APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

1903. *February* 24.

SAGUN BALKRISHNASHET KANEKAR AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, *v.* KAJI HUSSEN VALAD KAJI ALI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 3—9), RESPONDENTS.*

Limitation Act (XV of 1877), schedule II, article 134—Trust property—Wakf—Land held on condition of service—Alienation—Limitation.

Where trust property is alienated by the trustees and the alienees have been in possession by purchase for more than twelve years, the suit as one for the purpose of restoring the property to the trust must fail as barred by article 134, schedule II of the Limitation Act (XV of 1877).

SECOND appeal from the decision of F. K. Boyd, Assistant Judge of Ratnágiri, reversing the decree of Ráo Sáheb Vishvanath V. Vagh, Subordinate Judge of Málvan.

Suit for possession and management of certain lands alleged to have been granted in *wakf*.

The suit was filed on the 10th January, 1896.

The plaintiffs were the sons of defendant 3 and the cousins of defendants 4 and 5. The lands in question had formerly been in the possession of defendants 3, 4 and 5, but had been alienated by them to defendants 1 and 2, who now held them.

The plaintiffs alleged that these lands were a portion of certain lands which had been granted in inám to the Kázi family, to which they and defendants 3, 4 and 5 belonged, for the purpose of defraying the expenses connected with the service of a certain mosque. A moiety of the lands so granted was now in the possession of one Kazi Abdul Razak, who was not a party to the suit, and the other moiety had belonged to defendants 3, 4 and 5, who performed service at the mosque. These defendants, however, in 1891 had ceased to perform their services, and the plaintiffs consequently had been performing them. The plaintiffs further alleged that defendants 3, 4 and 5 had in the year 1863 mortgaged their moiety of the said inám lands to the defendants 1 and 2 and that the share therein of defendant 3 (the father of the plaintiffs) had been subsequently sold and purchased by the

* Second Appeal No. 120 of 1902.

said mortgagees (defendants 1 and 2). The final alienation was in the year 1875. The plaintiffs contended that these lands had been improperly alienated and that they were entitled to recover them on the ground that they were performing the services at the mosque for the purpose of which these lands had been granted.

Out of the seven defendants, the suit was contested only by defendants 1 and 2. They alleged that the lands had been the private property of defendants 3, 4 and 5, who had mortgaged and sold them. They further denied that the plaintiffs had a right to sue in the life-time of their father (defendant 3) and contended that the claim was time-barred, the alienations in their favour being more than twelve years prior to the institution of the suit.

The Court of first instance dismissed the suit on the ground that the plaintiffs' father was still alive and had not transferred his rights to them and that therefore they could not sue.

On appeal the Court confirmed the decree, holding that the suit was not properly framed and that the proper course to follow was to have the defendants 3, 4 and 5 removed from being trustees of the mosque.

Against this decision the plaintiffs having preferred a second appeal, the High Court (Parsons and Ranade, JJ.) held that the suit was maintainable and, reversing the decrees of the lower Courts, sent back the case to the Court of first instance for trial on the merits in reference to the remarks in its judgment. (See I. L. R. 24 Bom. 170.)

On remand the first Court found that the property in suit was *wakf*, that its alienations were not legally valid, and that the suit was time-barred, the plaintiffs' possession being adverse for more than twelve years before the suit. That Court therefore dismissed the suit.

On appeal by the plaintiffs the Judge reversed the decree and allowed the claim holding (1) that the lands in suit were *wakf*; (2) that the alienations were valid as against plaintiffs so long only as the alienors held office for which the endowment was made; (3) that the plaintiffs were entitled to recover possession; and (4) that the suit was not time-barred.

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Paragraphs 4, 5, 7 and 8 of the Judge's judgment ran as follows:—

4. With regard to my finding on the second issue:—No alienation can in the beginning be of more than the right, title and interest of the alienor. What, then, was the right, title and interest of defendant 3 and Kaji Mohidin at the time of the alienations by them to defendants 1 and 2? They were undoubtedly in possession of the plaint lands. In what capacity were they in this possession? This raises, to a certain extent, the difficulty of the whole case, which will, I think, be more appropriately dealt with in discussing my finding on the fourth issue. Under the *firman* it is clear that they were not absolute owners. Did they, then, hold as trustees? Here a distinction must be clearly made with regard to the *firman*. This document creates an endowment in *wakf* and thereunder there are two distinct classes of beneficiaries. The first consists of those deriving benefit from "the charitable or religious object" to which the endowment is consecrate, *viz.*, the whole Mahomedan community. The second consists of those who are or may become entitled to the emoluments of the office of *peshnimaz*. In what relation did the alienors stand towards these two distinct classes? My view is that they may be considered to stand in the light of trustees towards the former class, but not towards the second; and it is to this class that plaintiffs belong and in this capacity that they now sue. No possible definition of *trustee* will include one who holds in his own right and derives no right whatever from the *cestui qui trust*. In *Barney* v. *Barney* [(1892) 2 Ch. 265)] it is laid down that "a trustee properly so called must have property committed to his charge." The person who so commits, or on whose behalf such commission is made, must of course be *cestui qui trust*. Plaintiffs, in the character in which they sue, cannot in any way be described as *cestuis qui trustent*. It is, therefore, clear that defendant 3 and Kaji Mohidin were never trustees as regards plaintiffs. As I shall point out later, there are many rulings with regard to the alienation of life-interest in cases very similar to the present, and the only possible way to reconcile these with the clear language of section 10, Limitation Act, is to hold that such alienors are not trustees in the absolute sense of the term. There remains only one other possible capacity in which the alienors can have held, *viz.*, that of persons holding in their own right, but not absolutely. And this, with regard to the descendants of the original grantee, is the exact effect of the *firman*. With regard to these the *firman* creates what I cannot distinguish from an ordinary service inám.

5. The next question is whether the alienors held a life-interest, or a limited interest, *viz.*, only during tenure of office. Such interests are distinguished in *Venkatesh* v. *Timmappa* (P. J. 1897, page 146). Now the *firman* clearly lays down that the profits of the lands are for emolument of the office of *peshnimaz*, and this is an office which still exists and the work of which is carried on by plaintiffs. I therefore think that the tenure of office, and not the life-time of any holder, is to be considered in determining the extent of his title. The intention of the *wakf* must be considered. The ruling of this High

Court in *Lotlikar* v. *Wagle* (I. L. R. 6 Bom. 596) here demands attention: "Land, which is the property of a temple, cannot be sold away from the temple. But what was sold in this case was the right, title and interest of one Bacha, a servant of the temple, who held the land in dispute as remuneration for his service. I think that (*a*) *in the absence of any statute to the contrary*, such interest as the holder of service land has in the land may be alienated; subject, of course, in the hands of the alienee, to the (*b*) *determination of such interest by the death of the original holder, or by his removal from his office* on account of his failure to perform the service for which the land was held." This is a case very much on all fours with the present case. In the matter of (*a*), no doubt, under strict Mahomedan Law, *wakf* property is absolutely inalienable in the same way as in strict Hindu Law, service inâm or watan, whether devasthan or otherwise, is alienable (Amir Ali, p. 383); but there are many rulings against this view. An *obiter dictum* by Farran, J., in *Amrutlal* v. *Sheik Hussein* (I. L. R. 11 Bom. 505) expresses the principle adopted. Referring to *wakf*, I instance *Bibee Kuneez* v. *Bibee Saheba Jan* (8 W. R. 313; also *Futtoo Bibee* v. *Bhurrut Lall* (10 W. R. 299) quoted by Ranade, J., in his judgment on the first stage of the present case. Upon the general analogy between the present form of *wakf* and service *inâm* or *watan* there are many rulings applicable, *e.g.*, *Jamal Saheb* v. *Murgaya Swami* (I. L. R. 10 Bom. 34); *Trimbak Bawa* v. *Narayan Bawa* (I. L. R. 7 Bom. 188) and others. With regard to (*b*), as I have said above, the *firman* does not create life-interests. And I find that resignation or removal would have the same effect. In this I am supported by Parsons, J., who says: "..... upon whom (*viz.*, plaintiffs) on the death of the present mutawallis, the office of mutawalli would fall by descent, *if indeed it has not already fallen..... by abandonment and resignation*"; and by Ranade, J., who has remarked: "the relief about possession might also be claimed under certain circumstances, *if it is proved that they* (*viz.*, *plaintiffs*) *have succeeded to the office of mutawalli*." And, as I have pointed out, this latter fact is not disputed. These, then, are my reasons for my finding on the second issue.

7. My finding on the fourth issue presents some points of interest. In my view of the case, article 140, Limitation Act, is decisive. This lays down that in a suit by a remainderman, a reversioner (other than a landlord), or a devisee for possession of immoveable property, the time limit is twelve years from the date when his estate falls into possession. That is to say that, in the present case, the time-bar dates from the new title (*viz.*, 1891) and not from the alienations of 1863 and 1873 or 1875. The date of suit being 10th January, 1896, there is no question of limitation.

8. Upon this last issue the arguments of the learned vakils on either side were mainly directed. The entire case for defendants turns upon the applicability or otherwise of section 10, Limitation Act. That section is as follows:—"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,

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shall be barred by any length of time." The alienees (defendants 1 and 2) are admittedly assigns for valuable consideration, although their title in part is that of mortgagee, *vide Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (I. L. R. 15 Bom. 583). If, then, the alienors "were persons in whom property had become vested in trust," the section will apply and the time-bar will be twelve years from the alienation, as laid down in article 134. Upon this hypothesis many rulings were quoted, *e.g.*, *Chintamoni Mahapatro* v. *Sarup* (I. L. R. 15 Cal. 703); *Nilmony Singh* v. *Jagabandhu Roy* (I. L. R. 23 Cal. 536); *Kannan* v. *Nilkandan* (I. L. R. 17 Mad. 337); and most important of all, *Behari Lal* v. *Muhammad Muttaki* (I. L. R. 20 All. 482). Upon this point I take the last as typical and embodying the principle running through all. In this case a son sued to recover possession against certain alienees on the ground that the alienations were in *violation of the trust*, and it was held by the Full Bench that limitation commenced to run *against the trustee* from the date of the alienees obtaining possession. The mortgages here were for valuable consideration, and the ruling does not more than follow section 10, Limitation Act. But I find the hypothesis on which these rulings were quoted entirely unsound. The learned vakil for plaintiffs did not approach this point; but, to my mind, it is that upon which the entire case turns. For the reasons I have given in paragraph 4 of this judgment, I cannot hold that the alienors can in any way be regarded as trustees so far as regards plaintiffs. I hold, therefore, that none of these rulings are applicable and that nothing in section 10 can support defendants. It follows from my view in the matter of trust that if plaintiffs had sued as members of the Mahomedan community, they would have been time-barred; but that is not the character they bear in the present suit.

Defendants 1 and 2 preferred a second appeal.

Inverarity (with *Chimanalal H. Setalvad* and *H. C. Coyaji*) for the appellants (defendants 1 and 2):—The principal point is one of limitation. The plaintiffs are members of the Kazi family. In this case only a half share of *wakf* property was given to the Kazi family and the dispute relates to that half share. It was mortgaged by defendant 3, the father of the present plaintiffs, and his brother Mohidin, to an ancestor of defendants 1 and 2 in 1863. Subsequently both of them passed separate mortgages of their shares in 1873. Afterwards in 1875 Balkrishna, father of defendant 1, bought defendant 3's share at a Court-sale. It is admitted that defendants 1 and 2 have been in possession of the half share since 1863. They are in possession now partially as mortgagees and partially as owners. Though the property in suit is found to be the property of the mosque, still we contend that the present suit for recovery of possession is time-barred by our

adverse possession for more than twelve years. The Judge has not correctly grasped the effect of the judgment of the High Court remanding the case for trial on the merits. The High Court held that the suit was maintainable only for the purpose of having the lands restored to the trust and that the plaintiffs can get possession as trustees if they succeed in recovering the lands for the trust.

We do not admit that the plaintiffs ever succeeded to the office of mutawalli. If the property is trust property, still the claim would be time-barred under article 134, schedule II, of the Limitation Act. There is no such thing as succession of life estates in Mahomedan Law: *Abdul Gafur* v. *Nizamudin* (1), *Ismail Mahomed* v. *Hurbai*.(2)

It is not alleged that the grant is to the Kazi family. The plaintiffs sue as trustees for the masjid and the claim is time-barred: *Dattagiri* v. *Dattatraya* (3); *The President, &c., of the College of St. Mary Magdalen* v. *Attorney General* (4); *Gnanasambanda* v. *Velu Pandaram* (5); *Behari Lal* v. *Muhammad Muttaki*. (6)

Raikes (with *R. R. Desai*) for respondents 1—4 (plaintiffs):—The main question is whether the alienors were trustees and whether they had the legal ownership. If they were trustees, then we contend that our cause of action arose when we entered on the office in 1891. The alienors, if they were trustees, had to perform certain services and to light up the mosque, and in consideration of the services they were to take the income of the lands. The only way the lands could be available for services and lighting was by turning their income into money. The trustees could do that by leasing the lands or by grant for life on yearly payment. The plaintiffs are therefore entitled to possession because the alienors have ceased to render service and the plaintiffs have been rendering it since 1891. The view taken by the High Court when it remanded the case is consistent with our present contention.

(1) (1892) 19 I. A. 178; 17 Bom. 1.
(2) (1898) P. J. p. 107.
(3) (1902) 4 Bom. L. R. 743; see ante p. 363.
(4) (1857) 6 H. L. Cases 189.
(5) (1899) 27 I. A. 69; 23 Mad. 271.
(6) (1898) 20 All. 482.

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We do not admit that the alienors were trustees, but supposing that they were, still their alienations would be good during the time they remained in office. If the alienations were within the powers of the alienors, they would be effectual only during their life-time or till their resignation or removal from office. Our right to the lands accrued to us in 1891 when the office-holders ceased to render service. We do not claim through the alienors, but we claim *per formam doni: Amrutlal* v. *Shaik Hussein* (1); *Trimbak Bawa* v. *Narayan Bawa* (2); *Lotlikar* v. *Wagle* (3); *Venkatesh* v. *Timmappa* (4); *Jamal Saheb* v. *Murgaya* (5); *Jewun Doss* v. *Shah Kubeer-ood-deen* (6); *Piran* v. *Abdool Karim*.(7)

Sitaram S. Patkar for respondent 7 (defendant 5).

Setalvad in reply.

BATTY, J.:—In this case the plaint as described by the Court of first instance alleged that certain land therein referred to was the service inám property of a mosque; that the rights of service and of managing the estate belonged to the family of the plaintiffs and of defendant 3 their father, and of defendants 4 and 5; that the defendants 3, 4 and 5 had ceased to perform service, and that the plaintiffs had rendered the service in their stead and that the defendants 1 and 2 had enjoyed, through the defendants 3, 4 and 5, a part of the profits of the share to which the plaintiffs were entitled.

The defendants 3, 4 and 5, members of the plaintiffs' family, did not contest the claim.

The defendants 1 and 2, who are Hindus, admittedly have been in possession of the land in suit since 1863 under mortgages both from defendant 3, the father of plaintiff, and from the father of defendants 4 and 5 and from defendants 4 and 5 themselves, and in 1875 purchased at a Court-sale the equity of redemption of defendant 3.

The plaintiffs' suit was rejected by the Court of first instance and the lower Appellate Court on the ground that, the plaintiffs'

(1) (1887) 11 Bom. 492, 505.
(2) (1882) 7 Bom. 188.
(3) (1882) 6 Bom. 596.
(4) P. J. 1897, p. 146.
(5) (1885) 10 Bom. 34.
(6) (1840) 2 Moore's I. A. 390.
(7) (1891) 19 Cal. 203, 218.

father being still alive, the plaintiffs could not claim present possession and had not shown that they have a right to the office to which the property in suit belongs.

In the grounds of second appeal the plaintiffs alleged, *inter alia*, that the lower Appellate Court had erred in holding (1) that under the Mahomedan Law the whole of the property in suit was not endowment property; (2) that having found that part of the property was endowment property it erred in rejecting the whole of the plaintiffs' claim; (3) that it erred in holding that part of the property was the private property of the defendants 3, 4 and 5. They also alleged (4th para. of the memorandum of appeal) that the lower Court ought to have held the alienations alleged by the defendants 1 and 2 were under the Mahomedan Law void: and (para. 10) that the lower Appellate Court erred in holding that the plaint was not properly framed to entitle the plaintiffs to obtain relief, and that if there was any formal defect the plaintiffs should be allowed to amend their plaint.

The above being the position taken up by the plaintiffs, the decrees of the lower Courts were reversed on second appeal, the judgments in which by Parsons, J., and Ranade, J., are reported at I. L. R. 24 Bom. 170. Parsons, J., held that the suit would be maintainable if regarded as one to recover trust property improperly alienated from the trust, and that as beneficiaries entitled in pursuance of the trust the plaintiffs could sue to have the alienations set aside and the property restored to the trust, though if they desired to obtain possession themselves, they must show that they are also holder of the office of mutawalli. It is clear that Parsons, J., regarded the suit as maintainable on this ground alone.

The judgment of Ranade, J., explicitly stated that if the suit is treated as one for the possession of the land it is defective and not properly maintainable in its present form, and proceeded to observe that as the lower Appellate Court had found that the lands are only partly endowed property, and the Kazi defendants 3, 4 and 5 have also beneficial interest therein, alienation to the extent of this beneficial interest might be permissible, but that it was obvious that the suit considered in *this* light was

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improperly framed and defective in its character of which para. 10 of the memorandum of appeal showed the appellants themselves to be conscious. It was solely on the ground that the principal object of the plaint was to secure a declaration that the lands were the inám property of the mosque, and as such not liable to alienation, that the suit was allowed to proceed: for it was stated if that declaration could be claimed by appellants, their inability to seek the other reliefs claimed would not defeat the main object of the suit.

The lower Appellate Court appears to have held that the property in dispute was not trust property in the hands of the alienors, but was practically a wage fund to which, as persons performing the required services, the alienors were entitled during their tenure of office, and which to the extent of that limited title they could therefore alienate without committing any breach of trust and without affecting anything beyond their interests in the remuneration provided for such services. And on this ground the lower Appellate Court appears to have held that article 134 would be inapplicable to the suit, as the property had not been purchased from the alienors, defendants 3 to 5, as trustees, but merely as servants alienating by anticipation the wages provided for their service. This is the only meaning that I can attach to paras. 4 and 5 of the very elaborate and ingenious judgment of the lower Appellate Court. For the case of *Lotlikar* v. *Wagle* [1] is cited by the lower Appellate Court as on all fours with the present case. That was a case in which the assignee of land devoted to the remuneration of service, had alienated the interest assigned to him as such remuneration, and it was held that when his service had determined, the interest of the alienee would else determine—but not before—that is to say, it might last possibly as long as the alienor lived or possibly only till he was ejected by the trustees.

Now no doubt a servant may dispose of his wages without effecting any alienation of any trust property from which those wages are payable. And this is referred to by Ranade, J., in his remark that to the extent of such beneficial interest, alienation might be permissible. But then, that remark is immediately

[1] (1882) 6 Bom. 596.

followed by the statement that if this suit be considered in this light it is obvious that it was improperly framed and defective in its character. The order of remand, therefore, did not authorise the trial of the suit as viewed in this light, but declared it for such purposes imperfectly framed and defective in character. And by that decision we are bound.

From the judgment of Ranade, J., it may be gathered that the grounds on which the lower Court proceeded were at least in some measure approved, so far as concerned the rejection of the suit considered as one to recover the land as in any sense private property. Thus if treated as a suit to recover a portion of a private estate, partition would be necessary and non-joinder of coparceners would be fatal. But the lower Appellate Court having found that the land was partly endowment property, that is at least in part subject to a trust, an equally fatal objection was recognised as arising from the form of the suit, which is manifestly distinguishable from the case of *Lotlikar* v. *Wagle* for the judgment in that case speaks of the alienor as assignee of the land as remuneration from the temple authorities for his services. In the present case, on the other hand, it is not alleged that the land in suit has been assigned to the remuneration of the plaintiff or even that it had been assigned specifically as the remuneration of services to be performed by defendants 3, 4 and 5. And as this was left indefinite and as the share alienated by them was only a portion of that which was available as remuneration, it was clearly impossible to treat the suit as one merely for the recovery of a specific wage fund, set apart for the remuneration of the plaintiffs. For there is no allegation in the plaint that the land had been assigned to the plaintiffs by the mutawalli. If the defendants 3 to 5 held the land, and alienated the land, not as trustees or mutawallis but merely as servants to whom it had been assigned as remuneration for services exigible from them, the plaintiffs, it would seem, could not claim that land as remuneration until the tenure of defendants 3 to 5 as such servants had determined. All the plaintiffs could claim would be to have the land restored to the trust. This seems to have been the view of the case taken by Parsons, J., and Ranade, J., in the judgment in *Kazi Hassan* v.

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Sagun Balkrishna.[1] The claim was susceptible of three alternative constructions. Either the land was to be regarded as entirely private property, in which case partition with the joinder of all the parties would be necessary, or secondly if all of it were impressed with a trust, the suit could only be one for its restoration to the trust and to set aside an alienation by the defendants as trustees. Thirdly, if it were partly subject to trust and partly held for mere service, not only would it be necessary to allege specific assignment for service, but the determination of the assignment under which the defendants 3 to 5 had held, and a re-assignment to the plaintiffs. The only alternative in which the suit as brought would be maintainable was therefore that the land had been alienated by the trustees and not by the servants. And if that alienation by the trustees had continued for more than twelve years, there could be no doubt, as the lower Appellate Court recognised, that the suit would be time-barred. The question whether the plaintiffs were mutawallis was thus immaterial. Their contention in their grounds of appeal was, as shown above, that the whole was endowment property; that no part was the private property of the defendants 3 to 5; and that the alienation by them was void. And thus they claimed not that the defendants 3 to 5 had alienated their own rights to the remuneration for service which had determined, but that the endowment property itself had been illegally alienated, as indeed the transaction impugned purports to have alienated it. In such case whether the plaintiffs claim as beneficiaries or as mutawallis their suit brought more than twelve years after the alienation is beyond time. The case of *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (2), which is the only one of those cited by respondents in any way appearing to support their contention to the contrary, appears to have been decided with reference to the regulations therein referred to, *viz.*, Regulations III of 1810 and II of 1805 (*vide* page 423), and the mutawalli in that case was accordingly regarded as the authorised agent of Government appointed for the performance of the acknowledged duty to Government for the protection of the endowment and had, as indicated in the judgment, to collect revenue on behalf of Government. It is unnecessary here to consider whether

(1) (1899) 24 Bom. 170; 1 Bom. L. R. 649. (2) (1840) 2 Moore's I. A. 390.

the right of the Secretary of State would be barred under article 149 or otherwise. As against the plaintiff or any private individual, article 134 would be a bar to recovery of possession of the property purchased. The plaintiff does not ask to redeem. Plaintiff impeaches the mortgage as well as the sale as wholly void. The case of *Venkatesh Prabhu* v. *Timmappa* (1) has therefore no application. The rulings cited by the lower Appellate Court of *Chintamoni Mahapatro* v. *Sarup* (2); *Nilmony Singh* v. *Jagabandhu Roy* (3); *Kannan* v. *Nilkandan* (4) and *Behari Lal* v. *Muhammad Muttaki* (5) establish, as that Court fully recognised, that if the alienations were in violation of the trust, limitation would run against the trustees from the date of the alienees obtaining possession. To these may be added *Gnanasambanda* v. *Velu Pandaram* (6) and the case there cited of *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (7), the recent case of *Dattagiri* v. *Dattatraya* (8) and cases there cited and the case of *President, &c., of Magdalen Hospital* v. *Knotts.* (9) The lower Appellate Court appears to have realised that these cases would be absolutely conclusive, but that they were quoted on the unsound hypothesis that the alienors in this case were trustees. But it appears also that the plaintiffs' vakil did not raise this point and that the hypothesis was impugned not by the learned vakil for the plaintiffs, but by the lower Appellate Court *suo motu*. It is, I think, always a matter for regret that a Court should select for the ground of its decision a point that has not been approached by the vakil or the counsel of the party in whose favour it is supposed to tell. For while the other side must be taken by surprise if a point not urged against him is made the ground of decision, the party in whose favour it is decided may be deprived of the benefit which he might have derived from a consideration of such arguments as he may have advanced. It appears from the lower Appellate Court's judgment in this case that the plaintiffs' vakil did not rely upon the point on which the lower Appellate Court considered the entire case turned, *viz.*, that the alienors disposed of the property in question

(1) (1897) P. J. 146.
(2) (1888) 15 Cal. 703.
(3) (1896) 23 Cal. 536.
(4) (1884) 7 Mad. 337.
(5) (1898) 20 All. 482.
(6) (1899) 23 Mad. 271; 27 I. A. 69.
(7) (1872) L. R. I. A. Sup. Vol. 47; s. c. 9. Beng. L. R. 377.
(8) (1902) ante p. 362.
(9) (1879) 4 Ap. Cas. 324.

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not as trustees, but as owners of the property alienated by them. If the plaintiffs had contended that the property had been alienated as their share of the remuneration for services exigible, they would have had to show not merely that they had performed those services, which it is conceivable they might have performed at the desire and on the behalf of defendants 3, 4 and 5 from whom they were exigible, but that on their undertaking the performance of those services, the land in suit could not be withheld from them as the earnings of defendants 3, 4 and 5. But the lower Courts have not decided that point and have apparently never been asked to decide it, and there is consequently no finding that the plaintiffs individually have a better right to the land or its proceeds or to any particular part of it than the defendants 3, 4 and 5 or their assignees the defendants 1 and 2. The lower Appellate Court has found that the plaintiffs have succeeded to the office of mutawalli. And that finding would no doubt have entitled them to urge a claim, if not time-barred, to rights vested in the mutawalli, that is to say, to the property in suit as trust property. But as the lower Appellate Court has found the property is not trust property at all, but only the earnings of defendants 3 to 5, entitled as servants and not as mutawallis, the plaintiffs could not succeed without proving that the right of those defendants to the property so viewed has determined. And though their right to the office of mutawalli may have fallen by abandonment, and resignation, if the property was not vested in them as mutawallis in trust but, as the lower Appellate Court held, as persons holding in their own right absolutely, their vacation of the office of mutawalli would not show that such absolute right had ceased to exist and had been transferred to the plaintiffs. The lower Appellate Court appears to have held that the land was held as inám for services, and refers to a sanad of 1895 as showing that it has always been so regarded. Apart from the question whether a sanad granted in 1895, apparently just before suit, could retroact on transactions effected in 1863 and 1875, or change the title of the alienors in the past, it is difficult to see how the plaintiffs could claim the restoration of the land as *inám* before the particular estate assumed to vest in successive

life-holders had determined. It is not and cannot be contended that the office of *peshnimaz* falls within the definition of a hereditary office under Bombay Act III of 1874, which relates to offices for the performance of duties connected with matters of civil administration. The question whether if held free from the trust as service inám the land tenure was one of successive life estates is one which it is not necessary in this appeal to determine or to consider. No authority has been cited to show that if the land is held free from a trust on condition of service, and as such alienated by the holders for the time being, other members of the family merely because they were suffered to perform the service in lieu of the alienors, would have the right to recover from the alienees. The only ground on which the plaintiffs could have succeeded in the suit as framed was, as already pointed out, that the property was trust property improperly alienated by the trustees, and liable as such to be restored to the trust. And the lower Appellate Court having found that the alienees have been in possession by purchase for far more than twelve years, the suit as one for the purpose of restoring the property to the trust, must necessarily fail as barred by article 134 of the Limitation Act. I therefore think that the decree of the lower Appellate Court must be reversed and the suit must be dismissed with costs. By consent of the parties the judgment of my learned colleague has been delivered by me on his behalf, he having vacated his seat on the Bench shortly after the hearing of the appeal and before this judgment was ripe for delivery.

STARLING, J.:—About 50 years ago a certain *thikan* was held, as to one moiety by one Kaji Abdul Rajak and as to the other by one Kaji Ali and one Kaji Mohidin. This *thikan* seems to have consisted of three pieces of land which had apparently been granted in 1641 and confirmed by a *firman* registered in 1834 to the ancestors of the abovenamed three persons. One of the pieces of land in respect of a moiety of which this suit is brought was described in the *firman* as being set apart for the lighting of a mosque to which another of the pieces of land was also dedicated. It is to my mind clear that as to the piece of land now in dispute the grantees were trustees to receive

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the income of the land and to apply it in or towards the lighting of the mosque, and the fact that after providing sufficiently for the carrying out of that purpose there might be a surplus left which the grantees, not unlawfully, might apply to their own use for services rendered by them in that behalf does not make them any the less trustees. It was argued that although they might be trustees yet the interest of each successive generation was only a life-interest. A life estate, however, is unknown to Mahomedan Law. The Hedaya lays down in Volume III, Book xxx, Chap. 2, page 489 of Grady's Edition, that an *amree* or life grant "is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered void by involving an invalid condition"; consequently the donee, with a life condition added to the gift, becomes the absolute owner. This principle is recognized by the Privy Council as law in *Mussamut Humeeda* v. *Mussamut Budlun* [1], which was followed in *Abdul Gafur* v. *Nizamudin* [2] affirming the decision in *Nizamudin* v. *Abdul Gafur* [3]. Therefore the grantees did not hold the property by a series of life estates. In fact, the *firman* itself seems to treat them as the owners of the land and, except as to the office of *peshnimaz* which was provided for by a separate royal grant, not as mere *mukhtyars* managing the property on behalf of the grantor according to the terms imposed by him. This distinguishes it from the case of *Jewun Doss* v. *Shah Kubeer-ood-deen* [4], the *firman* in which case, to be found at page 419, distinctly showing that the grantee was only to be in occupation of the lands granted in order to apply their produce as directed therein, in fact, that he was not the owner of the lands, and had notithe legal estate in himself, but was merely a *mukhtyar*, and that in the event of his heirs being in possession of the lands under the *firman*, they would be in possession merely as *mukhtyars* for the time being. In the present case there is a grant of three pieces of land to the grantee as *inámdár*, and to my mind as full owner of the legal estate, one piece being described for the mosque, another for the lighting of the mosque, and the third being unfettered by any trust or condition.

(1) (1872) 17 Cal. W. R. 525.
(2) (1892) L. R. 19 I. A., p. 178; 17 Bom. 1.
(3) (1888) 13 Bom. 264.
(4) (1840) 2 Moore's I. A. 390.

Consequently I am of opinion that this is not a *wakf* strictly so called with the quality of absolute inalienability attached to the lands, but that the grantees were in the position of ordinary trustees. If the grantees be ordinary trustees, then article 134 of Act XV of 1877 applies, and as the defendants have been in possession under their mortgage more than twelve years, the plaintiffs' suit would be barred. The respondents-plaintiffs relied upon the case of *Trimbak* v. *Narayan*(1) which was, however, disapproved of in *Gnanasambanda* v. *Velu Pandaram*(2), and I do not therefore consider that it affords any guide to the Court in the present case. There is, however, a recent case of *Dattagiri* v. *Dattatraya*(3), which seems to me to be on all fours with this case, and, after taking into consideration all the authorities and arguments brought to the notice of the Court, I am of opinion that the plaintiffs' suit is barred and the decree of the lower Court must be reversed with costs and the decree of the Subordinate Judge restored.

Decree reversed.

(1) (1882) 7 Bom. 188. (2) (1899) L. R. 27 I. A. at p. 73.
(3) (1902) 4 Bom. L. R. 743, ante p. 363.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

THAKORE FATESINGJI DIPSANGJI (ORIGINAL PLAINTIFF), APPELLANT, v. BAMANJI ARDESHIR DALAL (ORIGINAL DEFENDANT), RESPONDENT.*

1903. *February* 26.

Landlord and tenant—Permanent tenancy—Void lease—Lessee's adverse possession—Disclaimer of landlord's title to evict—Estoppel—Unregistered lease—Admissibility in evidence—Ratification—Acquiescence—Submission—Limitation Act (XV of 1877), schedule II, articles 120, 139 and 144—Evidence Act (I of 1872), sections 115 and 116—Registration Act (III of 1877), section 49—Panch Mahâls.

One Dipsangji, the Thakore of Kanjeri in the Panch Mahâls, died on the 7th August, 1877, leaving him surviving the plaintiff Fatesingji, who was born on the 8th December, 1874. The Panch Mahâls had been ceded by Scindia to the British Government in 1861, but by Act XV of 1874, Act XX of 1864,

* Appeal No. 9 of 190 .