ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905. *April 4.*

BIBI KHAVER SULTAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* BIBI RUKHIA SULTAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Gift—Transfer of Possession—Costs.

On the 5th day of July, 1901, J, a Mahomedan lady, executed a gift of moveable and immoveable properties, including the house in which she resided, in favour of A, B, C, D, E, the widow and minor children, respectively, of her deceased son M. After the execution of the deed of gift, A took exclusive possession of the house on her own and on her children's behalf.

On the 7th day of July, 1901, J returned to the house and at her instance, the tenants, who resided on a portion of the property transferred, attorned to A.

During the absence of J from July 5th to July 7th, 1901, certain furniture and other moveable property, belonging to her, remained in the house, the subject of the gift.

On the 18th of October, 1903, J died intestate. Upon S, the sole surviving daughter of J, filing a suit, claiming that the alleged gift was invalid under Mahomedan Law,

Held, the execution of a deed of gift of immoveable property accompanied by a temporary abandonment of possession by the donor in favour of the transferee and the attornment of tenants to the transferee is a sufficient delivery of seisin to make the gift valid under the Mahomedan Law.

The fact that during the abandonment of possession, a portion of the donor's moveable property remains on the premises, and that the donor, after a temporary absence, continues to reside in the same, does not render the transfer of possession inoperative.

Shaik Ibhram v. *Shaik Suleman*(1) followed

It was within the discretion of the lower Court to allow separate costs to the 1st defendant and her minor children. But only one set of costs was allowed in the appeal.

APPEAL from Chandavarkar, J.—

On the 5th day of July, 1901, Bibi Begum Jan, a member of the Usuli division of the Shiah sect of Mahomedans, executed a deed of gift of certain moveable and immoveable properties, including the house in which she resided, to the defendants Bibi Rukhia Sultan and her children, the widow and minor children of her predeceased son, Aga Mahomed Mirza.

* Appeal No. 1379 of 1904.

(1) (1884) 9 Bom. 146.

After the execution of the deed of gift, Bibi Rukhia Sultan, the 1st defendant, took exclusive possession of the house on behalf of herself and of her children, the other defendants.

On the 7th day of July, 1901, Bibi Begum Jan returned to the house, and at her instance, the tenants, who resided on a portion of the property transferred, attorned to the 1st defendant.

During the absence of Bibi Begum Jan, from the 5th of July, 1901, until the 7th of July, 1901, certain furniture and other moveable property belonging to her, remained on the premises, and, on her return, Bibi Begum Jan exercised the same control as to this property, which she had exercised prior to her departure.

On the 18th of October, 1903, Bibi Begum Jan died intestate, leaving the plaintiff, Bibi Khaver Sultan, as her sole surviving daughter and heir.

On the 22nd of January, 1904, the plaintiff filed a suit (being Suit No. 51 of 1904) in the High Court of Judicature in Bombay.

The plaintiff prayed *inter alia*:—

1. That it might be declared that the plaintiff as heir of her said mother is entitled to the 3 immoveable properties described in the plaint and that possession thereof might be awarded to her.

2. That it might be declared that the plaintiff as heir of her said mother is entitled to all the moveable property left by her said mother and that possession of such portion as the plaintiff had not already received might be awarded to her.

3. That the 1st defendant might be ordered to account to the plaintiff for the whole of the property immoveable and moveable of the said Bibi Begum Jan taken possession of by her as aforesaid and for the rents, income and profits thereof and that the 1st defendant might be charged rent for such portion of the said immoveable property as she and her family had occupied since the death of the said Bibi Begum Jan.

On the 29th day of September, 1904, Chandavarkar, J., passed a decree in favour of the defendants. The following are the material passages of the judgment:—

"The evidence of His Highness the Aga Khan, of Dr. Rozario, and of Mr. Moos, a Solicitor of this Court, is conclusive as to the factum of the deed of gift.

"The evidence of the said three witnesses is also conclusive as to the delivery of the moveable property under the deed by Bibi

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Begum Jan to the 1st defendant immediately after the execution.

"The only question that remains for consideration is as to the immoveable properties, the question being whether possession was duly given of them under the deed of gift to the defendant by Bibi Begum Jan, so as to fulfil the requirements of the Mahomedan Law and make the gift legally complete and valid.

"I will sum up the conclusion at which I have arrived upon the whole of the evidence and probabilities in the case:—After the execution of the deed of gift, Bibi Begum, having declared by the deed that she had given possession of the immoveable properties to the 1st defendant and her children physically abandoned possession of the house and stayed for a day or two with the family of His Highness the Aga Khan and the 1st defendant went and took exclusive possession of the house on her own and her children's behalf. Bibi Begum returned after a day or two and at her instance the tenants attorned to the 1st defendant. Bibi Begum continued to reside there and had her things in the house but she resided not as owner but as a member of the family; the rents were collected and the properties enjoyed by the 1st defendant on her own and her children's behalf.

"These are my findings of fact and upon them the question of law arises whether under these circumstances there was a complete and effectual delivery of seisin to make the gift valid under the Mahomedan Law.

"It is contended for the plaintiff that there was not and a decision of the Madras High Court in *Bava Saib* v. *Mahomed*(1) is relied upon. There Davies and Boddam, JJ., held that the donor's intention 'must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.' So far not much exception can perhaps be taken to the principle of law enunciated by the learned Judges, but they go on to say that where the subject of the gift is a house and the donor after giving possession to the donee continues to occupy it with him, there can be no complete gift and they rely on the authority of case XXII at page 231 of Macnaghten's Precedents, 4th Edition.

(1) (1896) 19 Mad. 343 at p. 344.

In that case it is said 'In books of Law it is expressly stated, that if a person dispose by gift of a house to another, and continue himself to inhabit it, or even keep some part of his property therein, the gift is void. . . . . Any person disposing of his house to another by gift, must relinquish possession, to legalize the donation, and must so completely vacate it, as not to leave even a straw of his own property remaining therein, and must divest himself of all use and benefit therefrom, surrendering it totally to the donee'. According to this strict view, and some of the texts cited in the Precedents from Mahomedan Lawgivers support it, whatever else a donor may do by way of substantial delivery of seisin, if he leaves there anything belonging to him, a bag of food or even a straw, the gift is void. Whether this strict view should be enforced by our Courts is a question the solution of which would have been attended with difficulty and required a careful consideration of all the authorities and texts bearing on the point, but in sitting as a single Judge I am spared the necessity of an elaborate discussion of the question, bound as I am by the decision of a Division Bench of this Court in *Shaik Ibhram* v. *Shaik Suleman*[1]. In that case too, the donor continued to live in the house, the subject of the gift, until his death. In the argument at the Bar of case XXII of Macnaghten's Precedents, on which the Madras decision in *Bava Saib* v. *Mahomed*[2] to which I have already referred, was based, was cited and relied upon to show that there had been no entire relinquishment by the donor and no exclusive possession by the donee. But West and Nanabhai, JJ., overruled that argument and held, 'As to the law of the case, the Courts below are to bear in mind, that when land is occupied by tenants, a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift. Such a possession would, according to the case of *Khajoorooniss* v. *Rowshan Jehan*[3], be sufficient. As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession[4]. He occupies cer-

(1) (1884) 9 Bom. 146.
(2) (1896) 19 Mad. 343.
(3) (1876) 2 Cal. 184, 197.
(4) Domat C. L., I., 863.

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tain part, and this occupation becoming actual possession by the will of the parties, extends to the whole which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken—*Ex parte Fletcher*(1). An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested.'

"After the authority of this ruling by which I am bound and which is stated by Mr. Ameer Ali in his Mahomedan Law(2) to be in accordance with the principle stated in the Majma-ul-Anhar, it would be mere pedantry on my part to enter into a discussion of the texts and authorities which were cited before me in the course of the argument at the Bar. I will only venture to observe that the decision in *Shaik Ibhram* v. *Shaik Suleman*(3) is quite in consonance with the spirit in which Garth, C. J., has observed in *Mullick Abdool Guffoor* v. *Muleka*(4) that our Courts should administer the Mahomedan Law. Garth, C. J., there said:—'In dealing with these points we must not forget that the Mahomedan Law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Bagdad, and other Mahomedan countries, under a very different state of laws and society from that which now prevails in India; and that although we do our best here in suits between Mahomedans to follow the rules of Mahomedan Law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Mahomedan Law ordinarily current in India, namely, Abu Haniffa and his two disciples'.

"Moreover I am informed by the learned Advocate General that this dictum of Garth, C. J., was approved by the Chief Justice of this Court and Starling, J., in their oral judgment delivered upon the appeal from my judgment in *Ebrahimbhai* v. *Fulbai*(5). There too in appeal the question was raised whether the

(1) (1877) 5 Ch. D. 809.
(2) Vol. I., p. 71.
(3) (1884) 9 Bom. 146.
(4) (1884) 10 Cal. 1112 at p. 1123.
(5) (1902) 26 Bom. 577.

assignment by the husband to his wife of certain moneys in the hands of the Accountant General was not invalid by reason of the fact that the husband had not after the gift relinquished all control over the moneys but had exercised certain acts of ownership. There is no written judgment of the Appeal Court but I take it from the learned Advocate General (who argued there the case for the appellant and contended that the gift was invalid because the possession given was not exclusive) that the Appeal Court, relying on the observations of Garth, C. J., just cited overruled the contention and confirmed my judgment.

"Further we have in the case of the present gift nearly the same facts on which the Privy Council held in *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan*[1] that there was sufficient possession taken under the gift in that case. Here as it was there, 'the lady had merely proprietary, not actual possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits.' Here, as in the Privy Council case, the lady declared by the deed of gift that she had made over to the donees possession of all the properties given by the deed; that she had abandoned all connection with them and that the donee was to have complete control of every kind in respect thereof. Upon that state of facts the Privy Council said :—' If possession were once taken and the deed of gift took effect no subsequent change of possession would invalidate it.' In the present case Bibi Begum after her express declaration in the deed that possession had been delivered remained with the family of His Highness the Aga Khan for a day or two. That act of hers was sufficient to make the 1st defendant's possession complete and exclusive and the fact that subsequently Bibi Begum returned and resided with the 1st defendant could not alter the possession once taken and completed. If the Mahomedan Law were otherwise it should mean that no member of a family can make a gift of her house to another unless the donor is prepared to sacrifice the ties of affection and leave the house bag and baggage and never thereafter step into the house to reside as a guest or close relation of the family. If exclusive possession taken by the donee

(1) (1889) 16 I. A. 95 at p. 216.

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immediately after the execution of the deed and retained for a day or two is not sufficient to make the gift complete, of how many days duration should that possession be to complete the gift? Where is the line to be drawn? It must be drawn somewhere and in the eye of law whether Mahomedan or other, one day's exclusive possession should I venture to think be as good as one or twenty years. The proposition that the donor should leave nothing belonging to him, not even a straw, should be interpreted in the light of common sense and according to the exigencies and necessities of modern life. It can only mean that the donor should not reside and use the house as owner. The proposition, in its literal sense, is to use the language of the Privy Council in *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan*[1] 'wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.' In the case of the gift of a house as between two strangers it may be perfectly legitimate to hold that the donor should not occupy the house with the donee or leave anything belonging to him in the house; but as between near relations such a proposition seems inconsistent with the principle of justice, equity and good conscience on which the Privy Council and this Court have been accustomed to administer the Mahomedan and other law.

"Before parting with the case, I ought to say, that for the defendants it was strenuously urged before me, that the parties to the deed of gift were Usuli Shiahs, a progressive school of Mahomedans and that the Mahomedan Law as to gifts applicable to them was much more liberal than the Mahomedan Law applicable to other classes of Shiahs or the Sunnis. Several authorities from the original texts in Persian and Arabic were cited before me in support of this argument but having regard to the view I take of the case on the authority of the decided cases by which I am, as a single Judge, bound, I abstain from encumbering this judgment with a discussion which in my opinion is unnecessary."

The plaintiff appealed.

(1) (1889) 16 I. A. 205 at p. 215.

The grounds of appeal were, *inter alia*,—

1. That the learned Judge had erred in holding the gift by Bibi Begum to the defendants to be valid.

2. That the learned Judge had erred in holding that everything necessary had been done to satisfy the requirements of Mahomedan Law as to possession.

3. That the learned Judge should have held that the donor had not divested herself of the properties the subject-matter of the gift sufficiently to make the gift valid.

4. That the learned Judge should have held that the donor intended to retain and did as a matter of fact retain dominion over the properties till her death.

5. That the learned Judge had erred in holding that, because the donor stayed with the Aga Khan for a day or two after the gift, she had divested herself of the possession of the properties.

6. That the learned Judge had erred in not applying the Shiah Mahomedan Law as to gifts.

7. That the interests of the 1st defendant and her minor children were not in any way conflicting and they were not justified in incurring separate costs.

Bahadurji and *Setalvad* for the appellant (plaintiff).

There was not a sufficient relinquishment of possession to make the alleged gift valid under the Mahomedan Law, see *Adamkhan* v. *Alarakhi*[1], *Mohinudin* v. *Manchershah*[2], *Khajoorooniss* v. *Rowshan Jehan*[3], *Aga Mahomed* v. *Koolsom Beebee*[4]. Bibi Begum left all her property in the house during her visit to the Aga Khan from July 5th to July 7th. This property was only removed by the plaintiff after her death.

[Jenkins, C. J.—Is not all that is required, such relinquishment, as is reasonable under the circumstances? See *Macnaghten*[5]; *Amina Bebee* v. *Khatijah Bebee*[6].]

The present case differs, because no intention has been proved, of putting the 1st defendant in possession. *Bava Saib* v. *Mahomed*[7] is a direct authority in favour of the plaintiff.

Then as to costs. The 1st defendant is the mother of the defendants 2 to 5. Their interests did not in any way conflict. With reference to the deed of gift, the written statement of defendants 2 to 5 was an echo of the written statement of the

(1) (1882) 6 Bom. 645 at p. 647.
(2) (1882) 6 Bom. 650.
(3) (1876) 2 Cal 184.
(4) (1897) 25 Cal. 9.
(5) Macnaghten's Mahomedan Law (4th Edn.), p. 233.
(6) (1864) 1 Bom. H. C. R. 157.
(7) (1896) 19 Mad. 343.

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1st defendant, but two sets of costs were allowed. The case of *Russick Das Bairagy* v. *Preonath Misree*[1] does not apply, for the point in that suit did not arise.

Raikes (acting Advocate General) and *Lowndes* for the 1st respondent (1st defendant).

The gift is valid. *Kalidas Mullick* v. *Kanhaya Lal Pundit*[2] is a Hindu case, which shews that a gift is not necessarily invalid, for the mere reason that the donor has not delivered possession. The Mahomedan Law relating to the invalidity of gifts must be confined within the strictest limits, see *Ebrahimbhai* v. *Fulbai*[3], *Shaik Ibhram* v. *Shaik Suleman*[4] and the remarks of *Ameer Ali*[5]. In the case of minors, where a father or other guardian shews a *bonâ fide* intention of making a gift, the law will be satisfied without change of possession, see *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*[6]. In the present case possession was in fact given, and the deed of gift took effect. Even assuming, that a subsequent change of possession took place, such change of possession would not invalidate the gift, see *Sheikh Muhammad Mumtaz* v. *Zubaida Jan*[7].

With reference to the question of costs, the plaintiff claimed an account from the 1st defendant, and the defendants were entitled to a separate defence.

Branson and *Robertson* for respondents 2 to 5 (defendants 2 to 5).

Gifts under the Mahomedan Law form part of the law of contract, see *Ameer Ali*[8], where the authorities are collected. The minors are in a more favourable position than their mother, for in their case, transfer of possession was not required to validate the gift, see *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*[6].

The interests of the 1st respondent and her minor children were not identical. From the commencement of the proceedings they were represented by different attorneys. The correspond-

(1) (1883) 10 Cal. 102.
(2) (1884) 11 Cal. 121.
(3) (1902) 26 Bom. 577 at p. 596.
(4) (1881) 9 Bom. 146.
(5) Ameer Ali's Mahomedan Law, Vol. 1, pp. 42—44, 60.
(6) (1874) 2 I. A. 87 at p. 101.
(7) (1889) 16 I. A. 205 at p. 216.
(8) Ameer Ali's Mahomedan Law, Vol. 1, p. 62.

ence shews, that no objection was taken to this procedure on behalf of the plaintiff and the defendants were entitled to a separate defence, see *Remnant* v. *Hood*(1), *Boswell* v. *Coaks*(2).

JENKINS, C. J.:—This suit has been brought to establish the plaintiff's title to the moveable and immoveable properties specified in the plaint, but it has been dismissed by Chandavarkar, J., with costs. From this decree the present appeal has been preferred, and before us the claim has been limited to the immoveable property. The validity of the claim depends upon whether a good gift of the immoveable properties has been made in favour of the defendant, and the plaintiff attacks the gift on the ground that there has been no sufficient delivery of possession. It is admitted that as to the moveable property the gift is valid. The facts have been very fully and critically investigated by Chandavarkar, J., and agreeing as I do with his reasoning and his findings I need do no more than state briefly my conclusions.

First then it is clear that Bibi Begum Jan duly executed on the 5th July, 1901, the document of gift, on which the defendants rely, and I have no doubt that she so executed it in pursuance of an intention she had formed to make an effectual gift of the property, to which it relates, in favour of the defendants. She at the same time handed over the title deeds of the property. In regard to so much of the property as was let to tenants she made such transfer of possession as the subject-matter allowed by procuring an attornment in favour of the 1st defendant, and the whole of the property falls within this category except the upper floors of the house, in which she and the defendants resided.

So the only question is whether as to this house it can be fairly said that possession was not transferred.

Of the ground floor there was a delivery of possession by the attornment I have mentioned. It is urged, however, that there was no delivery of possession in respect of the upper floors. But when the deed of gift was executed the defendants alone were actually residing in the house; for Bibi Begum Jan had

(1) (1859) 27 Beav. 613. (2) (1887) 36 Ch. D. 444 at p. 447.

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left it, and remained away for some days with a view to effecting a delivery of possession. But it is said that this was of no use, as her furniture and other moveable property remained in the house during her absence, and she herself returned, and on her return exercised the same control as she had done before. Reference in this connection was made to the rule to be found in the books that if a man makes a gift of a house, in which there are effects which belong to him, and deliver the house to the donee, the gift is not valid.

Now in whatever terms the texts may be expressed we must follow the previous decisions of our Court.

In *Shaik Ibhram* v. *Shaik Suleman*[1] the facts found were that on the 4th June, 1876, a deed of gift was executed by one Sultan of some lands and his dwelling house in favour of Shaik Ibhram. Notwithstanding the deed, Sultan remained in the house till his death in the following July. In reference to these facts, the law was thus laid down by West and Nanabhai Haridas, JJ.:—"As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies certain part, and this occupation becoming actual possession by the will of the parties, extends to the whole which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken—*Ex parte Fletcher*[2]. An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested."

This decision has now stood in the authorized reports for over 20 years; and it has never, as far as I can find, been questioned: on the contrary it has since been referred to as containing a true exposition of the law in *Ismal* v. *Ramji*-[3] to which Tyabji, J., was a party, while in *Rahim Bakhsh* v. *Muham-*

(1) (1884) 9 Bom. 146 at p. 150. (2) (1877) 5 Ch. D. 809.
(3) (1899) 23 Bom. 682.

mad Hasan[1] Mahmood, J., in delivering the judgment of the Court expressly distinguishes the case then before him from so much of the decision in *Shaik Ibhram* v. *Shaik Suleman*[2] as related to the house without in any way suggesting that the law as laid down on this point was erroneous.

The decision is also cited by Muttusami Ayyar, J., in *Sharifa Bibi* v. *Gulam Mahomed Dastagir Khan*[3].

Here then, if anywhere, it is best *stare decisis*, and applying to the facts of this case the principle laid down in *Shaik Ibhram* v. *Shaik Suleman*[2] there can (in my opinion) be no doubt that the gift of the house was perfected in the way the law requires.

Not only was there the departure of the donor, which was absent in *Shaik Ibhram's* case[2], but on her return to her old residence the donor made periodical payments to the 1st defendant of Rs. 30 for her board and lodging.

I say those payments were made, because there is positive evidence to that effect, and the learned Judge before whom the evidence was given refuses to accept the suggestion that he should reject it as absolutely baseless. I see no such impossibility as should compel us to say the learned Judge was wrong in this: the 1st defendant says she was advised to take this sum as a wise precaution, and there can have been no difficulty in giving effect to the advice.

It is clear from the facts found in *Shaik Ibhram's* case[2] that the Court did not consider the retention by the donor of his effects in the house as a circumstance invalidating the gift.

A further circumstance which exists in this case and which did not exist in the *Shaik Ibhram's* case, tends to remove all substance from the objection that the donor resumed residence in the house. It is the relation in which the donor stood to the objects of her bounty. She was not only the mother of one donee and grandmother of the other donees, but stood virtually in *loco parentis* to the minors, so that any possession she could be said to have retained, may reasonably be ascribed to an intention on her part to exercise control on their behalf rather than on her own.

(1) (1888) 11 All. 1 at p 12. (2) (1884) 9 Bom. 146.
(3) (1892) 16 Mad. 43 at p. 48.

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The Mahomedan Law of gifts still abounds with those pitfalls, which belong to an archaic system of law; for the Mussalman community, differing in this respect from the Hindu, is for some reason or other excluded from the operation of those portions of the Transfer of Property Act, which according to the decisions enable a gift to be effected by a registered deed.

But it has not been suggested before us that any of those pitfalls except that with which I have dealt, call for consideration in the circumstances of this case.

Objection has been taken to the order allowing 2 sets of costs, but I think the learned Judge was within his discretion.

The result is that the decree must be confirmed with costs, but only one set will be allowed in appeal.

Decree confirmed.

Attorneys for the appellant:—*Messrs. Tyabji, Dayabhai & Co.*

Attorneys for the respondents:—*Messrs. Mirza and Mirza and Messrs. Payne & Co.*

A. H. S. A.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

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BALVANT RAMCHANDRA NATU AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Construction of grant—Court Fees Act (VII of 1870), section 7, clause 5, proviso 3—Annual Survey Assessment which is remitted—Limitation Act (XV of 1877), schedule II, article 14—Executive Government—Ultra vires order—Nullity—Pensions Act (XXIII of 1871), section 4—"Relating to," construction of—Right to hold land distinguished from the right to money or revenue—Right of an alienee of the revenue to possession of land—Holdings which an Inámdár acquires by purchase from a kadim occupant or by lapse of prior occupancies distinguished from the rights which he obtains directly from the grant itself—Bombay Revenue Jurisdiction Act (X of

* First Appeal No. 163 of 1903.