learned brother and myself have given reasons a good deal different from those given in that case. But where several different lines of reasoning lead to the same result, one is fortified in the belief that the result is correct.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah; on difference between Mr. Justice Heaton and Mr. Justice Hayward.

SHANKARLAL TAPIDAS (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

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December 18.

Summary Settlement Act (Bombay Act VII of 1863)—Land granted to a mosque—At summary settlement land continued to mosque on payment of annual quit-rent—Alienation of land by mutavali of the mosque—Full assessment demanded by Government from the alienee.

At the time of the summary settlement held in 1879, the land in dispute which had been granted to a mosque was continued on payment to Government of an annual quit-rent, under the Sanad which ran as follows:—

"By Act VII of 1863 of the Bombay Legislative Council...is hereby declared that the said land, subject...to the payment to Government of an annual quit-rent of Rs. 17-8-0, seventeen and annas eight only, shall be continued for ever by the British Government as the endowment property of the Jumma Masjid...without increase of the said quit-rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government."

Nearly sixty years before suit, the then manager of the mosque alienated (it was assumed that the alienation was unlawful) the land to a stranger. From 1912 onwards, the Government levied full assessment on the land in the hands of the alienee. A suit having been brought to recover the extra assessment so levied:—

Held, by Shah and Hayward, J.J. (Heaton J., dissenting), that the provisions of the Summary Settlement Act, 1863, and the terms of the Sanad pointed

* First Appeal No. 130 of 1915.

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to the conclusion that the condition that the land must continue to be the property of the mosque in order that the holder for the time being may have the benefit of the exemption from settlement allowed by the Sanad could not be implied, and that the Government did not get any right under the Sanad to levy the full assessment even when the property ceased to be the endowment property otherwise than by a lawful alienation.

APPEAL from the decision of P. J. Taleyarkhan, District Judge of Broach.

Suit to recover a sum of money.

The amount in dispute was recovered by the Government from the plaintiff as full assessment on certain land held by the plaintiff.

The land in question was granted by a Mahomedan ruler to the Jumma Masjid at Amod. In 1879, at the introduction of the summary settlement the land was continued by British Government to the mosque, under a Sanad which ran as follows :—

"By Act VII of 1863 of the Bombay Legislative Council...is herby declared that the said land, subject (in addition to Salami or other payments which may have hitherto been levied) to the payment to Government of an annual quit-rent of Rs. 17-8-0, seventeen and annas eight only, shall be continued for ever by the British Government as the endowment property of the Jumma Masjid at Amod, Taluka Amod, Zilla Broach, without increase of the said quit-rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government."

Nearly sixty years before suit, the then Mutavali of the mosque alienated the land to an ancestor of one Punjabhai. Punjabhai first mortgaged the land to the plaintiff in 1897, and ultimately sold it to him in 1906.

In 1912, the Government levied full amount of assessment on the land from the plaintiff ; and recovered also the full assessments for the years 1913 and 1914.

The plaintiff filed the present suit on the 7th July 1914 to recover the extra assessment levied from him for the years 1912, 1913 and 1914.

The defendant contended *inter alia* that the claim to recover the amount for 1912 was barred under Article 16 of the Indian Limitation Act; that the plaintiff and his predecessors-in-title had purchased the land with full knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purposes; that when it was brought to the notice of Government that the income of the land in suit was not being applied to religious purposes, they took steps to levy full assessment as the land was in possession of the plaintiff and was not utilized for the purpose for which it had been granted; and that the land had, under the circumstances, reverted to the ordinary tenure and as such was liable to the ordinary assessment according to law.

The District Judge held that the land in question was granted on condition that its income should be applied to religious purposes; that the Government was entitled to levy full assessment on the land in view of the fact that its income was no longer applied to religious purposes; that the service at the mosque was being carried on as before; that the plaintiff had acquired no right to hold the land on the reduced assessment by prescription; and that the plaintiff's claim to recover the extra assessment for 1912 was time-barred. The suit was, therefore, dismissed.

The plaintiff appealed to the High Court.

The appeal was heard by Heaton and Hayward, JJ., but their Lordships having differed in opinion, referred the following questions of law, to a third Judge:—

1. Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor-in-title became the holder of the lands by a lawful alienation?

2. If not, then, as a matter of law, does the Sanad imply the following condition; that if the lands cease to be the endowment property of the

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mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands.

In making the references their Lordships delivered the following judgments :—

HEATON, J. :—The plaintiff, a Hindu, is the holder of certain lands which were once the endowment property of the Jumma Masjid at Amod and he claims to hold these lands at a quit-rent much less than the full assessment on the lands. The Collector, presumably because he found that the lands had in fact ceased to be the endowment property of the mosque, levied the full assessment from the plaintiff. The latter being aggrieved sued to recover the excess monies levied and for an injunction restraining the Collector from levying in the future more than the quit-rent stated in the Sanad conferring the lands as endowment property. His suit was dismissed and he has appealed to this Court.

The question involved is a very easy one to state, a difficult one to answer. Is the Collector right in levying the full assessment? The land in question is cultivable assessed land. To go back to first principles, the land is liable to pay land revenue, for this is provided by section 45 of the Land Revenue Code. The assessment for land revenue has been fixed and having been fixed, "it shall be levied"; for that is the law laid down by section 100 of the Land Revenue Code. There are of course exceptions to the general propositions comprised in sections 45 and 100; but the only exception which has any application here, is that stated in section 52 of the Land Revenue Code. It is provided by section 100 that "in fixing the assessment regard shall be had to the requirements of the proviso to section 52". The proviso to the section runs as follows :— "Provided that in the case of lands partially exempt from land-revenue, or the liability of which to payment of land-revenue is subject to special conditions or

restrictions, respect shall be had in the fixing of the assessment and the levy of the revenue to all rights legally subsisting, according to the nature of the said rights."

As the result of prolonged argument the conclusion reached was this: that the question now is whether the plaintiff has a legal right to hold the land subject only to the payment of assessment as stated in the Sanad. If he has then the case falls within the proviso to section 52 and that legal right must be respected in levying the assessment. It is of course for the plaintiff to show that he has this legal right. He seeks to do this in two ways: first, by putting the Sanad before the Court and contending that the Sanad gives the legal right in question to whomsoever thereafter is owner of the lands. Secondly, he seeks to do it in virtue of the Sanad together with proof that he is the lawful owner of the lands and holds them according to the purpose of the Sanad.

Undoubtedly the plaintiff is the holder of the lands and I will assume that he is now the lawful owner, for he claims that he has become the owner and on the evidence adduced we must take it as between the plaintiff and the defendant that the former has acquired a lawful title, at least by adverse possession if in no other way. We are not here concerned with the question whether a suit could be brought on behalf of the mosque to recover the land.

I will deal with the second part of the proposition, that being the lawful owner of the lands the plaintiff is entitled to hold them at the assessment stated in the Sanad, because he holds them according to or at least not contrary to the purpose of the Sanad. I will not discuss the evidence; it is fairly set out by the District Judge in his judgment. It does not suggest in any

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way that the plaintiff is the proper and lawful alienee of the endowment lands. If he were, it may be that he would have an irresistible case. As a fact the plaintiff in all probability holds as a spoliator of the endowment or as the successor of such a person. The original alienation must have been in all probability a wrongful alienation or in other words a breach of trust and the alienee must have been a spoliator; for alienations of this kind, as is notorious, are commonly improper. This of course is not certain, it is only a probability, but in my opinion it operates as a certainty against the plaintiff in this case for he has to establish the facts he relies on and the evidence he himself has adduced suggests an improper, not a lawful, alienation of the endowment property away from the mosque. The plaintiff, therefore, fails to show that the alienation by which he has ultimately become the owner of the lands was in accordance with the purpose of the endowment. It is a fact, therefore, in this case that the purpose of the endowment has been defeated. As the plaintiff is a lawful holder of the lands but holds them contrary to the purpose of the endowment he cannot claim that he holds according to the purpose of the Sanad; for the purpose of the Sanad is in this matter identical with the purpose of the endowment, unless I am wrong in my opinion as to the first line of the plaintiff's argument. As he holds contrary to the purpose of the Sanad he cannot conceivably take the benefit of the Sanad, unless that Sanad irrevocably deprives Government of the right to levy the full assessment from whomsoever thereafter may be the owner of the lands.

Thus we are led to the first part of the two-headed proposition urged by the plaintiff.

The Sanad runs as follows :—

"...By Act VII of 1863 of the Bombay Legislative Council...is hereby declared that the said land, subject (in addition to Salami or other payments

which may have hitherto been levied) to the payment to Government of an annual quit-rent of Rs. 17-8-0, seventeen and annas eight only, shall be continued for ever by the British Government as the endowment property of the Jumma Masjid at Amod, Taluka Amod, Zilla Broach, without increase of the said quit-rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government."

What is stated is that the property is to continue for ever as the endowment property of the Masjid. But in fact the property has ceased to be the endowment property of the Masjid. This is a contingency not expressly provided for. Is it impliedly provided for? The Sanad was issued under Bombay Act VII of 1863 and was, to put it briefly, the outcome of an arrangement between the Government and the manager of the mosque. According to this arrangement the lands were to be continued for ever to the mosque on payment annually of the stated assessment and no further proof of title was to be required from the Manager on behalf of the mosque. The purpose of the arrangement was to secure the lands in perpetuity as the endowment of the mosque. No power to alienate is conferred and there is no grant to "heirs and assigns." There could not properly be either in such a case as this, for either would be in my opinion wholly inappropriate. I should, therefore, imply that as soon as the purpose of the arrangement failed the arrangement was at an end. The point is no doubt one as to which difference of opinion is almost inevitable and I find it very difficult to formulate my reasons convincingly, though my opinion is firmly established. My reasons reduced to their briefest and simplest form are these. The Sanad is intended to be a plain document for plain unlearned men; it is not an elaborate legal document. Its purpose, as would be thoroughly well understood, was at least this (1) to secure the lands in perpetuity as a mosque endowment; (2) to fix an assessment in perpetuity; and (3) to secure the holder of the Sanad

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from any interference at the hands of Government so long as the agreed assessment was paid. What would a plain unlegal man say was to happen when the lands granted as religious endowment ceased to be endowment lands. He would, as I think, say without hesitation that as soon as the lands ceased to be endowment lands the right to hold them at a reduced assessment would cease also. He would, I think, imply this from the words of the Sanad and the circumstances in which it was given.

It is probable that by treating the Sanad as a legal document to be construed (or it may be camouflaged) by the rules of English real property law, the contrary result would be reached. That, however, is a probability I feel ought not to influence me: we are dealing with Indian not with English property and with an Indian not an English document.

It was argued that the plaintiff could succeed in virtue of section 7 of Act VII of 1863 as his predecessor-in-title was the rightful owner at the time of the settlement. That however is not proved; and the evidence suggests the extreme improbability of such a thing. It seems indeed obvious to me that the alienee would not be the rightful owner at the date of the settlement for the purpose of that settlement; for his ownership, as he was a Hindu not connected with the mosque, would be incompatible with the purpose of such a settlement.

It was also suggested that the Sanad must be taken to be of the kind contemplated by section 6 of Bombay Act VII of 1863, and that therefore it must be taken to have contemplated the right to transfer and also the rights of assigns. But in fact the Sanad did not do this and it seems to me that having regard to the general law as to religious endowments the Sanad

could not properly contemplate and imply unrestricted powers of alienation.

It was again suggested that the words "it shall be lawful for the Governor-in-Council, &c." in section 2 of Bombay Act VII of 1863 mean that the Governor-in-Council *must*, &c. If that be so, then undoubtedly the Sanad must be taken to "guarantee the continuance, in perpetuity, of the said land to the said holders, their heirs and assigns, upon the said terms"; and the plaintiff would be entitled to succeed. Now as is well-known the English words "it shall be lawful" naturally imply the same thing as the word "may" and not the same thing as the word "must." It is only in particular circumstances that those words are given the "legal twist" which changes their meaning from the normal to the peculiar. I do not think such circumstances exist here.

Therefore I think we must take the Sanad as I have said as a plain document intended for plain men. So taking it I gather from it an implied provision that the privilege of the lesser assessment will cease when the property ceases to be the endowment property of the mosque; unless of course it can be shown that the alienation was a lawful alienation. This has not been shown.

Therefore I would dismiss the appeal with costs.

As however my learned brother and myself are unfortunately not agreed, our order in the matter must be held over until the decision of the Full Bench in *Bhuta* v. *Lakadu Dhansing*[1] is made known. We are not in agreement in two matters. On the pleadings my learned brother thinks that it must be presumed that the alienation by which the plaintiff's predecessor-in-title became the holder of the lands, was a lawful

[1] (1918) 43 Bom. 433.

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alienation. I do not think so. The plaintiff in paragraph 4 of his plaint alleged:

"The plaint property is bought by the ancestors of Patel Punjabhai Ramdas of Amod more than 60 years back and since then continued in their independent possession and use. Punjabhai Ramdas passed a sanad deed of the property in Samvat 1953, Vaishakh Sud 10th, in my favour, and in Samvat 1962, Maha Vad 12th, the same is sold off to me. Since then the property has continued in my independent possession and use."

The defendant in paragraph 3 of his written statement replied:

"The property in suit was Dewasthan land and the plaintiff and his predecessors-in-title have purchased it with knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purpose."

I do not read these pleadings as containing an assertion by the plaintiff that he held under a lawful alienation, still less as containing an admission by the defendant that it was so.

The second matter as to which we differ is whether the Sanad is to be read or not as implying a condition.

Therefore the points of law to be considered are:—

(1) Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor-in-title became the holder of the lands by a lawful alienation?

(2) If not, then, as a matter of law, does the Sanad imply the following condition: that, if the lands cease to be the endowment property of the mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands?

HAYWARD, J.:—The plaintiff Bania sued to establish his claim to hold certain land partially exempt from land revenue as endowment property of a mosque. He derived his title from a previous purchaser from a previous manager of the mosque. He did not join the present manager as a party and his title as against the

mosque was not disputed by the defendant Secretary of State. But it was pleaded that as the land had practically ceased to be the endowment property of the mosque, it had become liable to full assessment to land revenue as directed by the Collector on behalf of the Secretary of State.

It was *inter alia* argued at the trial that this was "tantamount to a resumption of the grant" and was not justified by the terms of the Sanad granted to the manager of the mosque by the Collector on behalf of the Secretary of State under the Summary Settlement Act VII of 1863. This argument was rejected by the District Judge but has been repeated before us in First Appeal and would appear to raise the real issue between the parties for determination by this Court.

Now the plaintiff's title has not been disputed in the pleadings as against the mosque. It might indeed be disputed in other proceedings between him and the manager but it must, in my opinion, be presumed for the purpose of these proceedings to be a good title as against the mosque. The only issue to be decided would therefore appear to be whether the transfer of the land by the previous manager of the mosque has rendered it liable to full assessment to land revenue by the Collector on behalf of the Secretary of State. It appears to me that the decision of that issue depends on the true interpretation of the terms of the Sanad granted to the previous manager of the mosque under the Summary Settlement Act VII of 1863. The relevant terms are: "The said land...shall be continued for ever...without increase of the annual quit-rent...as the endowment property of the mosque." The Sanad was granted in 1879 by the Collector on behalf of the Secretary of State. The plain meaning of those terms, in my opinion, is that the land with its exemption from full assessment to

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land revenue was granted to the manager not as his private property but as the public property of the mosque. The property granted was the land with its exemption and the manager was not to deal with it as his private property but was to hold it for the benefit of the public entitled to use the mosque. He was to hold it subject to the rules of Mahomedan law relating to mosques. It was not intended, in my judgment, to distinguish between the land and its exemption or to render the exemption liable to resumption upon the transfer of the property. If this had been intended, it would not have been left to implication but there would have been express provision. It was not, in fact, in my judgment, intended to restrict the lawful powers of the manager to transfer the property for justifying necessity under the Mahomedan law nor to protect the property against unlawful transfers by reserving special powers of resumption, over and above the ordinary remedies available to the public entitled to use the mosque, to the Collector on behalf of the Secretary of State.

It appears to me further that this is the true interpretation of the terms of the Sanad, not only according to the plain meaning of the terms used but also according to the authority for its grant given by the Legislature. It was provided that it should be lawful in respect of lands brought under the Summary Settlement to "guarantee by Sanad the continuance, in perpetuity, of the said land to the said holders, their heirs and assigns" by section 2 (1) and that the said lands should be the "transferable property of the said holders, their heirs and assigns without restriction as to... transfer...continued, in perpetuity, subject to a fixed annual payment...at the rate of two annas for each rupee of the assessment" by section 6 of the Summary Settlement Act VII of 1863. There was, therefore,

express prohibition against restriction of the rights of transfer and against the imposition of full assessment on lands brought under the Summary Settlement Act. It was not intended to distinguish lands held on behalf of religious institutions because the special provisions of section 38 (2) of Reg. XVII of 1827 were repealed by and those of section 8 (3) of the Summary Settlement Act II were not repeated in Act VII of 1863. It would further appear immaterial whether the transfer was effected after or before the grant of the Sanad. If after, the transferee could claim immediately under the Sanad. If before, he could claim the benefits of it as the rightful owner under the provisions of section 7 of the Summary Settlement Act VII of 1863. It would not be possible to levy full assessment under the general law relating to land revenue as rights legally subsisting have been specially protected by the proviso to section 52 referred to in section 100 of the Land Revenue Code, 1879. It should finally be observed that the right of resumption in respect of lands granted for religious purposes under the general law relating to land revenue has been reserved not merely by implication but in express words in the form Appendix K to Rule 13 of the rules under section 214 of the Land Revenue Code, 1879, and such express reservation has been given legal sanction under the Crown Grants Act XV of 1895. It appears to me, therefore, both on the plain meaning of the terms of the Sanad and on the law relating to its grant, that no power of resumption has been reserved to the Collector on behalf of the Secretary of State.

If that view should be correct then there ought to have been a decree for the recovery of Rs. 33-12-0 the excess assessment levied for two years by the Collector —the recovery of the excess levied for the third year, having been time-barred—with costs against the

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Secretary of State; but as that view has the misfortune to differ from that held by my learned brother, the matter must be reserved for decision according to the rule shortly to be laid down by the Full Bench of this Court.

The points thus referred were heard by Shah J., on the 9th December 1918.

S. Y. Abhyankar, for the plaintiffs:—The Sanad in question admittedly contains no express condition restricting alienation. The condition cannot be spelt out by implication, as the Sanad was the result of a compromise arrived at between the Secretary of State and the grantee. If, then, we take the terms of the Sanad by themselves, there are only two conditions imposed on the continuance of the grant: (1) that the grantees shall remain loyal to the British Government; and (2) that they shall every year pay a quit-rent of Rs. 17-8-0 to Government.

As regards statutory provisions, the earliest provision is contained in Bombay Regulation No. XVII of 1827, section 38, clause 3 of which provides that: "all land held exempt from the payment of public revenue, if such exemption was granted in consideration of service to be performed, or for the support of religious or other establishments, or for other special purposes, shall be liable to be assessed if the conditions of the grant are not fulfilled." Next, in 1863, the Bombay Legislature passed two Acts (viz., II and VII) for the summary settlement of claims to exemption from payment of Government land revenue. The former Act is applicable to the Southern Maratha Country and the Carnatic, whilst the latter applies to Gujarat and the Konkan. In Bombay Act II of 1863, there is a provision in clause 3 of section 8, which says: "lands held on behalf of religious or charitable institutions, wholly

or partially exempt from the payment of land-revenue, shall not be transferable from such institutions either by assignment, sale (whether such sale be judicial, public or private), gift, devise or otherwise howsoever." This provision has not been enacted in the later Act, viz., Act VII of 1863. The reason of the omission seems to be that in the Districts of Broach and Surat there was at the time a well-recognised custom that lands granted to an endowment could be alienated: see *Abas Alli* v. *Ghulam Muhammad*[1] and *Krishnarav Ganesh* v. *Rangrav*[2].

The preamble to Bombay Act VII of 1863 shows that the purpose of the settlement was to preclude all doubt in regard to the relative rights of the Government and the holders. The provisions of section 2 show that the object of settlement was to settle a claim or rather the relations of the Government with the holder.

Lands attached to a religious endowment can be transferred for a necessary purpose: see *Parsotam Gir* v. *Dat Gir*[3].

Assuming that the alienation here is unlawful, then it is the original grantee alone who can come in and assert it; and it is not open to Government to intervene in their executive capacity and resume the lands.

Lastly, a transfer operates to convey all the interests of the transferor in the thing transferred; no implication as to the right to resume can be allowed in favour of the Crown: see *In re Antaji Keshav Tambe*[4].

S. S. Patkar, Government Pleader, for the respondent:—In the Sanad in question there are two conditions. First, there is an express condition that the grantees shall remain lawful and faithful subjects of Government.

(1) (1863) 1 Bom. H. C. 36.
(2) (1867) 4 Bom. H. C. (A. C. J.) 1.
(3) (1903) 25 All. 296.
(4) (1893) 18 Bom. 670.

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Secondly, there is an implied condition that the lands shall not be diverted from the use of the mosque. The implied condition must be deemed to arise, for the Sanad provides that the land "shall be continued for ever...as the endowment property of the Juma Masjid." The perpetual annexing of the land to the mosque necessarily involves prohibition of alienation. It is settled that religious endowments in this country, whether they be Hindu or Mahomedan, are not alienable: see *Narayan* v. *Chintaman*[1] and *President, &c., of the College of St. Mary Magdalen, Oxford* v. *The Attorney-General*[2]. The Mahomedan law also forbids alienation of the mosque property: see Tyabji's Mahomedan Law, pp. 373, 419, 420. The grant in the present case being a Crown grant should be construed in favour of Government and against the grantee: see *Vaman Janardan Joshi* v. *The Collector of Thana*[3] and *The Collector of Ratnagiri* v. *Antaji Lakshman*[4].

The Summary Settlement Act (Bombay Act VII of 1863) provides for four modes in which exemption under the Act could be allowed: see sections 6, 19, 20 and 21. The Act deals with exemption from payment of Government revenue and has nothing to do with grant of land. There is nothing to show that the settlement here was under section 6 of the Act: section 7 has therefore no application.

Lastly, the express condition that the manager shall continue to be a loyal and faithful subject of the British Government is in favour of the inference of an implied condition that the land shall be for ever the endowment property of the mosque.

Abhyankar, in reply:—If there was a settlement at all in this case it should have been under section 6 of

(1) (1881) 5 Bom. 393.
(2) (1857) 6 H. L. C. 189.
(3) (1869) 6 Bom. H. C. (A. C. J.) 191.
(4) (1893) 12 Bom. 534 at p. 544.

Bombay Act VII of 1863; for a Sanad can be issued only on such a settlement: a Sanad is not a grant; it is only a settlement of previously existing rights.

As to the argument that Crown grants must be construed in favour of the Crown, the limits of that rule are stated in *Lord* v. *The Commissioner for the City of Sydney*[1] cited in *Vaman Janardan Joshi* v. *The Collector of Thana*[2]; and *In re Antaji Keshav Tambe*[3]; and it is only when the ordinary modes of construction fail that resort should be had to the above doctrine.

C. A. V.

SHAH, J.:—In consequence of the difference of opinion between Sir John Heaton J. and Hayward J. who heard this appeal, it has been referred to me under section 98 of the Code of Civil Procedure in accordance with the conclusion arrived at by the Full Bench in *Bhuta* v. *Lakadu Dhansing*[4] as to the procedure to be followed in such cases.

The points of law upon which they differ have been stated thus: "(1) Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor-in-title became the holder of the lands by a lawful alienation? (2) If not, then as a matter of law does the Sanad imply the following condition: that, if the lands cease to be the endowment property of the mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands?"

As to the first question it is not disputed before me, and both the differing judgments proceed on the hypothesis that for the purpose of this suit the plaintiff must be taken to have acquired a lawful title to the land in suit, quite apart from the question whether the

(1) (1859) 12 Moo. P. C. 473.
(2) (1869) 6 Bom. H. C. (A. C. J.) 191.
(3) (1893) 18 Bom. 670 at p. 676.
(4) (1918) 43 Bom. 433.

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original alienation in favour of the ancestor of the plaintiff's predecessor-in-title was lawful or not. I am not concerned in this litigation with the question whether the manager of the mosque has now any right to the land in suit against the plaintiff: and I express no opinion whatever on that question. The plaintiff must be taken in this suit to have acquired a lawful title to the land. The question, whether the original alienation in favour of the ancestor of Punjabhai, who mortgaged the land in 1897 and subsequently sold it in 1906 to the present plaintiff, was lawful or not, stands on a different footing. The plaint refers to this alienation in favour of Punjabhai's ancestor more than sixty years ago: and in the written statement it is pleaded that the land in suit is Devasthan land and the plaintiff and his predecessor-in-title have purchased it with knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purposes. It is difficult to say that the defendant questioned the validity of the alienation referred to in the plaint; and it is urged for the appellant that the defendant did not care to put the plaintiff to the proof of the propriety and validity of an alienation, which took place many years ago. It is urged that the existence of a local custom in the District of Broach in favour of an alienation of *wakf* property is recognised in *Abas Alli* v. *Ghulam Muhammad*[1] and that in *Narayan* v. *Chintaman*[2] Westropp, C. J. while referring to the inalienability of religious endowments, whether Hindu or Mahomedan, recognises certain exceptions including the exception based on the local custom referred to. Further it cannot be said that according to Mahomedan law the *wakf* property can *never* be validly alienated. Under these circumstances I think that on

[1] (1863) 1 Bom. H. C. 36. [2] (1881) 5 Bom. 393.

the pleadings the alienation in favour of Punjabhai's ancestor may be properly taken to be lawful. This point, however, has no practical importance, having regard to the view, which I take of the second question: and I should hesitate to base my decision on such an implication from the pleadings. If the ultimate decision depended in any way on this point, I might have considered the suggestion that in the interests of justice it would be proper to send down an issue on the point, to allow the parties an opportunity of adducing evidence thereon, and to decide the question on proper materials instead of basing an inference in favour of the plaintiff on the pleadings.

Assuming, however, that the alienation in favour of the plaintiff's predecessor-in-title was unlawful, as the second question assumes, is the defendant entitled to levy full assessment on the land? The answer to this question depends upon the construction of the Sanad. The Sanad was issued in 1879 to the manager of the mosque. The land in suit was brought under the Summary Settlement authorised by Act VII of 1863. After reciting that fact the Sanad provides "that the said land subject (in addition to Salami or other payments which may have been hitherto levied) to the payment to Government of an annual quit-rent of Rs. 17-8-0 only shall be continued for ever by the British Government as the endowment property of the Joomma Masjid at Amod without increase of the said quit-rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government." It is not suggested in the present case that the condition that the managers of the mosque shall continue to be faithful and loyal subjects of the British Government is not fulfilled.

The right to levy the full assessment is claimed for the Government on the ground that the land has ceased

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to be the property of the mosque. It is contended that the condition that the grant shall continue only so long as the land shall continue to be the property of the mosque is implied by the terms of the Sanad and that the absence of the words "heirs and assigns" is consistent only with that view. The learned Government Pleader contended that even if the original alienation by the manager in favour of Punjabhai's ancestor were lawful the Government would still have the right to resume the grant in case the land ceased to be the property of the mosque. For the plaintiff it is urged that the Sanad is in the usual form adopted in the case of a settlement relating to any religious endowment, that the absence of the words "heirs and assigns" is not inappropriate in such a case, and that according to the provisions and the scheme of the Summary Settlement Act (Bombay Act VII of 1863), which applies to the present settlement, and according to the terms of the Sanad no such condition as is suggested by the defendant can be implied. It is urged that so long as the quit-rent is paid and so long as the managers continue to be faithful and loyal subjects, the Government have agreed to continue the land in perpetuity as the endowment property, whether it continues to be the property of the mosque or is transferred validly or invalidly to third parties.

After a careful consideration of the arguments urged on both sides, I am of opinion that no such condition as is stated in the question is implied by the terms of the Sanad, and that the Government have no right to levy the full assessment, as they have done. In the first place the land is expressly brought under the Summary Settlement authorised by Bombay Act VII of 1863. This indicates to my mind that the nature of the settlement is such as is authorised by section 2 of the Act. The section is general and would apply to all

lands, including the endowment lands. The Sanad does not in terms refer to section 2; but the expression "Summary Settlement" authorised by Act VII of 1863 can properly refer only to such settlement as is authorised by the section.

It is contended by the Government Pleader that the Sanad may be the result of an inquiry and a decision contemplated by the Act and he refers to sections 14, 19, 20, 21 and 22 of the Act. In the first place the record of the case does not disclose any basis for the suggestion that there was a decision and that the Sanad was based upon such a decision. Secondly, it is contrary to the terms of the Sanad, as ordinarily the settlement based upon an inquiry and a decision would not be the summary settlement authorised by the Act. It would be a settlement which would represent the terms of the old grant, based upon the proof of such grant.

Further, the words of grant in the Sanad read in their plain and natural sense show that so far as the Government are concerned, the property shall forever be continued as the endowment property of the mosque. It would not be reasonable to imply such a condition as is now suggested by the Government from these words. If the Government wanted to impose such a condition it should have been stated, instead of leaving it to be implied in this manner. I do not think that it could be implied without unduly straining the words or without reading words in the Sanad which are not there. The infirmity of this contention is exposed, in my opinion, by the fact that it necessarily involves the result that the Government could levy full assessment, even if the property be alienated by the managers of the mosque for a proper purpose in a proper manner. No doubt the Government Pleader has contended that that is the true view. But I feel sure from the judgment

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of Mr. Justice Heaton that he would disallow such a contention, for he observes that if the plaintiff were a proper and lawful alienee of the endowment lands he would have an irresistible case. Therefore it is that the point of difference has been limited to a case where the property ceases to be endowment property otherwise than by a lawful alienation. I have no hesitation in disallowing the contention that under the terms of the Sanad the Government have the right to resume the grant or to levy full assessment when the property is validly and properly alienated by the managers of the mosque. This affords a reason for not importing such a condition in the Sanad at all even when the property ceases to be the endowment property otherwise than by a lawful alienation.

The omission of the words "heirs and assigns" does not present any insuperable difficulty to my mind. In the case of endowment lands these words are probably considered unnecessary or inappropriate, when the nature of the settlement is indicated in clear words by reference to Act VII of 1863. But whatever the reason of the omission may be, I do not think that the omission can justify the importing of a condition, which is not expressed, and which seems to be inconsistent with the provisions of the Act.

The purpose of the Act is clearly stated in the preamble and section 2 authorises the continuance in perpetuity of the land to the holders, their heirs and assigns, upon certain terms and conditions. Section 6 provides that the property shall be heritable and transferable: it may be that in virtue of the special limitations of the particular holder it may not be heritable or transferable in the ordinary sense: but so far as the Government are concerned, it would be heritable and transferable. Section 7 provides also

that any settlement made by the Governor-in-Council with the holder of any land will be binding upon the rightful owner, his heirs and assigns whoever such rightful owner may be. These provisions apply to the Summary Settlement authorised by the Act, and in my opinion they apply even when the settlement is in respect of the endowment lands. The importing of the condition now suggested would be inconsistent with these provisions. This view is also supported by the omission in Act VII of 1863 of the provisions corresponding to section 38, clause 2 of Regulation XVII of 1827, and section 8 of Bombay Act II of 1863. Act VII of 1863, which repealed section 38 of the Regulation of 1827, and Act II of 1863 were passed about the same time. Both the Acts have been framed with similar objects in view and the absence of any provision in Act VII of 1863 corresponding to section 8 of Act II of 1863 is not without significance. In *Krishnarav Ganesh* v. *Rangrav*[1] Westropp J. observes with reference to this omission as follows :—"That Bombay Act VII of 1863 contains no similar provision, may possibly be due to the fact that in some few places in the territories to which it applies, e.g., Broach and Surat, it seems that by local custom, contrary to the general law, lands held for Muhammadan religious purposes have been treated as alienable."

The provisions of the Act, which must be taken to govern the settlement in question, and the terms of the Sanad point to the conclusion that the condition that the land must continue to be the property of the mosque in order that the holder for the time being may have the benefit of the exemption from assessment allowed by the Sanad cannot be implied, and that the Government do not get any right under the Sanad to levy the full assessment even when the property ceases

[1] (1867) 4 Bom. H. C. (A. C. J.) 1 at p. 9.

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to be the endowment property otherwise than by a lawful alienation.

The argument that the Government could not have intended to continue the grant even when the purpose of the grant is defeated has no force in view of the provisions of the Act. In every case the purpose of the grant is defeated in a sense, when a trespasser becomes the holder by adverse possession and deprives the rightful holder of his property. In the case of the endowment property the purpose is more glaringly defeated when a stranger comes in otherwise than by a lawful alienation. The true view seems to me to be that when any land is brought under the Summary Settlement authorised by Act VII of 1863, the right of the Government to the quit-rent fixed in the Sanad in accordance with the provisions of the Act, and the right of the lawful holder for the time being to the exemption allowed under the Summary Settlement are fixed in perpetuity subject of course to the conditions expressly mentioned in the Sanad, without any reference to the question whether the land continues to be the property of the original grantee or not. It is for the manager of the religious institution to take care of the endowment property as it is for an individual to take care of his private property: and the negligence, or the misconduct of the manager, cannot benefit the Government under the provisions of the Act and the terms of the Sanad.

I, therefore, agree with my brother Hayward on the second question.

The result is that the decree of the lower Court is reversed, and there will be a decree for the plaintiff for Rs. 33-12-0 with costs throughout on the defendant.

Decree reversed.

R. R.