnama and adverse possession for more than 30 years. The trial court decreed the suit on both the grounds, 'title' as well as of 'adverse possession'. The plaintiff's appeal was allowed by this Court. It has been observed by this Court that adverse possession had been established by a consistent course of conduct of the plaintiff in the case, possession was hostile to the full knowledge of the municipality. Thus, the High Court could not have interfered with the finding as to adverse possession and could not have ordered remand of the case to the Judicial Commissioner. The order of remand and the proceedings thereafter were quashed. This court restored decree in favour of plaintiff for declaration of title and recovery of possession and also for a permanent injunction, has dealt with the matter thus:

> "2. The plaintiff filed a suit for declaration of his title and recovery of possession and also a permanent injunction restraining the defendant municipality from disturbing the possession of the plaintiff. It appears that prior to the suit, proceedings under Section 145 were started between the parties in which the Magistrate found that the plaintiff was not in possession but upheld the possession of the defendant on the land until evicted in due course of law.
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> 3. In the suit the plaintiff based his claim in respect of plot No. 1735, Ward No. 1 of Ranchi Municipality on the ground that he had acquired title to the land by virtue of a hukumnama granted to him by the landlord as far back as April 17, 1912 which is Ex.18. Apart from the question of title, the plaintiff further pleaded that even if the land belonged to the defendant municipality, he had acquired title by prescription by being in possession of the land to the knowledge of the municipality for more than 30 years, that is to say, from 1912 to 1957.
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> 10. Lastly, the High Court thought that as the land in question consisted of a portion of the tank or a land appurtenant thereto, adverse possession could not be proved. This view also seems to be wrong. If a person asserts a hostile title even to a tank which as claimed by the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner, (namely, the municipality in this case), to evict the trespasser, his title by prescription would be complete after thirty years."

(emphasis supplied)

11. In *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165, the plaintiff filed a suit claiming to be in possession for over 70 years. The plaintiff claimed possession of the excess land from the society, its Manager and Defendants Nos. 3 to 6. The society denied the rights of the plaintiff to bring a suit for ejectment or its liability for compensation. Alternatively, the society claimed the value of improvements. The main controversy decided by the High Court was whether the plaintiff can maintain a suit for possession without proof of title. This court observed that in case the rightful owner does not come forward within the period of limitation his right is lost, and the possessory owner acquires an absolute title. The plaintiff was

in *de facto* possession and was entitled to remain in possession and only the State could evict him. The State was not impleaded as a party in the case. The action of the society was a violent invasion of his possession and in the law, as it stands in India, the plaintiff can maintain a possessory suit under the provisions of the Specific Relief Act, 1963. The plaintiff has asserted that he had perfected his title by "adverse possession" but he did not join the State in a suit to get a declaration. He may be said to have not rested the suit on the acquired title. The suit was thus limited to recovery of possession from one who had trespassed against him. The Court observed that for the plaintiff to maintain suit based on adverse possession, it was necessary to implead the State Government i.e. the owner of the land as a party to the suit. A plaintiff can maintain a suit based on adverse possession as he acquires absolute title. The Court observed:

"(17) In our judgment this involves an incorrect approach to our problem. To express our meaning we may begin by reading 1907 AC 73 to discover if the principle that possession is good against all but the true owner has in any way been departed from. 1907 AC 73 reaffirmed the principle by stating quite clearly:

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

Therefore, the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him. The action of the Society was a violent invasion of his possession and in the law, as it stands in India the plaintiff could maintain a possessor suit under the provisions of the Specific Relief Act in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. As this was a suit of latter kind title could be examined. But whose title? Admittedly neither side could establish title. The plaintiff at least pleaded the statute of Limitation and asserted that he had perfected his title by adverse possession. But as he did not join the State in his suit to get a declaration, he may be said to have not rested his case on an acquired title. His suit was thus limited to recovering possession from one who had trespassed against him. The enquiry thus narrows to this: did the Society have any title in itself, was it acting under authority express or implied of the true owner or was it just pleading a title in a third party? To the first two questions we find no difficulty in furnishing an answer. It is clearly in the negative. So the only question is whether the defendant could plead that the title was in the State? Since in every such case between trespassers the title must be outstanding in a third party a defendant will be placed in a position of dominance. He has only to evict the prior trespasser and sit pretty pleading that the title is in someone else. As Erle J put it in *Burling* v. *Read*, (1848) 11 QB 904 'parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning'. This will be subversive of the fundamental doctrine which was accepted always and was reaffirmed in 1907 AC 73. The law does not, therefore, countenance the doctrine of 'findings keepings'.

(22) The cases of the Judicial Committee are not binding on us but we approve of the dictum in 1907 AC 73. No subsequent case has been brought to our notice departing from that view. No doubt a great controversy exists over the two cases of (1849) 13 QB 945 and (1865) 1 QB 1 but it must be taken to be finally resolved by 1907 AC 73. A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition

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accepted in 1907 AC 73 and may be taken to be declaratory of the law in India. We hold that the suit was maintainable."

(emphasis supplied)

12. In *Lallu Yashwant Singh (dead) by his legal representative* v. *Rao Jagdish Singh*, AIR 1968 SC 620, this Court has observed that taking forcible possession is illegal. In India, persons are not permitted to take forcible possession. The law respect possession. The landlord has no right to re-enter by showing force or intimidation. He must have to proceed under the law and taking of forcible possession is illegal. The Court affirmed the decision of Privy Council in *Midnapur Zamindary Company Ltd.* v. *Naresh Narayan Roy*, AIR 1924 PC 144 and other decisions and held:

"10. In *Midnapur Zamindary Company Limited* v. *Naresh Narayan Roy*, 51 Ind App 293 = at p. 299 (AIR 1924 PC 144 at p.147), the Privy Council observed:

"In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."

11. In *K.K. Verma* v. *Naraindas C. Malkani* (AIR 1954 Bom 358 at p. 360) Chagla C.J., stated that the law in India was essentially different from the law in England. He observed:

"Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under Section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Section 9 and claim possession against the true owner."

12. In *Yar Mohammad* v. *Lakshmi Das* (AIR 1959 All 1 at p.4), the Full Bench of the Allahabad High Court observed:

"No question of title either of the plaintiff or of the defendant can be raised or gone into in that case (under Section 9 of the Specific Relief Act). The plaintiff will be entitled to succeed without proving any title on which he can fall back upon and the defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however, always subject to a regular title suit and the person who has the real title or even the better title cannot, therefore, be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession."

The High Court further observed:

"Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court. No person can be allowed to become a Judge in his own cause. As observed by Edge C.J., in *Wali Ahmad Khan* v. *Ayodhya Kundu*, (1891) ILR 13 All. 537 at p.556:

"The object of the section was to drive the persons who wanted to eject a person into the proper Court and to prevent them from going with a high hand and ejecting such persons."

14. In *Hillava Subbava* v. *Narayanappa*, (1911) 13 Bom. LR 1200 it was observed:

"No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: *Lillu* v. *Annaji*, (1881) ILR 5 Bom. 387 *and Bandu* v. *Naba*, (1890) ILR 15 Bom 238."

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We are unable to appreciate how this decision assists the respondent. It was not a suit under Section 9 of the Specific Relief Act. In (1881) ILR 5 Bom 387, it was recognised that "if there is a breach of the peace in attempting to take possession, that affords a ground for criminal prosecution, and, if the attempt is successful, for a summary suit also for a restoration to possession under Section 9 of the Specific Relief Act I of 1877-*Dadabhai Narsidas* v. *The Sub-Collector of Broach*, (1870) 7 Bom. HC AC 82." In (1890) ILR 15 Bom 238 it was observed by Sargent C J., as follows:

> "The Indian Legislature has, however, provided for the summary removal of anyone who dispossesses another, whether peaceably or otherwise than by due course of law; but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law. This would also appear to be the view taken by West J., in (1881) ILR 5 Bom 387."
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> 15. In our opinion, the law on this point has been correctly stated by the Privy Council, by Chagla C.J., and by the Full Bench of the Allahabad High Court, in the cases cited above."

(emphasis supplied)

13. This Court has approved the decision of the Privy Council as well as Full Bench of the Allahabad High Court in *Yar Mohammad* v. *Laxmi Das*, AIR 1959 All. 1.

14. In *Somnath Berman* v. *Dr. S.P. Raju*, (1969) 3 SCC 129 : AIR 1970 SC 846, this Court has recognized the right of a person having possessory title to obtain a declaration that he was the owner of the land in a suit and an injunction restraining the defendant from interfering with his possession. This Court has further observed that section 9 of the Specific Relief Act, 1963 is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff, in an action of ejectment is sufficient title even if the suit is brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and the right to possession vested in a third party. This Court has observed:

> "10. In *Narayana Row* v. *Dharmachar*, (1903) ILR 26 Mad 514 a bench of the Madras High Court consisting of Bhashyam Ayyangar and Moore, JJ. held that possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrongdoer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in *Krishnarao Yashwant* v. *Vasudev Apaji Ghotikar*, (1884) ILR 8 Bom 871. That was also the view taken by the Allahabad High Court-see *Umrao Singh* v. *Ramji Das*, ILR 36 All 51, *Wali Ahmad Khan* v. *Ahjudhia Kandu*, (1891) ILR 13 All 537. In *Subodh Gopal Bose* v. *Province of Bihar*, AIR 1950 Pat 222 the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in *Debi Churn Boldo* v. *Issur Chunder Manjee*, (1883) ILR 9 Cal 39; *Ertaza Hossein* v. *Bany Mistry*, (1883) ILR 9 Cal 130, *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry*, (1890) ILR 17 Cal 256 and *Nisa Chand Gaita* v. *Kanchiram Bagani*, (1899) ILR 26 Cal 579, in our opinion does not lay down the law correctly."

(emphasis supplied)

15. It is apparent from the aforesaid decision that a person is entitled to bring a

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suit of possessory title to obtain possession even though the title may vest in a third person. A person in the possessory title can get injunction also, restraining the defendant from interfering with his possession.

16. Given the aforesaid, a question to ponder is when a person having no title, merely on the strength of possessory title can obtain an injunction and can maintain a suit for ejectment of a trespasser. Why a person who has perfected his title by way of adverse possession cannot file a suit for obtaining an injunction protecting possession and for recovery of possession in case his dispossession is by a third person or by an owner after the extinguishment of his title. In case a person in adverse possession has perfected his title by adverse possession and after the extinguishment of the title of the true owner, he cannot be successfully dispossessed by a true owner as the owner has lost his right, title and interest.

17. In *Padminibai* v. *Tangavva*, (1979) 4 SCC 486 : AIR 1979 SC 1142, a suit was filed by the plaintiff for recovery of possession on the basis that her husband was in exclusive and open possession of the suit lands adversely to the defendant for a period exceeding 12 years and his possession was never interrupted or disturbed. It was held that he acquired ownership by prescription. The suit filed within 12 years of his death was within limitation. Thus, the plaintiff was given the right to recover possession based on adverse possession as Tatya has acquired ownership by adverse possession. This Court has observed thus:

> "1. Tatya died on February 2, 1955. The respondents, Tangava and Sundra Bai are the co widows of Tatya. They were co-plaintiffs in the original suit.
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> 11. We have, therefore, no hesitation in holding in agreement with the courts below that Tatya had acquired title by remaining in exclusive and open possession of the suit lands adversely to Padmini Bai for a period far exceeding 12 years, and this possession was never interrupted or disturbed. He had thus acquired ownership by prescriptions."

(emphasis supplied)

18. In *State of West Bengal* v. *The Dalhousie Institute Society*, (1970) 3 SCC 802 : AIR 1970 SC 1778, this Court considered the question of adverse possession of Dalhousie Institute Society based on invalid grant. It was held by this Court that title was acquired by adverse possession based on invalid grant and the right was given to the claimant/applicant to claim compensation. This Court held that a person acquires title by adverse possession and observed:

> "16. There is no material placed before us to show that the grant has been made in the manner required by law though as a fact a grant of the site has been made in favour of the Institute. The evidence relied on by the Special Land Acquisition Judge and the High Court also clearly establishes that the respondent has been in open, continuous and uninterrupted possession and enjoyment of the site for over 60 years. In this respect, the material documentary evidence referred to by the High Court clearly establishes that the respondent has been treated as owner of the site not only by the Corporation but also by the Government. The possession of the respondent must have been on the basis of the grant made by the Government, which, no doubt, is invalid in law. As to what exactly is the legal effect of such possession has been considered by this Court in *Collector of Bombay* v. *Municipal Corporation of the City of Bombay*, [1952] SCR 43 as follows:
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> > "...the position of the respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the respondent

Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the respondent Corporation has acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government Resolution of 1865...."

17. The above extract establishes that a person in such possession clearly acquires title by adverse possession. In the case before us, there are concurrent findings recorded by the High Court and the Special Land Acquisition Judge in favour of the respondent on this point and we agree with those findings."

(emphasis supplied)

19. It is apparent from the aforesaid discussion that title is acquired by adverse possession.

20. In *Mohammed Fateh Nasib* v. *Swarup Chand Hukum Chand*, AIR 1948 PC 76, Privy Council considered the question of adverse possession by a plaintiff. In the plaint, his case was based upon continuous, open, exclusive and undisturbed possession. He averred that he had acquired an indefeasible title to the suit property by adverse possession against the whole world. In 1928, he was surreptitiously dispossessed from the suit property. The question arose for consideration whether the plaintiff remained in adverse possession for 12 years and whether it was adverse to the wakf. The Privy Council agreed with the findings of the High Court that the "plaintiff" and his predecessors-in-interest had remained in possession of the suit property for more than 12 years before 1928 to acquire a title under section 28 of the Act and the plaintiff was not a mere trespasser. The court further held that title by the adverse possession can be established against wakf property also. The Privy Council observed:—

"On that basis the first question to be determined is whether the plaintiff proved continuous, open exclusive and undisturbed possession of the property in suit for 12 years and upwards before 1928 when he was dispossessed, that being the relevant date under Article 142 of the Limitation Act. If that question is answered in the affirmative then the further question arises whether such possession was adverse to the wakf.

Their Lordships agree that this is the correct test to apply and, having examined the evidence, oral and documentary, they agree with the finding of the High Court that the plaintiff and his predecessors-in-interest had been in possession of the suit property for more than 12 years prior to 1928 so as to acquire a title under Section 28 of the Limitation Act. It is no doubt true, as the learned Subordinate Judge held, that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession. But that principle has no application in the present case. The plaintiff is not a mere trespasser; he himself purchased the property for a large sum and Aberjan, upon whose possession the claim ultimately rests, was put into possession by an order of the Court, whether or not such order was rightly made. Apart from this, their Lordships think that the character of the possession established by the plaintiff was adequate to found title even in a trespasser.

Their Lordships feel no hesitation in agreeing with the High Court that adverse possession by the plaintiff and his predecessors-in-interest has been proved for the requisite period.

The only question which then remains is whether such possession was adverse to the wakf. It is not disputed that in law a title by adverse possession can be established against wakf property, but it is clear that a trustee for a charity entering into possession of property belonging to the charity cannot, whilst remaining a

trustee, change the character of his possession, and assert that he is in possession as a beneficial owner."

(emphasis supplied)

21. The plaintiff's title was declared based on adverse possession.

22. The question of perfecting title by adverse possession again came to be considered by the Privy Council in *Gunga Govind Mundul* v. *The Collector of the Twenty-Four Pergunnahs*, 11 M.I.A. 212; it observed that there is an extinguishment of title by the law of limitation. The practical effect is the extinction of the title of the owner in favour of the party in possession and this right is an absolute interest. The Privy Council has observed thus:

"4. The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep., vol. vi., p. 139, cited in Macpherson, Civil Procedure, p. 81 (3rd ed.). Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred, and the effect of that bar must operate in favour of the party in possession.

Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that."

8. It is of the utmost consequence in India that the security which long possession efforts should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands, -- contiguous owners are apt to charge one another with encroachment. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may taken that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is; the legal right of the Government is to its rent; the lands owned by others; as between private owners contesting inter see the title of the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands of Jumma is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation."

(emphasis supplied)

23. In *S.M. Karim* v. *Mst. Bibi Sakina*, AIR 1964 SC 1254, a question arose under section 66 of the Code of Civil Procedure, 1908 which provides that no suit shall be maintained against a certified purchaser. The question arose for consideration that in case possession is disturbed whether a plaintiff can take the alternative plea that the title of the person purchasing benami in court auction was extinguished by long and uninterrupted adverse possession of the real owner. If the possession of the real owner ripens into title under the Act and he is dispossessed, he can sue to obtain possession. This Court has held that in such a case it would be open for the plaintiff to take such a plea but with full particulars so that the starting point of limitation can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for several 12 years or that the plaintiff had acquired an absolute title was not enough to raise such a plea. Long possession was not necessarily an adverse possession and the

prayer clause is not a substitute for a plea of adverse possession. The opinion expressed is that plaintiff can take a plea of adverse possession but with full particulars. The Court has observed:

> "5. As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukhan Das* v. *Krishanand*, ILR 32 Pat 353 and *Sri Bhagwan Singh* v. *Ram Basi Kuer*, AIR 1957 Pat 157, to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakir Alam, Syed Aulad Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal* v. *Kesho Prasad*, AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea."
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> (emphasis supplied)

24. There is an acquisition of title by adverse possession as such, such a person in the capacity of a plaintiff can always use the plea in case any of his rights are infringed including in case of dispossession. In *Mandal Revenue Officer* v. *Goundla Venkaiah*, (2010) 2 SCC 461 this Court has referred to the decision in *State of Rajasthan* v. *Harphool Singh*, (2000) 5 SCC 652 in which the suit was filed by the plaintiff based on acquisition of title by adverse possession. This Court has referred to other decisions also in *Annakili* v. *A. Vedanayagam*, (2007) 14 SCC 308 and *P.T. Munichikkanna Reddy* v. *Revamma*, (2007) 6 SCC 59. It has been observed that there can be an acquisition of title by adverse possession. It has also been observed that adverse possession effectively shifts the title already distanced from the paper owner to the adverse possessor. Right thereby accrues in favour of the adverse possessor. This Court has considered the matter thus:

> "48. In *State of Rajasthan* v. *Harphool Singh*, (2000) 5 SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State

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Government were dismissed by the lower appellate court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below: (SCC p. 660, para 12)

> "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in *P. Lakshmi Reddy* v. *L. Lakshmi Reddy*, AIR 1957 SC 314, adverted to the ordinary classical requirement - that it should be nec vi, nec clam, nec precario - that is the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

50. Before concluding, we may notice two recent judgments in which law on the question of acquisition of title by adverse possession has been considered and reiterated. In *Annakili* v. *A. Vedanayagam*, (2007) 14 SCC 308, the Court observed as under: (SCC p. 316, para 24)

> "24. Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title."

51. In *P.T. Munichikkanna Reddy* v. *Revamma*, (2007) 6 SCC 59, the Court considered various facets of the law of adverse possession and laid down various propositions including the following: (SCC pp. 66 & 68, paras 5 & 8)

> x x x
>
> 8. ... to assess a claim of adverse possession, two-pronged enquiry is required:
>
> 1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
> 2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property. (emphasis in original)"
>
> (emphasis supplied)

25. In *P.T. Munichikkanna Reddy* v. *Revamma*, (2007) 6 SCC 59, this Court has observed as under:

> 2. The defendant-respondents in their written statement denied and disputed the

aforementioned assertion of the plaintiffs and pleaded their own right, title and interest as also possession in or over the said 1 acre 21 guntas of land. **The learned trial Judge decreed the suit inter alia holding that the plaintiff-appellants have acquired title by adverse possession as they have been in possession of the lands in question for a period of more than 50 years**. On an appeal having been preferred thereagainst by the respondents before the High Court, the said judgment of the trial court was reversed holding:

> "(i) ... The important averments of adverse possession are twofold. One is to recognise the title of the person against whom adverse possession is claimed. Another is to enjoy the property adverse to the title-holder's interest after making him known that such enjoyment is against his own interest. These two averments are basically absent in this case both in the pleadings as well as in the evidence....
>
> (ii) The finding of the court below that the possession of the plaintiffs became adverse to the defendants between 1934-36 is again an error apparent on the face of the record. As it is now clarified before me by the learned counsel for the appellants that the plaintiffs' claim in respect of the other land of the defendants is based on the subsequent sale deed dated 5-7-1936.
>
> It is settled law that mere possession even if it is true for any number of years will not clothe the person in enjoyment with the title by adverse possession. As indicated supra, the important ingredients of adverse possession should have been satisfied."

6. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. **Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title.** The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, p. 81.) It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
2. **Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.**

30. In Karnataka Wakf Board the law was stated, thus: (SCC p. 785, para 11)

> "11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner

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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. **Adverse possession is a hostile possession by clearly asserting 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, nec clam, nec precario', that is, peaceful, open and continuous.** The possession must be adequate in continuity, in publicity, and in extent to show 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 the statutory period. (See *S.M. Karim* v. *Bibi Sakina*, *Parsinni* v. *Sukhi* and *D.N. Venkatarayappa* v. *State of Karnataka*.) 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 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, a person who claims adverse possession should show: (a) on what date 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 pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

26. In *State of Haryana* v. *Mukesh Kumar*, (2011) 10 SCC 404, the court considered the question whether the plaintiff had become the owner of the disputed property by way of adverse possession and in that context considered the decisions in *Revamma* (supra) and *Fairweather* v. *St. Marylebone Property Co. Ltd.*, (1962) 2 AER 288 (HL) and *Taylor* v. *Twinberrow*, 1930 All ER Rep 342 (DC) and observed that adverse possession confers negative and consequential right effected only as somebody else's positive right to access the court is barred by operation of law. Right of the paper owner is extinguished and that competing rights evolve in favour of adverse possessor as he cared for the land, developed it as against the owner of the property who had ignored the property. This Court has observed thus:

"32. This Court in *Revamma*, (2007) 6 SCC 59 observed that to understand the true nature of adverse possession, *Fairweather* v. *St Marylebone Property Co. Ltd.*, (1962) 2 All ER 288 (HL) can be considered where the House of Lords referring to *Taylor* v. *Twinberrow*, (1930) 2 K.B. 16 termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law. As against the rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property."

(emphasis supplied)

27. In *Krishnamurthy S. Setlur (dead) by LRs.* v. *O.V. Narasimha Setty*, (2007) 3 SCC 569, the Court pointed out that the duty of the plaintiff while claiming title based on adverse possession. The suit was filed by the plaintiff on 11.12.1981. The trial court held that the plaintiff has perfected the title in the suit lands based on adverse possession, and decreed the suit. This Court has observed that the plaintiff must plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question arose for consideration whether tenant's possession could be treated as possession of the owner for computation of the period of 12 years under the provisions of the Act. What is the nature of pleading required in the plaint to constitute a plea of adverse possession has been emphasised by this

Court and another question also arose whether the plaintiff was entitled to get back the possession from the defendants? This Court has observed thus:

"12. Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the court.

13. As stated, this civil appeal arises from the judgment of the High Court in RFA No. 672 of 1996 filed by the original defendants under Section 96 CPC. The impugned judgment, to say the least, is a bundle of confusion. It quotes depositions of witnesses as findings. It quotes findings of the courts below which have been set aside by the High Court in the earlier round. It criticizes the findings given by the coordinate Bench of the High Court in the earlier round of litigation. It does not answer the question of law which arises for determination in this case. To quote an example, one of the main questions which arises for determination, in this case,: is whether the tenant's possession could be treated as possession of the owner in computation of the period of twelve years under Article 64 of the Limitation Act, 1963. Similarly, as an example, the impugned judgment does not answer the question as to whether the decision of the High Court dated 14.8.1981 in RSA No. 545 of 1973 was at all binding on the LRs. of Iyengar/their alienees. Similarly, the impugned judgment does not consider the effect of the judgment dated 10.11.1961 rendered by the trial court in Suit No. 94 of 1956 filed by K.S. Setlur against Iyengar inter alia for reconveyance in which the court below did not accept the contention of K.S. Setlur that the conveyance executed by Kalyana Sundram Iyer in favour of Iyengar was a benami transaction. Similarly, the impugned judgment has failed to consider the effect of the observations made by the civil court in the suit filed by Iyengar for permanent injunction bearing Suit No. 79 of 1949 to the effect that though Shyamala Raju was in possession and cultivation, whether he was a tenant under Iyengar or under K.S. Setlur was not conclusively proved. Similarly, the impugned judgment has not at all considered the effect of Iyengar or his LRs. not filing a suit on title despite being liberty given to them in the earlier Suit No. 79 of 1949. In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment. As stated above, the impugned judgment is under Section 96 CPC, it is not a judgment under Section 100 CPC. As stated above, adverse possession or ouster is an inference to be drawn from the facts proved (sic) that work is of the first appellate court."

(emphasis supplied)

28. In *P.T. Munichikkanna Reddy* v. *Revamma*, (2007) 6 SCC 59, the plaintiff claimed the title based on adverse possession. The court observed:

"5. Adverse possession in one sense is based on the theory or presumption that

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the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See *Downing* v. *Bird*, 100 So. 2d 57 (Fla. 1958); *Arkansas Commemorative Commission* v. *City of Little Rock*, 227 Ark. 1085 : 303 S.W. 2d 569 (1957); *Monnot* v. *Murphy*, 207 N.Y. 240 100 N.E. 742 (1913); *City of Rock Springs* v. *Sturm*, 39 Wyo. 494 : 273 P. 908 : 97 A.L.R. 1 (1929).

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess cannot be given a complete go by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim."

(emphasis supplied)

29. In Halsbury's Laws of England, 4th Edn., Vol. 28, para 777 positions of person in adverse possession has been discussed and it has been observed on the basis of various decisions that a person in possession has a transmissible interest in the property and after expiration of the statutory period, it ripens as good a right to possession. Para 777 is as under:

"777. **Position of person in adverse possession**: While a person who is in possession of land without title continues in possession, then, before the statutory period has elapsed, he has a transmissible interest in the property which is good against all the world except the rightful owner, but an interest which is liable at any moment to be defeated by the entry of the rightful owner; and, if that person is succeeded in possession by one claiming through him who holds until the expiration of the statutory period, the successor has then as good a right to the possession as if he himself had occupied for the whole period."

(emphasis supplied)

30. In Halsbury's Laws of England, extinction of title by the effect of the expiration of the period of limitation has also been discussed in Para 783 and once right is lost to recover the possession, the same cannot be re-vested by any re-entry or by a subsequent acknowledgment of title. Para 783 is extracted hereunder:

"783. **Extinction of title:** At the expiration of the periods prescribed by the Limitation Act 1939 for any person to bring an action to recover land (including a redemption action) or an action to enforce an advowson, the title of that person to the land or advowson is extinguished. This is subject to the special provisions relating to settled land and land held on trust and the provisions for constituting the proprietor of registered land a trustee for the person who has acquired title against him. The extinguished title cannot afterward be revested either by re-entry or by a subsequent payment or acknowledgment of title. A rent-charge is extinguished when the remedy to recover it is barred."

(emphasis supplied)

31. Nature of title acquired by adverse possession has also been discussed in the Halsbury's Laws of England in Para 785. It has been observed that adverse possession leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the rights of others to eject him. Same is a "good title", both at law and in equity. Para 785 is also extracted hereunder:

> "785. **Nature of title acquired**: The operation of the statutory provision for the extinction of title is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him.
>
> A title gained by the operation of the statute is a good title, both at law and in equity, and will be forced by the court on a reluctant purchaser. Proof, however, that a vendor and those through whom he claims have had independent possession of an estate for twelve years will not be sufficient to establish a saleable title without evidence to show the state of the title at the time that possession commenced. If the contract for purchase is an open one, possession for twelve years is not sufficient, and a full length of the title is required. Although possession of land is prima facie evidence of seisin in fee, it does not follow that a person who has gained a title to land from the fact of certain persons being barred of their rights has the fee simple vested in himself; for, although he may have gained an indefeasible title against those who had an estate in possession, there may be persons entitled in reversion or remainder whose rights are quite unaffected by the statute."

(emphasis supplied)

32. In an article published in Harvard Law Review on "Title by Adverse Possession" by Henry W. Ballantine, as to the question of adverse possession and acquisition of title it has been observed on strength of various decisions that adverse possession vests the possessor with the complete title as effectually as if there had been a conveyance by the former owner. As held in *Toltec Ranch Co.* v. *Cook*, 191 U.S. 532, 542 (1903). But the title is independent, not derivative, and "relates back" to the inception of the adverse possession, as observed. (see *Field* v. *Peoples*, 180 Ill. 376, 383, 54 N.E. 304 (1899); *Bellefontaine Co.* v. *Niedringhaus*, 181 Ill. 426, 55 N.E. 184 (1899). *Cf. La Salle* v. *Sanitary District*, 260 Ill. 423, 429, 103 N.E. 175 (1913); *AMES, LECTURES ON LEGAL HIST.* 197; 3 *ANGLO-AMERICAN ESSAYS*, 567). The adverse possessor does not derive his title from the former owner, but from a new source of title, his possession. The "investitive fact" is the disseisin and exercise of possession as observed in *Camp* v. *Camp*, 5 Conn. 291 (1824); *Price* v. *Lyon*, 14 Conn. Conn. 279, 290 (1841); *Coal Creek, etc. Co.* v. *East Tenn. I. & C. Co.*, 105 Tenn. 563; 59 S.W. 634, 636 (1900). It has also been observed that titles to property should not remain uncertain and in dispute, but that continued de facto exercise and assertion of a right should be conclusive evidence of the de jure existence of the right.

33. In *Lala Hem Chand* v. *Lala Pearey Lal*, AIR 1942 PC 64, the question arose of the adverse possession where a trustee had been in possession for more than 12 years under a trust which is void under the law, the Privy Council observed that if the right of a defendant owner is extinguished the plaintiff acquires it by adverse possession. In case the owner suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession. The relevant portion is extracted hereunder:

> "…. The inference from the evidence as a whole is irresistible that it was with his knowledge and implied consent that the building was consecrated as a Dharmasala and used as such for charitable and religious purposes and that Lala Janaki Das, and after him, Ramchand, was in possession of the property till 1931. As forcibly

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pointed out by the High Court in considering the merits of the case, "during the course of more than 20 years that this building remained in the charge of Janaki Das, and on his death in that of his son, Ramchand, the defendant had never once claimed the property as his own or objected to its being treated as dedicated property." This Board held in ('66) 11 M.I.A. 345 : 7 W.R. 21 : 1 Suther. 676 : 2 Sar. 284 (P.C.), *Gunga Gobindas Mundal* v. *The Collector of the Twenty Four Pergunnahs*, at page 361, that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation the practical effect is the extinction of his title in favour of the party in possession." Section 28, Limitation Act, says:

> "At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." Lala Janaki Das and Ramchand having held the property adversely for upwards of 12 years on behalf of the charity for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the defendant, if he had any, has become extinguished by operation of S. 28, Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the defendant has become barred by limitation, had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably S. 10, Limitation Act, would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the plaintiffs have established their title to the suit property by adverse possession for upwards of 12 years before the defendant obtained possession of it; and since the suit was brought in January 1933, within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, whose title to hold it if he had any has become extinct by limitation, in whichever manner he may have obtained possession permissively or by trespass."
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> (emphasis supplied)

34. In *Tichborne* v. *Weir*, (1892) 67 LT 735, it has been observed that considering the effect of limitation is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed. As the mode of conveying the title is not prescribed in the Act, the Act does not confer it. But at the same time, it has been observed that yet his "title under the Act is acquired" solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. In the said case question arose for transfer of the lease formerly held by Baxter to Giraud who for over 20 years had been in possession of the land without any acknowledgment to Baxter who had equitably mortgaged the lease to him. The question arose whether the statute transferred the lease to Giraud and he became the tenant of the landlord. In that context, the aforesaid observations have been made. It has been held what is acquired would depend upon what right person has against whom he has prescribed and acquisition of title by adverse possession would not more be than that. The lease is not transferred under a statute but by the extinguishment of rights. The other person ripens the right. Thus, the decision does not run counter to the various decisions which have been discussed above and deals with the nature of title conferred by adverse possession.

35. The decision in *Taylor* v. *Twinberrow*, (1930) 2 K.B. 16 has also been referred to submit to the contrary. In that case, also it was a case of a dispute between the tenant and sub-tenant. The Kings Bench considered the effect of the expiration of 12 years' adverse possession under section 7 of the Act of 1833 and observed that that does confer a title, whereas its effect is merely negative to destroy the power of the then tenant Taylor to claim as a landlord against the sub-tenant in possession. It

would not destroy the right of the freeholder, if Taylor's tenancy was determined, by the freeholder, he could eject the sub-tenant. Thus, Taylor's right would be defeated and not that of the freeholder who was the owner and gave the land on the tenancy to Taylor. In our opinion, the view is in consonance with the law of adverse possession as administered in India. As the basic principle is that if a person is having a limited right, a person against him can prescribe only to acquire that limited right which is extinguished and not beyond that. There is a series of decisions laying down this proposition of law as to the effect of adverse possession as against limited owner if extinguishing title of the limited owner not that of reversion or having some other title. Thus, the decision in *Taylor* v. *Twinberrow* (supra) does not negate the acquisition of title by way of adverse possession but rather affirms it.

36. The operation of the statute of limitation in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him. *Perry* v. *Clissold*, (1907) AC 73 has been referred to in *Nair Service Society Ltd.* v. *K.C. Alexander* (supra) in which it has been observed that it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the original owner, and if the original owner does not come forward and assert his title by the process of law within the period prescribed under the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title. In *Ram Daan (Dead) through LRs.* v. *Urban Improvement Trust*, (2014) 8 SCC 902, this Court has observed thus:

> "11. It is settled position of law laid down by the Privy Council in *Perry* v. *Clissold*, 1907 AC 73 (PC) (AC p. 79)
>
> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."
>
> The above statement was quoted with the approval by this Court in *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165. Their Lordships at para 22 emphatically stated: (AIR p. 1175)
>
> "22. The cases of the Judicial Committee are not binding on us but we approve of the dictum in *Perry* v. *Clissold*, 1907 AC 73 (PC)."

37. The decision in *Fairweather* v. *St. Marylebone Property Co. Ltd.*, (1962) 2 AER 288 (HL) has also been referred, to submit that adverse possession is a negative concept where the possession had been taken against the tenant, its operation was only to bar his right against men in possession. As already discussed above, it was a case of limited right possessed by the tenant and a sub-tenant could only perfect his right against the tenant who inducted him as sub-tenant prescribed against the tenant and not against the freeholder. The decision does not run counter to any other decision discussed and is no help to hold that plaintiff cannot take such a plea or hold that no right is conferred by adverse possession. It may be a negative right but an absolute one. It confers title as owner in case extinguishment is of the right of ownership.

38. The plaintiff's right to raise the plea of adverse possession has been recognized in several decisions of the High Court also. If such a case arises on the facts stated in the plaint and the defendant is not taken by surprise as held in *Nepen Bala Debi* v. *Siti Kanta Banerjee*, (1910) 8 Ind Cas 41 (DB) (Cal), *Ngasepam Ibotombi Singh* v. *Wahengbam Ibohal Singh*, AIR 1960 Manipur 16, *Aboobucker s/o Shakhi Mahomed*

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Laloo v. *Sahibkhatoon*, AIR 1949 Sindh 12, *Bata Krista Pramanick* v. *Shebaits of Thakur Jogendra Nath Maity*, AIR 1919 Cal. 339, *Ram Chandra Sil* v. *Ramanmani Dasi*, AIR 1917 Cal. 469, *Shiromani Gurdwara Parbhandhak Committee, Khosakotla* v. *Prem Das*, AIR 1933 Lah 25, *Rangappa Nayakar* v. *Rangaswami Nayakar*, AIR 1925 Mad. 1005; *Shaikh Alimuddin* v. *Shaikh Salim*, 1928 IC 81 (PC).

39. In *Pannalal Bhagirath Marwadi* v. *Bhaiyalal Bindraban Pardeshi Teli*, AIR 1937 Nagpur 281, it has been observed that in-between two trespassers, one who is wrongly dispossessed by the other trespasser, can sue and recover possession. A person in possession cannot be dispossessed otherwise than in due course of law and can sue for injunction for protecting the possession as observed in *Krishna Ram Mahale (dead) by L.Rs* v. *Shobha Venkat Rao*, (1989) 4 SCC 131, *State of U.P.* v. *Maharaja Dharmander Prasad Singh*, (1989) 2 SCC 505.

40. In *Radhamoni Debi* v. *The Collector of Khulna*, (1900) ILR 27 Cal. 943 it was observed that to constitute a possessory title by adverse possession, the possession required to be proved must be adequate in continuity in publicity, and in the extent to show for a period of 12 years.

41. In *Somnath Burman* v. *S.P. Raju*, (1969) 3 SCC 129, the Court recognized the right of the plaintiff to such declaration of title and for an injunction. Section 9 of the Specific Relief Act is in no way inconsistent, the wrongdoer cannot resist suit on the ground that title and right are in a third person. Right to sue is available to the plaintiff against owners as well as others by taking the plea of adverse possession in the plaint.

42. In *Hemaji Waghaji Jat* v. *Bhikhabhai Khengarbhai Harijan*, (2009) 16 SCC 517, relying on *T. Anjanappa* v. *Somalingappa*, (2006) 7 SCC 570, observed that title can be based on adverse possession. This Court has observed thus:

> "23. This Court had an occasion to examine the concept of adverse possession in *T. Anjanappa* v. *Somalingappa*, (2006) 7 SCC 570.
>
> The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that: (SCC p.577, para 20)
>
> > "20.... The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.""

43. At the same time, this Court has also observed that the law of adverse possession is harsh and Legislature may consider a change in the law as to adverse possession.

44. In the light of the aforesaid discussion, when we consider the decision in *Gurdwara Sahib* v. *Gram Panchayat Village Sirthala*, (2014) 1 SCC 669 decided by two -Judge Bench wherein a question arose whether the plaintiff is in adverse possession of the suit land this Court referred to the Punjab & Haryana High Court decision on *Gurdwara Sahib Sannauli* v. *State of Punjab*, (2009) 154 PLR 756 and observed that there cannot be 'any quarrel' to the extent that the judgments of courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. The discussion made is confined to para 8 only. The same is extracted hereunder:

> "4. In so far as the first issue is concerned, it was decided in favour of the plaintiff returning the findings that the appellant was in adverse possession of the

suit property since 13.4.1952 as this fact had been proved by a plethora of documentary evidence produced by the appellant. However, while deciding the second issue, the court opined that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword. The learned Civil Judge relied upon the judgment of the Punjab and Haryana High Court in *Gurdwara Sahib Sannuali* v. *State of Punjab*, (2009) 154 PLR 756 and thus, decided the issue against the plaintiff. Issue 3 was also, in the same vein, decided against the appellant.

8. "There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

(emphasis supplied)

45. It is apparent that the point whether the plaintiff can take the plea of adverse possession was not contested in the aforesaid decision and none out of the plethora of the aforesaid decisions including of the larger Bench were placed for consideration before this Court. The judgment is based upon the proposition of law not being questioned as the point was not disputed. There no reason is given, only observation has been recorded in one line.

46. It is also pertinent to mention that the decision of this court in *Gurudwara Sahib* v. *Gram Panchayat Village, Sirthala* (supra) has been relied upon in *State of Uttarakhand* v. *Mandir Sri Laxman Sidh Maharaj*, (2017) 9 SCC 579. In the said case, no plea of adverse possession was taken nor issue was framed as such this Court held that in the absence of pleading, issue and evidence of adverse possession suit could not have been decreed on that basis. Given the aforesaid, it was not necessary to go into the question of whether the plaintiff could have taken the plea of adverse possession. Nonetheless, a passing observation has been made without any discussion of the aspect that the court below should have seen that declaration of ownership rights over the suit property could be granted to the plaintiff on strength of adverse possession (see: *Gurudwara Sahib* v. *Gram Panchayat, Sirthala*). The Court observed:

"24. By no stretch of imagination, in our view, such a declaration of ownership over the suit property and right of easement over a well could be granted by the trial court in the plaintiff's favour because even the plaintiff did not claim title in the suit property on the strength of "adverse possession". Neither were there any pleadings nor any issue much less evidence to prove the adverse possession on land and for grant of any easementary right over the well. The courts below should have seen that no declaration of ownership rights over the suit property could be granted to the plaintiff on the strength of "adverse possession" (see *Gurdwara Sahib* v. *Gram Panchayat Village Sirthala*, (2014) 1 SCC 669. The courts below also should have seen that courts can grant only that relief which is claimed by the plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it. In other words, courts cannot travel beyond the pleadings for granting any relief. This principle is fully applied to the facts of this case against the plaintiff."

(emphasis supplied)

47. Again in *Dharampal (Dead) through LRs* v. *Punjab Wakf Board*, (2018) 11 SCC 449, the court found the averments in counterclaim by the defendant do not constitute plea of adverse possession as the point of start of adverse possession was not pleaded and Wakf Board has filed a suit in the year 1971 as such perfecting title by adverse possession did not arise at the same time without any discussion on the aspect that

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whether plaintiff can take plea of adverse possession. The Court held that in the counterclaim the defendant cannot raise this plea of adverse possession. This Court at the same relied upon to observe that it was bound by the decision in *Gurdwara Sahib* v. *Gram Panchayat Village Sirthala* (supra), and logic was applied to the counterclaim also. The Court observed:

> "28. In the first place, we find that this Court in *Gurdwara Sahib* v. *Gram Panchayat Village Sirthala*, (2014) 1 SCC 669 has held in para 8 that a plea of adverse possession cannot be set up by the plaintiff to claim ownership over the suit property but such plea can be raised by the defendant by way of defence in his written statement in answer to the plaintiff's claim. We are bound by this view.
>
> 34. Applying the aforementioned principle of law to the facts of the case on hand, we find absolutely no merit in this plea of Defendant 1 for the following reasons:
>
> 34.1. First, Defendant 1 has only averred in his plaint (counterclaim) that he, through his father, was in possession of the suit land since 1953. Such averments, in our opinion, do not constitute the plea of "adverse possession" in the light of law laid down by this Court quoted supra.
>
> 34.2. Second, it was not pleaded as to from which date, Defendant 1's possession became adverse to the plaintiff (the Wakf Board).
>
> 34.3. Third, it was also not pleaded that when his adverse possession was completed and ripened into the full ownership in his favour.
>
> 34.4. Fourth, it could not be so for the simple reason that the plaintiff (Wakf Board) had filed a suit in the year 1971 against Defendant 1's father in relation to the suit land. Therefore, till the year 1971, the question of Defendant 1 perfecting his title by "adverse possession" qua the plaintiff (Wakf Board) did not arise. The plaintiff then filed present suit in the year 1991 and, therefore, again the question of perfecting the title up to 1991 qua the plaintiff did not arise."
>
> (emphasis supplied)

48. In *State of Uttarakhand* v. *Mandir Shri Lakshmi Siddh Maharaj* (supra) and *Dharampal (dead) through LRs* v. *Punjab Wakf Board* (supra), there is no discussion on the aspect whether the plaintiff can later take the plea of adverse possession. It does not appear that proposition was contested and earlier binding decisions were also not placed for consideration of the Court. As there is no independent consideration of the question, we have to examine mainly the decision in *Gurdwara Sahib* v. *Gram Panchayat Village Sirthala* (supra).

49. When we consider the decision rendered by Punjab & Haryana High Court in *Gurdwara Sahib Sannauli* (supra), which has been referred by this Court in *Gurudwara Sahib* v. *Gram Panchayat, Sirthala* (supra), the following is the discussion made by the High Court in the said decision:

> "10. I have heard learned Counsel for the parties and perused the record of the appeal. I find force in the contentions raised by learned counsel for the respondents. In *Bachhaj Nahar* v. *Nillima Mandal*, J.T. 2008 (13) S.C. 255 the Hon'ble Supreme Court has authoritatively laid down that if an argument has been given up or has not been raised, same cannot be taken up in the Regular Second Appeal. It is also relevant to mention here that in *Bhim Singh* v. *Zile Singh*, (2006) 3 RCR Civil 97, this Court has held that no declaration can be sought by a plaintiff about ownership based on adverse possession as such plea is available only to a defendant against the plaintiff. Similarly, in R.S.A. No. 3909 of 2008 titled as *State of Haryana* v. *Mukesh Kumar*, (2009) 154 P.L.R. 753, decided on 17.03.2009 this Court has also taken the same view as aforesaid in *Bhim Singh's case* (supra)."

50. There is no independent consideration. Only the decision of the same High Court in *Bhim Singh* v. *Zila Singh*, AIR 2006 P&H 195 has been relied upon to hold

that no declaration can be sought by the plaintiff based on adverse possession.

51. In *Bhim Singh* (supra) the plaintiffs had filed a suit for declaration and injunction claiming ownership based on adverse possession. Defendants contended that plaintiffs were not in possession. The Punjab & Haryana High Court in *Bhim Singh* v. *Zila Singh* (supra) has assigned the reasons and observed thus:

> "11. Under Article 64 of the Limitation Act, as suit for possession of immovable property by a plaintiff, who while in possession of the property had been dispossessed from such possession, when such suit is based on previous possession and not based on title, can be filed within 12 years from the date of dispossession. Under Article 65 of the Limitation Act, a suit for possession of immovable property or any interest therein, based on title, can be filed by a person claiming title within 12 years. The limitation under this Article commences from the date when the possession of the defendant becomes adverse to the plaintiff. In these circumstances, it is apparent that to contest a suit for possession, filed by a person on the basis of his title, a plea of adverse possession can be taken by a defendant who is in hostile, continuous and open possession, to the knowledge of the true owner, if such a person has remained in possession for a period of 12 years. It, thus, naturally has to be inferred that plea of adverse possession is a defence available only to a defendant. This conclusion of mine is further strengthened from the language used in Article 65, wherein, in column 3 it has been specifically mentioned: "when the possession of the defendant becomes adverse to the plaintiff." Thus, a perusal of the aforesaid Article 65 shows that the plea is available only to a defendant against a plaintiff. In these circumstances, natural inference must follow that when such a plea of adverse possession is only available to a defendant, then no declaration can be sought by a plaintiff with regard to his ownership on the basis of an adverse possession.
>
> 12. I am supported by a judgment of Delhi High Court in 1993 3 105 PLR (Delhi Section) 70, *Prem Nath Wadhawan* v. *Inder Rai Wadhawan*.
>
> 13. The following observations made in the *Prem Nath Wadhawan's case* (supra) may be noticed:
>
> > "I have given my thoughtful consideration to the submissions made by the learned Counsel for the parties and have also perused the record. I do not find any merit in the contention of the learned Counsel for the plaintiff that the plaintiff has become absolute owner of the suit property by virtue of adverse possession as the plea of adverse possession can be raised in defence in a suit for recovery of possession but the relief for declaration that the plaintiff has become absolute owner, cannot be granted on the basis of adverse possession."
>
> (emphasis supplied)

52. The Punjab & Haryana High Court has proceeded on the basis that as per Article 65, the plea of adverse possession is available as a defence to a defendant.

53. Article 65 of the Act is extracted hereunder:

	Description of suit	Period of limitation	Time from which period begins to run
65.	For possession of immovable property or any interest therein based on title. *Explanation.*— For the purposes of this article— (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a	Twelve years.	When the possession of the defendant becomes adverse to

	devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		the plaintiff.

54. The conclusion reached by the High Court is based on an inferential process because of the language used in the III[rd] Column of Article 65. The expression is used, the limitation of 12 years runs from the date when the possession of the defendant becomes adverse to the plaintiff. Column No. 3 of Schedule of the Act nowhere suggests that suit cannot be filed by the plaintiff for possession of immovable property or any interest therein based on title acquired by way of adverse possession. There is absolutely no bar for the perfection of title by way of adverse possession whether a person is suing as the plaintiff or being sued as a defendant. The inferential process of interpretation employed by the High Court is not at all permissible. It does not follow from the language used in the statute. The large number of decisions of this Court and various other decisions of Privy Council, High Courts and of English courts which have been discussed by us and observations made in Halsbury Laws based on various decisions indicate that suit can be filed by plaintiff on the basis of title acquired by way of adverse possession or on the basis of possession under Articles 64 and 65. There is no bar under Article 65 or any of the provisions of Limitation Act, 1963 as against a plaintiff who has perfected his title by virtue of adverse possession to sue to evict a person or to protect his possession and plethora of decisions are to the effect that by virtue of extinguishment of title of the owner, the person in possession acquires absolute title and if actual owner dispossesses another person after extinguishment of his title, he can be evicted by such a person by filing of suit under Article 65 of the Act. Thus, the decision of *Gurudwara Sahib* v. *Gram Panchayat, Sirthala* (supra) and of the Punjab & Haryana High Court cannot be said to be laying down the correct law. More so because of various decisions of this Court to the contrary.

55. In *Gurudwara Sahib* v. *Gram Panchayat, Sirthala* (supra) proposition was not disputed. A decision based upon concession cannot be treated as precedent as has been held by this Court in *State of Rajasthan* v. *Mahaveer Oil Industries*, (1999) 4 SCC 357, *Director of Settlements, A.P.* v. *M.R. Apparao*, (2002) 4 SCC 638, *Uptron India Limited* v. *Shammi Bhan*, (1998) 6 SCC 538. Though, it appears that there was some expression of opinion since the Court observed there cannot be any quarrel that plea of adverse possession cannot be taken by a plaintiff. The fact remains that the proposition was not disputed and no argument to the contrary had been raised, as such there was no decision on the aforesaid aspect only an observation was made as to proposition of law, which is palpably incorrect.

56. The statute does not define adverse possession, it is a common law concept, the period of which has been prescribed statutorily under the law of limitation Article 65 as 12 years. Law of limitation does not define the concept of adverse possession nor anywhere contains a provision that the plaintiff cannot sue based on adverse possession. It only deals with limitation to sue and extinguishment of rights. There may be a case where a person who has perfected his title by virtue of adverse possession is sought to be ousted or has been dispossessed by a forceful entry by the owner or by some other person, his right to obtain possession can be resisted only when the person who is seeking to protect his possession, is able to show that he has also perfected his title by adverse possession for requisite period against such a plaintiff.

57. Under Article 64 also suit can be filed based on the possessory title. Law never intends a person who has perfected title to be deprived of filing suit under Article 65 to recover possession and to render him remediless. In case of infringement of any other right attracting any other Article such as in case the land is sold away by the owner after the extinguishment of his title, the suit can be filed by a person who has perfected his title by adverse possession to question alienation and attempt of dispossession.

58. Law of adverse possession does not qualify only a defendant for the acquisition of title by way of adverse possession, it may be perfected by a person who is filing a suit. It only restricts a right of the owner to recover possession before the period of limitation fixed for the extinction of his rights expires. Once right is extinguished another person acquires prescriptive right which cannot be defeated by re-entry by the owner or subsequent acknowledgment of his rights. In such a case suit can be filed by a person whose right is sought to be defeated.

59. In India, the law respect possession, persons are not permitted to take law in their hands and dispossess a person in possession by force as observed in *Late Yashwant Singh* (supra) by this Court. The suit can be filed only based on the possessory title for appropriate relief under the Specific Relief Act by a person in possession. Articles 64 and 65 both are attracted in such cases as held by this Court in *Desh Raj* v. *Bhagat Ram* (supra). In *Nair Service Society* (supra) held that if rightful owner does not commence an action to take possession within the period of limitation, his rights are lost and person in possession acquires an absolute title.

60. In *Sarangadeva Periya Matam* v. *Ramaswami Gounder*, (supra), the plaintiff's suit for recovery of possession was decreed against Math based on the perfection of the title by way of adverse possession, he could not have been dispossessed by Math. The Court held that under Article 144 read with Section 28 of the Limitation Act, 1908, the title of Math extinguished in 1927 and the plaintiff acquired title in 1927. In 1950, he delivered possession, but such delivery of possession did not transfer any title to Math. The suit filed in 1954 was held to be within time and decreed.

61. There is the acquisition of title in favour of plaintiff though it is negative conferral of right on extinguishment of the right of an owner of the property. The right ripened by prescription by his adverse possession is absolute and on dispossession, he can sue based on 'title' as envisaged in the opening part under Article 65 of Act. Under Article 65, the suit can be filed based on the title for recovery of possession within 12 years of the start of adverse possession, if any, set up by the defendant. Otherwise right to recover possession based on the title is absolute irrespective of limitation in the absence of adverse possession by the defendant for 12 years. The possession as trespasser is not adverse nor long possession is synonym with adverse possession.

62. In Article 65 in the opening part a suit "for possession of immovable property or any interest therein based on title" has been used. Expression "title" would include the title acquired by the plaintiff by way of adverse possession. The title is perfected by

adverse possession has been held in a catena of decisions.

63. We are not inclined to accept the submission that there is no conferral of right by adverse possession. Section 27 of Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. The concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which has been extinguished and not more than that. For a person to sue for possession would indicate that right has accrued to him in *presenti* to obtain it, not in *futuro*. Any property in Section 27 would include corporeal or incorporeal property. Article 65 deals with immovable property.

64. Possession is the root of title and is right like the property. As ownership is also of different kinds of viz. sole ownership, contingent ownership, corporeal ownership, and legal equitable ownership. Limited ownership or limited right to property may be enjoyed by a holder. What can be prescribable against is limited to the rights of the holder. Possession confers enforceable right under Section 6 of the Specific Relief Act. It has to be looked into what kind of possession is enjoyed viz. de facto i.e., actual, 'de jure possession', constructive possession, concurrent possession over a small portion of the property. In case the owner is in symbolic possession, there is no dispossession, there can be formal, exclusive or joint possession. The joint possessor/co-owner possession is not presumed to be adverse. Personal law also plays a role to construe nature of possession.

65. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, nec-vi i.e. adequate in continuity, nec-clam i.e., adequate in publicity and nec-precario i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. *Animus possidendi* under hostile colour of title is required. Trespasser's long possession is not synonym with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and the large concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

66. Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one. In our opinion, it confers a perfected right which cannot be defeated on reentry except as provided in Article 65 itself. Tacking is based on the fulfillment of certain conditions, tacking maybe by possession by the purchaser, legatee or assignee, etc. so as to constitute continuity of possession, that person must be claiming through whom it is sought to be tacked, and would depend on the identity of the same property under the same right. Two distinct trespassers cannot tack their possession to constitute conferral of right by adverse possession for the prescribed period.

67. We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of

dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.

68. When we consider the law of adverse possession as has developed vis-à-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In Such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.

69. Resultantly, we hold that decisions of *Gurudwara Sahab* v. *Gram Panchayat Village Sirthala* (supra) and decision relying on it in *State of Uttarakhand* v. *Mandir Shri Lakshmi Siddh Maharaj* (supra) and *Dharampal (dead) through LRs* v. *Punjab Wakf Board* (supra) cannot be said to be laying down the law correctly, thus they are hereby overruled. We hold that plea of acquisition of title by adverse possession can be taken by plaintiff under Article 65 of the Limitation Act and there is no bar under the Limitation Act, 1963 to sue on aforesaid basis in case of infringement of any rights of a plaintiff.

70. Let the matters be placed for consideration on merits before the appropriate Bench.

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