APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

1951 July 12

RAMABAI GOVIND GADRE (ORIGINAL PLAINTIFF), APPELLANT *v.* RAGHUNATH VASUDEO JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Will—Expression of confidence in executor that he will manage property in same manner as testator—Whether executor empowered to sell property—Trustee mixing up trust property with his own and purchasing house with mixed fund—Presumption as to nature of purchased property—Sale of house by trustee—Whether trustee can sell trust property—Indian Trusts Act (II of 1882), s. 36—Suit by beneficiary to recover possession of house from purchaser—Period of limitation for suit—Indian Limitation Act (IX of 1908), arts. 120, 144—Letters Patent Appeal—Raising of new plea by respondent—Practice—Question whether person is bona fide purchaser for value without notice is a question of fact.

An expression of confidence by the testator that the executor whom he appoints under the terms of his will will continue to manage his properties in the same manner as the testator was doing during his lifetime, does not import a power to sell of the type which the testator as the owner of the properties possessed.

If a trustee mixes up the trust property with his own and utilises the mixed fund in the purchase of any property, the presumption would be in favour of holding the property as having been purchased by the trustee out of the trust fund. Unless and until the trustee succeeds in establishing that no part of the trust property formed part of the consideration for the purchase of that property and he had purchased it out of his own separate property, he would not be able to claim the property as his own, and the beneficiary would be entitled to that property.

Tulasamma v. *Venkatasubbayya*,[1] relied on.

There is no express power conferred by the Indian Trusts Act, 1882, upon the trustee to sell the trust property. Where, therefore, the instrument of trust does not empower the trustee to sell the trust property, a sale by the trustee of such property is not justified unless it is a step towards the realization, protection or benefit of the trust property, or for the protection or support of a beneficiary who is not competent to contract within the meaning of s. 36 of the Act.

A suit by a beneficiary to recover possession of immovable trust property from a person to whom it has been unauthorisedly sold by the trustee is governed by art. 144 and not art. 120 of the Indian Limitation Act, 1908. The point of time when the limitation commences is the date of the alienation because that would be the first indication, if any, of the trustee claiming the trust property adversely to the beneficiary.

In a letters patent appeal it is not only the appellant but the respondent also who is held to the contentions which have been advanced before the Judge from whose judgment the appeal is filed.

* Letters Patent Appeal No. 38 of 1950.

[1] (1925) 48 Mad. 597.

Shripad v. *Shivram*,[1] and *Sattappa* v. *Mahomedsaheb*,[2] referred to.

The question whether or not a certain person is a *bona fide* transferee for consideration without notice is a question of fact, and a finding thereon by the lower Courts is binding on the Court of second appeal.

Pandit Ram Ratan Lal v. *Musammat Akhtari Begam*,[3] and *Bhagwat* v. *Kedari*,[4] referred to.

LETTERS PATENT APPEAL from the judgment of Chainani J. in Cross Second Appeals Nos. 608 and 1110 of 1948, preferred against the decision of L. Y. Ankalgi, Judge, Small Causes Court (with A. P.) at Poona, reversing the decree passed by D. G. Palekar, Extra Joint Civil Judge, Poona.

Suit for partition and possession.

Balkrishna and his brother Govind formed a joint Hindu family. The family owned considerable property consisting of lands, houses and large money-lending business. In 1894 the two brothers effected a severance in status and all the moveable and immovable properties, debts and outstandings were divided into two equal shares, but there was no actual partition of the properties by metes and bounds.

On July 30, 1894, Govind executed a will (*vyavasthapatra*) by which he appointed as executors Balkrishna's son Trimbak, and after him two other persons, P. P. Khare and Ramchandra Vishnu Joshi. Govind died on August 22, 1894, leaving him surviving his widow Ramabai (plaintiff) and three unmarried daughters.

Trimbak in his lifetime carried on the management of the properties as one single unit. He died in 1897 and thereafter the management was taken over by his two sons Martand and Janardan who also treated the whole property inclusive of the share of the estate of Govind therein as one. The other two persons Khare and Joshi did not then take any part in the management of the properties.

On April 17, 1907, Martand purchased the house in suit in his own name. In 1915 a partition was effected between Martand and Janardan at which the house was declared to belong to Martand alone.

On April 11, 1933, Martand sold the house to Raghunath Vasudeo Joshi (defendant). Thereupon the surviving executor

[1] (1934) 36 Bom. L. R. 1052. [2] (1935) 60 Bom. 516.
[3] (1939) 14 Luck. 621. [4] (1900) 25 Bom. 202.

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of Govind's will, viz. Ramchandra Vishnnu Joshi started proceedings for obtaining the probate of the will of Govind, and probate was ultimately granted to him in 1937. Joshi, the proving executor, in the course of the administration of the estate and in accordance with the terms of the will, sold Govind's half share in the house to plaintiff on June 29, 1939.

On April 18, 1940, the plaintiff filed the present suit against the defendant to recover by partition her half share in the house and mesne profits. The defendant contended that the suit house belonged to Martand alone, that even if Martand and Janardan were held to be trustees in respect of Govind's share in the property Martand was competent to transfer the suit house to him and that the suit was barred by limitation.

The trial Court upheld the defendant's contentions and dismissed the plaintiff's suit. On appeal the appellate Court *inter alia* held that the burden of showing that the suit house had been purchased by Martand from his separate income was on the defendant and as the defendant had not proved that fact the plaintiff was entitled to succeed. The appellate Court, therefore, set aside the order passed by the trial Court and passed a decree in favour of the plaintiff for possession of half the share and for future mesne profits.

Both the plaintiff and the defendant filed appeals to the High Court from the decision of the appellate Court. The plaintiff claimed in her appeal that the mesne profits should have been awarded to her from the date of the suit, while the defendant contended in his appeal that the plaintiff was not entitled to any relief. Both the appeals were heard together by Chainani J. who delivered the followning judgment on August 2, 1950.

CHAINANI J. These are two cross-appeals arising out of the decree passed by the Judge, Small Causes Court, Poona, who, had been invested with appellate powers, by which he reversed the decree of the trial Court dismissing the suit which the plaintiff had brought to recover possession of half of the house No. 554 situated in Poona. The plaintiff is the widow of one Govind Mahadev Gadre. Govind and his brother Balkrishna formed a joint Hindu family. Govind had four daughters, while Balkrishna had one son, Trimbak. The family owned considerable properties consisting of lands and houses and a large money lending business to the extent of about Rs. 3,00,000. In 1893 Govind decided to separate from his brother Balkrishna. He intimated his desire to Balkrishna, who

told him that he no longer took any interest in wordly affairs and that Govind should partition the properties in consultation with Balkrishna's son, Trimbak. Govind then informed Trimbak that he wanted the entire family estate to be divided. Trimbak agreed to this, but suggested that as the properties were large and situated at different places, it would take a long time to partition them and that the actual partition of the properties might therefore be postponed for some time. Govind agreed to this suggestion of Trimbak. The manner in which the partition was then effected is mentioned in the will, which was made by Govind on July 30, 1894. This will provided that the total income from the lands was about Rs. 3,500 per year and that half of it should be paid to Govind's widow, who is the plaintiff. It is also stated in the will that if the widow was paid Rs. 1,500 per year, she would not be entitled to ask for the accounts of the income of the lands. Govind also made certain provisions for his four daughters and for the payment of Rs. 10,000 to his widow. He further directed that from the income of the money-lending business, which might fall to his share, Rs. 500 per year should be paid to the plaintiff. He also made certain other provisions with regard to the investment of his share in the original principal sum invested in money-lending business. He appointed Trimbak, one Purshotam Khare and the plaintiff's brother R. V. Joshi as executors of the will. Govind died on August 22, 1894. His share in the family property was not separated after his death, but the whole estate was managed as one unit by Trimbak till his death in 1897 and subsequently by Trimbak's sons Martand and Janardan. In 1907 Martand purchased the suit house for Rs. 3,000. In 1915 Martand separated from his brother Janardan. The dispute between them was referred to arbitration and a decree was obtained on the award given by the arbitrators. The arbitrators came to the conclusion that the suit house had been purchased by Martand and was his exclusive property. No share in it was therefore given to Janardan. In accordance with the terms of the will, the plaintiff was paid Rs. 1,500 per year till about 1915. It is not quite clear whether she was also paid the other amount of Rs. 500, which was to be given to her from the income of the money-lending business. The plaintiff has herself denied that this amount was paid to her. Disputes arose between the plaintiff and Martand and Janardan in or about 1915 and she had therefore to file suits in order to recover the

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amount due to her under the will. She filed three suits in 1917, 1921 and 1930. In June 1933 Martand sold the suit house to the defendant, and since then defendant has been in possession of it. In 1934, one of the executors of the will, Joshi, applied for probate of the will. The probate was granted to him in October 1937. There was an appeal to the High Court against the order granting probate, but that was dismissed. In June 1939, Joshi sold half of the suit house to the plaintiff. In 1940 the plaintiff filed the present suit for obtaining possession of half share in the suit house after it had been partitioned. Martand who had sold the house to the defendant was not a party to the suit. The defendant resisted the suit on various grounds. Three of his contentions, with which we are concerned in this appeal, were that the suit house belonged to Martand alone, that Govind had no share in it, that even if Martand and Janardan were held to be trustees in respect of Govind's share in the property, Martand was competent to transfer the suit house to him and that the plaintiff could not consequently challenge the sale in his favour and that the suit was barred by limitation. The trial Court decided these points in favour of the defendant and therefore dismissed the plaintiff's suit. The plaintiff appealed. The appellate Court held that the burden of showing that the suit house had been purchased by Martand from his separate income was on the defendant, and that as the defendant had not proved this fact, the plaintiff was entitled to succeed. That Court also decided other points in favour of the plaintiff, set aside the order passed by the trial Court dismissing the plaintiff's suit, and passed a decree for possession of half share in the suit house and also awarded to the plaintiff future mesne profits. Against this decision, both the plaintiff and the defendant have filed cross-appeals. The plaintiff in her appeal has claimed that the mesne profits should have been awarded to her from the date of the suit. The defendant has, on the other hand, contended in his appeal that the plaintiff is not entitled to any relief.

The principal question which arises for determination in this case is whether the suit house was the exclusive property of Martand or whether it formed part of the joint estate in which Govind had a half share. This is a question of fact and the finding of the lower appellate Court would normally be binding upon this Court in second appeal. Mr. Bhalerao, who has appeared for the plaintiff, has however contended that he can

challenge the finding even though it is on a question of fact, as the lower Court had wrongly thrown the burden of proof on the defendant. The issue which was framed by the trial Court on this point was as follows :—

"Does the plaintiff prove that the suit property was purchased by Martand with money belonging to the estate of the deceased Govind and Balkrishna? If, so, can the plaintiff claim any specific portion of the property or only the money by which it was purchased?"

The trial Court had therefore cast the burden upon the plaintiff. The lower appellate Court, however, took a different view that it was for the defendant to show that the house was purchased by Martand out of his exclusive funds.

It is not disputed that Martand and his brother Janardan were trustees in respect of Govind's share in the whole estate. Under the terms of the will, Trimbak and his sons were to take the surplus of the income from the whole estate, even the half share of the income due to Govind, subject to the payment by them of Rs. 2,000 to the plaintiff. The plaintiff has admitted in her evidence that there used to remain a surplus from the income of the landed property after she had been paid Rs. 1,500 and also from the income from the money-lending business after she had been paid Rs. 500. The family properties were large and the income from them was considerable. It was, therefore, possible for Martand to purchase the suit house from his share of the income. The amount paid for it was only Rs. 3,000 and it could not have been difficult for Martand to save this amount from his share of the income. The two alternatives to be considered are, whether the suit house was purchased from the income realised from the estate, in which case it will not be a trust property, or whether it was purchased from the corpus of the property in which Govind had a half share. It is not alleged that any properties were alienated by Trimbak or Martand or Janardan before 1907. It has, however, been suggested by Mr. Dharap that the amount required for the suit house might have been paid from the recoveries made from the money-lending business. That is possible, but there is no evidence on this point. It has also been urged by Mr. Dharap that as the whole estate was being managed as one unit and as Martand and Janardan did not separate Govind's half share in it and behaved and acted as if the whole estate was their own, which is shown by the fact that the whole estate was partitioned between them in 1915, it must be held that the income from the estate

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was blended with the corpus and that consequently the suit property must be held to be part of the joint estate in which Govind had a half share. I am unable to accept this view. Merely from the fact that the whole estate was being managed as one unit by Martand and Janardan as if it belonged to them exclusively, it does not follow that they also blended the income from the estate with the corpus. A strong circumstance in favour of the defendant is that in 1915 the arbitrators held that the suit house was the exclusive property of Martand on the ground that it had been purchased by him. It was held that his brother Janardan had no share in it. The plaintiff has also admitted in her evidence that Martand alone was doing *wahiwat* of this house. Martand had no other source of income in 1907. Consequently these facts would suggest that Martand and Janardan were enjoying their shares in the income from the estate separately in 1907 or for some time before 1907.

Mr. Dharap has invited my attention to the decision in *Tulasamma* v. *Venkatasubayya*.[1] In that case it was held that where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort* by virtue of his intermeddling with the estate of another, is proved to have amalagamated moneys of the testator with his own, and especially if he can be reasonably suspected of having destroyed the evidence which would otherwise be available to separate the two estates, on a suit being instituted by the beneficiary to recover the property from the intermeddler alleging that the property formed part of the estate, the burden of proof is on the intermeddler to show that the property did not belong to the plaintiff's estate but to himself. At page 601 it was observed that in such a case the onus of proof clearly rested on the person responsible for confounding the two funds and thereby rendering identification difficult on the plaintiff's part. In Lewin on Trusts, 15th edn., at p. 225, it is stated :

> "The trustee, wherever the trust property may be placed, must always be careful not to amalgamate it with his own, for, if he do, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own."

Before the principle of these cases can be applied, it must be be shown that there was blending of the trust properties by the trustees with their own properties. In this case the in-

[1] (1925) 48 Mad. 597.

come from the whole estate, including the half share in it which belonged to Govind and in respect of which Martand and Janardan were trustees, was to be enjoyed under the terms of the will by Martand and Janardan, subject of course to the payment by them of Rs. 2,000 to the plaintiff. Therefore, before the suit house can be held to be trust property, it must be shown that the income, which was realised from the estate, was blended with the corpus of the estate, with the result that it cannot be stated whether the suit house was purchased from the corpus of the estate or from the income. As I have mentioned above, there is no evidence on this point. On the other hand, the fact that the house was recognised in 1915 to be the exclusive property of Martand, suggests that there had been no blending of the income with the corpus of the property. Moreover, the present suit is not between a trustee and a *cestui que trust* or a beneficiary. It is a suit between the purchaser from the executor on one hand and the purchaser from the trustees on the other hand. The plaintiff has also not claimed a share in the suit house as a beneficiary but as a purchaser from the executor. The defendant, who is a purchaser for value, cannot also be said to have special knowledge of facts, which would shift the burden on him to show that the house had been purchased by Martand from his separate funds. The ordinary rule that it is for the plaintiff to prove her title and not to rely on weaknesses in defendant's title, must, therefore, in my opinion, apply in this case. It is consequently for the plaintiff to show that the suit property was purchased by utilising some part of the corpus of the joint estate. She has, however, not led any evidence on this point. It was possible for her to lead evidence, for she could have examined Martand or Janardan, and she could also have asked them to produce the account books, which, according to her, were maintained by them. It is true that at an early stage of the suit she made applications to the Court to summon Martand and Janardan and to ask them to produce certain documents: vide exhs. 46, 48, 58 and 72. Summonses were accordingly issued and served. The last of these applications appears to have been made in March, 1943. The suit was decided in June, 1945. It, therefore, appears that the plaintiff subsequently dropped the idea of examining Martand or Janardan. As therefore the plaintiff has failed to show that the suit house was purchased out of the corpus of the estate in which Govind had a half share, it must be held that

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she has failed to prove her title. The defendant is consequently entitled to succeed in his appeal and the plaintiff's suit will have to be dismissed.

In the view I take of the matter, it is not necessary to go into two other questions, which have been raised in this appeal by Mr. Bhalerao, and these are that Martand was, in his capacity as a trustee, competent to sell the property to the defendant and that the plaintiff cannot consequently challenge that transaction and that the plaintiff's suit is also barred by limitation.

The result, therefore, is that the appeal by the defendant, No. 608 of 1948, will be allowed and the plaintiff's suit will be dismissed. Having regard to the various contentions raised by the defendant, in which he has failed in both the lower Courts, I think parties should bear their own costs in the two lower Courts. The defendant should, however, get the costs of his appeal in this Court from the plaintiff. The cross-appeal filed by the plaintiff is dismissed with costs. Leave is granted to the plaintiff to file appeals under the Letters Patent.

The plaintiff appealed under the Letters Patent.

K. N. Dharap and *M. M. Virkar,* for the appellant.

R. N. Bhalerao, for the respondent.

BHAGWATI J. This is a Letters Patent appeal from a judgment of Mr. Justice Chainani delivered in Second Appeals Nos. 608 of 1948 and No. 1110 of 1948 against the judgment of the lower appellate Court constituted by the learned Judge, Small Cause Court, Poona, (with appellate powers), who allowed the appeal against the decision of the learned Extra Joint Civil Judge, Poona, dismissing the plaintiff's suit with costs. The facts which led to the filing of the suit may be shortly stated as under.

One Mahadev Gadre, had two sons Balkrishna and Govind. Balkrishna and Govind flourished and owned large movable and almost renounced this world. He had a son Trimbak *alias* Bapurao, and Trimbak had two sons, Martand and Janardan. Govind was a pleader. The joint family of Mahadev Gadre, Balkrishna and Govind flourished and owned large movable and immovable properties. They also carried on a money-lending business in which large capital was invested. After the death of Mahadev Gadre, both the brothers Balkrishna

and Govind continued to remain joint, but towards June-July 1894 Govind, after he returned from pilgrimage to Benares, wanted to give effect to the desire which he had entertained while at Benares to become separate from his brother Balkrishna. Govind was ailing and had not much expectation of life. He had married Ramabai but had no male issue by her. He therefore wanted to effectuate his desire to become separate from his brother Balkrishna and, having talked about the matter to Balkrishna who referred him to his son Trimbak and having further obtained the consent of Trimbak, came to a partition of the joint family properties. The two branches separated after mutual consent. The whole of the movable and immovable properties and the debts and outstandings in respect of the money-lending business were divided into two equal shares and one share was taken by Govind and the other was taken by Trimbak, and in this way a general division was effected, and each one became the owner of his respective half share. Govind having no male issue, desired to effect a *vyavasthapatra* or will in regard to the half share of the joint family properties which came to him, and he accordingly on July 30, 1894, executed a *vyavasthapatra* appointing as the *vyavasthapaks* or executors Trimbak Balkrishna, his nephew, and, after him, two other individuals Purushottam Parsuram Khare and Ramchandra Vishnu Joshi. Govind had great confidence in Trimbak. It was not possible there and then to divide the properties by metes and bounds. In fact Trimbak himself requested that the property should not then be divided actually into separate lots. Trimbak said to Govind that he was willing to act according to the *vyavastha* which Govind might make of his share, and Govind, therefore, being sure that so long as Trimbak was alive he would carry on the whole *vyavastha* after his death exactly in the same way in which Govind was doing, made a *vyavastha* of the property in the terms following :—He provided for certain legacies in favour of his three daughters Manubai, Belubai and Kashibai who were then unmarried. He provided that Rs. 10,000 should be paid to his wife Ramabai as her *stridhan* and that she should live with Trimbak and should be permitted to use a sum of Rs. 300 per year in charity. If it was not possible for Ramabai to live with Trimbak, she was to live in the half portion of the dwelling house at Poona, and Trimbak and his children were each year to pay to her during her lifetime half the income whatever the same might come to out of the income of the immovable properties that might be

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received every year. But if Trimbak paid Rs. 1,500 every year to Ramabai, she was not to ask for an account of the income. That amount was by way of the yearly maintenance of Ramabai. From the income of the money-lending business appertaining to his share, Govind directed that Rs. 500 per year should be paid to Ramabai for giving in charities as she liked and the remaining income should be taken by Trimbak or his children. In regard to the principal sum employed in the money-lending business, Govind directed that out of the recoveries the debts should be paid first, and then the gifts, and the sum appertaining to his one half share from the balance should be invested in promissory notes or be deposited with some other good institution, and out of the interest that might be received, income as mentioned before should be paid to Ramabai. The original capital in respect of the money-lending business was, however, not to be spent either for paying the debts or for the gifts or for paying the amount of Rs. 500 to Ramabai. Trimbak was, during his lifetime, to carry on the whole *vyavastha* in the manner mentioned by Govind. Should Trimbak, however, give up to carry on the *vyavastha*, then Purshottam Parshuram Khare and Ramchandra Vishnu Joshi were to carry on the *vyavastha* and when Trimbak gave up looking after the *vyavastha*, he was to explain the whole of the *vyavastha* to them.

This was the *vyavasthapatra* as executed by Govind on July 30, 1894. A short time thereafter, that is on August 22, 1894, Govind died leaving him surviving his widow Ramabai and his three daughters above mentioned. Trimbak, who was his trusted nephew and executor, carried on the management of the properties, movable and immovable, which had been the subject-matter of the partition as above, without however effecting any partition thereof by metes and bounds. He thus managed the one half share of the properties belonging to the joint family, which had come to Balkrishna's branch, on his own and managed the other half share, which had come to Govind on such separation but which had been the subject-matter of the *vyavasthapatra* executed by Govind, in his capacity as the executor of that *vyavasthapatra*. The two other persons Khare and Joshi did not take any part in the management of the properties. Trimbak died in the year 1897, and thereafter his sons Martand and Janardan entered into possession of all the properties which had been till then managed by Trimbak. Even after Trimbak's death, Khare and

Joshi, the two executors who had been named in the will of Govind, did not enter upon the administration of the estate of Govind, but kept aloof. Martand and Janardan carried on the management of all the properties inclusive of the share of the estate of Govind therein right from 1897 (Janardan having joined in the management in 1899 onwards) and all those properties were managed as a single unit, without any division made in regard to the share of Govind therein, by both these brothers Martand and Janardan. In the year 1907 Martand purchased the house in suit in his own name by a conveyance dated April 17, 1907. There were disputes between the two brothers Martand and Janardan. They were referred to arbitration and ultimately in 1915 an award decree was passed. As a result of the award made by the arbitrators, a partition was effected between Martand and Janardan. It is necessary to observe at this stage that the suit house which had been purchased by Martand in his own name in 1907 was declared to belong to Martand alone under the terms of this award decree. It appears that Khare and Joshi at that time broached the topic of the properties which would come to the share of Govind being set apart and handed over to the parties entitled thereto, but nothing seems to have been done by Martand and Janardan in regard to the same. In fact, no concrete steps were taken by Khare and Joshi, the surviving executor of Govind's will, to reduce the properties belonging to the estate of Govind into their possession. Martand sold the suit property to Raghunath Vasudeo Joshi on April, 11, 1933, and that appears to have spurred Joshi, the surviving executor of Govind's will, into action and he started proceedings for obtaining probate of the will of Govind in the year 1934. Probate of this will was ultimately granted in the year 1937. Joshi, the proving executor, in the course of the administration of the estate of Govind, in accordance with the terms of the will, sold Govind's half share in the suit property and the 12 annas share in the Pangri village, which had been purchased in the year 1900 by Martand and Janardan, to Ramabai on June 29, 1939. Ramabai appears to have asked for her half share in the suit house from the purchaser from Martand, namely Raghunath Vasudeo Joshi, but, on her failure to recover the same, filed the suit being Civil Suit No. 470 of 1940 in the Court of the Extra Joint Subordinate Judge at Poona on April 18, 1940, for recovery by partition of her half share in the suit house and for mesne profits. The contest thus was between the purchaser from the executor of Govind's

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will and the purchaser from Martand of the suit property. The defendant contested this claim of the plaintiff, and the trial Court came to the conclusion that the defendant was a bona fide purchaser for value without notice of this property from Martand and dismissed the plaintiff's suit with costs. An appeal was filed against this decision of the trial Court in the Court of the Judge, Small Causes, Poona, (with appellate powers), and the learned Judge in appeal allowed the appeal with costs and set aside the decree of the trial Court, he being of the opinion that Martand, who was a trustee of the estate of Govind, had mixed up the trust properties with his own properties, that Martand had failed to prove that the suit property was acquired by him out of his own moneys, and that the defendant not being a bona fide purchaser for value without notice, was not protected under s. 64 of the Indian Trusts Act and was bound to hand over the one half share of Govind in the suit property, as claimed by the plaintiff, to her. It was this judgment of the lower appellate Court which was appealed against by both the parties. The original defendant, against whom the suit was decreed, filed Second Appeal No. 608 of 1948 contending that he was a bona fide purchaser for value without notice and, having purchased the property in that manner from Martand who was a trustee, was protected under s. 64 of the Indian Trusts Act. The original plaintiff filed a cross-appeal being Second Appeal No. 1110 of 1948, claiming certain mesne profits which had not been allowed to her by the lower appellate Court. Both these second appeals came on for hearing and final disposal before Mr. Justice Chainani who heard them as a single Judge. He came to the conclusion that Martand was a trustee of Govind's estate, but there was no evidence to show that he had blended the property coming to Govind's share with his own property. Having come to that conclusion, he observed that there was no evidence to show that the suit property had been purchased by Martand out of the corpus of the estate or from the income thereof, and he therefore nonsuited the plaintiff. In the view which he took he observed that it was not necessary for him to go into two other questions which had been raised in the appeal before him by Mr. Bhalerao who appeared for the original defendant, namely (1) that Martand was, in his capacity as a trustee, competent to sell the property to the defendant and the plaintiff could not consequently challenge that transaction, and (2) that the plaintiff's suit was barred by limitation. Having, however, decided the appeal in this way, he felt that

the points involved in the two appeals required further consideration and he, therefore, granted leave to the plaintiff to file an appeal under the Letters Patent. The letters patent appeal No. 38 of 1950 was accordingly filed by the original plaintiff, and that appeal has now come on for hearing and final disposal before us.

The appeal has been very ably and exhaustively argued before us by Mr. Dharap, who appeared for the plaintiff-appellant, and Mr. Bhalerao, who appeared for the defendant-respondent. It does involve several intricate points of law and we shall proceed to dispose of the same.

The first question which we have to consider is, what was the position of Martand *qua* the estate of Govind. Govind, under the terms of his will, had appointed Trimbak, Khare and Joshi as his executors. Trimbak was the preferential executor if he may be so styled, and he continued to act as the executor and managed the estate of Govind which was the subject-matter of the will during his lifetime. After the death of Trimbak, however, neither Khare nor Joshi took it to be any part of his obligation to take charge of and manage the estate of Govind, and Martand and Janardan, the sons of Trimbak, continued to manage all the properties, movable and immovable, which were the subject-matter of the partition, including Govind's share therein as before. All these properties were managed as a single unit. Govind had expressed ample confidence in his nephew Trimbak and had also stated in the *vyavasthapatra* or will that Trimbak would continue to manage the properties in the same manner as he had been till then doing. It was contended by Mr. Bhalerao that this provision conferred on the executors a power to sell the properties which fell to the share of Govind, because Govind, if he would have been managing the properties himself, would have had, as the owner thereof, the power to sell the same. We do not agree with that contention. When the testator expresses his confidence in an executor whom he appoints under the terms of his will that the executor will continue to manage the properties in the same manner as he (the testator) was doing during his lifetime, it predicates the care and caution as also the prudence in the management of the properties of which the testator himself was capable. He expects that the executor will manage the properties as prudently and with the same care and caution as he himself was managing the same. That does not, however, import a power to sell of the type

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which the testator as the owner of the properties possessed. Trimbak certainly was a man of the confidence of Govind and he continued to manage the properties as an executor of Govind's will during his lifetime. The two other executors should have stepped in after the death of Trimbak, but, for some reason or other, they did not do anything of the type, and Martand and Janardan, the sons of Trimbak, went into possession of the properties which were being managed by Trimbak during his lifetime and continued to manage the same till, in any event, 1915, if not thereafter. They did not come into possession and management of the share of Govind therein by virtue of any title. They were not the executors of the will of Govind, the executors who were entitled to assume possession and management of the properties being Khare and Joshi. They however intermeddled with the estate of Govind and as such occupied the position of executors *de son tort*. An executor *de son tort* is in the position of a trustee, and that was the position which was rightly understood and taken up by the parties in this suit at all stages of this litigation. It was conceded that Martand was in the position of a trustee of Govind's share in the properties and his liability was that of a trustee, and the position of the defendant, who was the purchaser of the suit property from Martand, was the position of a purchaser of a property from a trustee. When Martand having obtained a conveyance of the suit property in his name on April 17, 1907, sold it in his turn to the defendant on April 11, 1933, he did not purport to sell it as the trustee of Govind's estate. He sold it as his own self-acquired property. If, however, the position of Martand was that of a trustee *qua* Govind's estate and if it was established that Martand had mixed up the trust properties with his own, the question remained to be considered whether the suit property which Martand had ostensibly acquired in his name on April 17, 1907, was in fact acquired by him out of his self-acquisitions or out of the blended fund, that is the common fund which was made up of the properties which came to his share as also the properties which came to the share of Govind on partition, and on whom the onus lay of proving whether the property was Martand's property or was joint property.

Both the Courts below have found that Martand mixed up his own properties with the properties belonging to Govind's estate. There is no doubt whatever that all the properties inclusive of Govind's share therein were managed as a single

unit and at no time was there any demarcation or separation of the properties which fell to Govind's share from the rest of the properties. It can, therefore, be taken as established that Martand, who was in the position of a trustee *qua* Govind's estate, mixed up the properties which came to the share of Trimbak's branch with the properties which came to Govind's share. If that is so, the trustee did mix up his own properties with the trust properties, and the position in law in such cases is well established and set out in Lewin on Trusts, 15th edn., at p. 225 :—

> "The trustee, wherever the trust property may be placed, must always be careful not to amalgamate it with his own, for, if he do, the *cestui qui trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own."

To the same effect is the decision in *Tulasamma* v. *Venkatasubbayya*.[1] It was held there that where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort* by virtue of his intermeddling with the estate of another, is proved to have amalgamated moneys of the testator with his own, and especially if he can be reasonably suspected of having destroyed the evidence which would otherwise be available to separate the two estates, on a suit being instituted by the beneficiary to recover the property from the intermeddler alleging that the property formed part of the estate, the burden of proof is on the intermeddler to show that the property did not belong to the plaintiff's estate but to himself. The ratio of this decision is very easy to understand. It is the primary duty of a trustee to recover possession of the trust property and deal with it in accordance with the directions contained in the deed of trust. It is his further duty to invest the trust estate in authorised securities, unless there is a direction to the contrary contained in the deed of trust. It is no business of his, and it would really be a breach of duty on his part, to mix up the trust property with his own, so that he would be in a position to deal with the trust property in any manner he liked. He has got to conform to the provisions and the terms and conditions contained in the deed of trust and he would be guilty of a breach of trust if he acted otherwise. If he mixed up the trust property with his own, the only result of that would be that it would not be invested in authorised securities and it would be dealt with in a manner not contemplated by the

[1] (1925) 48 Mad. 597.

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deed of trust, and the trustee would be guilty of a breach of trust if he did anything of the type. If he utilised the mixed fund in the purchase of any property, he would have first to make good to the trust estate whatever had been utilised out of the same, because the liability of a trustee committing a breach of trust is to indemnify the trust estate for all losses which the trust estate has incurred by reason of his such dealings therewith. In the case of a property which has been thus purchased out of the mixed fund, it would not be possible to predicate at any time whether a particular part of the trust fund went towards the purchase of that property, and unless and until the accounts were rendered by the trustee to the beneficiary or the *cestui que trust,* it would not be possible also to show that no part of the trust estate had ever gone towards the purchase of that property. As a matter of fact, it has been laid down that the beneficiary or the *cestui que trust* would be entitled to go against the whole of that property and to contend that the property had been purchased out of the trust fund which had been thus mixed up with the trustee's own property. It follows, therefore, that the presumption should rightly be in favour of holding the property as having been purchased by the trustee out of the trust fund, mixed up though it may be with his own property. Unless and until the trustee succeeds in establishing before a Court of law that no part of the trust property formed part of the consideration for the purchase of that property and he had purchased it out of his own separate property or properties, he would not be able to claim the property as his own, and the beneficiary or the *cestui que trust* would be entitled to that property. This is the position which is clearly laid down in law and is well recognised in the text-books and the authorities as above stated. In the present case before us Martand mixed up his properties, that is the properties which came to the share of Trimbak, with the trust properties, that is the properties which went to Govind's share on partition. Whether the property in suit was purchased out of the corpus or the income made not the slightest difference. We have not had before us any evidence to show how the corpus as well as the income were dealt with by Martand when he was managing all the properties inclusive of Govind's share therein. There is nothing before us to show that Martand had any independent source of income, apart from the properties which he thus managed. Whatever was acquired by Martand was out of the properties

which he was thus managing, and it makes not the slightest difference, so far as his liability as a trustee to Govind's estate is concerned, whether he acquired the property in suit in 1907 out of the corpus of the properties or the income thereof. All the properties, including Govind's share therein, were managed as one unit. The properties coming to Trimbak's branch were mixed up with the properties which came to Govind's share, and by reason of this mixing up of the properties which went to Trimbak's share with the trust properties, a position arose under which it was incumbent on Martand, when he claimed the suit property to be his own, to prove that it was so. The conflict was really between the proving executor of Govind's will on the one hand and the trustee of Govind's estate on the other, because the plaintiff derived her title from the proving executor of Govind's will and the defendant derived his title from Martand who was the trustee of Govind's estate. The onus of proving, therefore, that the property in suit belonged to Martand lay on the defendant who derived his title from him, but we see from the record that no effort was made at all by the defendant to call Martand in the witness-box to support this position. As a matter of fact, it is interesting to note that the plaintiff subpoenaed Martand to come and give evidence as also to produce his books of account for the relevant period, and though that attempt was made on more occasions than one, Martand did not turn up in Court. Much as we may disapprove of the method of a party calling the other party or his witnesses as his own, the fact remains that Martand was not called into the witness-box by the party whose duty it was to do so. We do not understand what useful purpose would have been served by the plaintiff calling Martand into the witness-box, because the plaintiff wanted to prove something which was inconsistent with the position which Martand had taken up in the matter of the purchase of the property in suit in his name in 1907 and the sale thereof to the defendant in 1933. These tactics, however, though deprecated by the Privy Council, are common enough in the Courts in the mofussil and we shall take no further notice of the same except commenting upon the inadvisibility of doing so. It was the duty of the defendant to have called Martand into the witness-box in order to prove, by producing the relevant books of account, that the property in suit was purchased by Martand out of his own self-acquired moneys and not from the mixed fund

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made up of his own personal properties and the trust properties. This, the defendant obviously failed to do. The onus being, therefore, on the defendant and he not having discharged the same, there was no proof at all that Martand had purchased the property in suit out of his self-acquired properties, with the result that the presumption in law which is laid down in the passage from Lewin on Trusts and *Tulasamma* v. *Venkatasubbavyya,* above quoted, obtained and the property which was purchased by Martand must be held to be purchased by him out of the blended or mixed fund, the beneficiary, that is Govind's estate represented by the proving executor, being held entitled to every portion of the blended property including the house in suit which was purchased out of the same. The method of approach which was adopted by Mr. Justice Chainani was, with great respect, not the proper one. Once it was proved that there was a mixed fund made up of the personal properties of the trustee as well as the trust property, it was not open to the Court to enquire as to whether the property was purchased from the corpus or from the income. Even though that position was adopted, we have before us the fact that for a considerable number of years the plaintiff, who was the legatee under Govind's will, was not paid Rs. 500 per year which she was to get out of the income of the money-lending business. As a matter of fact, she had to file a suit against Martand and Janardan and recover the monies from them. It is also not apparent on the record as to what portions of the outstandings were in fact recovered and how they were dealt with. In the events that happened, it was the duty of Martand who was in possession of all the facts to come forward and state what exactly were the sources from which the consideration moneys for the purchase of the property in suit came. All the evidence in that behalf was in his possession and the defendant who derived title from him was bound to put forward all that evidence in order to prove before the Court what the exact situation was. This, the defendant failed to do. We are of the opinion that the onus of proving that the property in suit was purchased from the mixed fund was not on the plaintiff, but the onus was on the defendant to prove that the suit property had been acquired by Martand out of his self-acquisitions. What the plaintiff had got to prove was merely the fact that Martand, the trustee, mixed up his own properties with the trust fund, and once that was done, the plaintiff's part of the case was established. The onus then lay on the defendant to show by calling Martand that Martand in fact purchased this property out of his

self-acquisitions. We are, therefore, of the opinion that the learned Judge's approach to this aspect of the case was wrong, and on the record, as it stands before us, the plaintiff would be entitled to a half share in the suit property having derived title thereto from the proving executor of Govind's will.

Mr. Bhalerao, however, urged that even so, there were two other points which he had taken up before Mr. Justice Chainani which would negative the plaintiff's claim. Mr. Justice Chainani referred to these points in the last but one paragraph of his judgment:

> "In the view I take of the matter, it is not necessary to go into two other questions, which have been raised in this appeal by Mr. Bhalerao and these are that Martand was, in his capacity as a trustee competent to sell the property to the defendant and that the plaintiff cannot consequently challenge that transaction and that the plaintiff's suit is also barred by limitation."

Mr. Bhalerao was entitled to urge these two points before us because he had urged them before Mr. Justice Chainani, though ultimately Mr. Justice Chainani did not think it necessary to record his adjudication in respect of the same. The first point which was urged by Mr. Bhalerao was that Martand was a trustee and as such the legal owner of the property, invested with the right to sell the same. Martand sold the property in the year 1933 and therefore the defendant derived a valid title to the same, unimpeachable by the plaintiff. According to what is recorded by Mr. Justice Chainani that was also the point which Mr. Bhalerao had argued before him, namely that Martand was, in his capacity as a trustee, competent to sell the property to the defendant and the plaintiff could not consequently challenge that transaction. If there was nothing more on the record, the only argument of Mr. Bhalerao could be that the trustee being the legal owner of the property was entitled to sell the same, and he having sold it, the title of the purchaser could not be challenged by anybody. This argument barely so stated does not find favour with us. A trustee no doubt is a legal owner of the property, the beneficial ownership in the same vesting in the beneficiary or the *cestui que* trust. Merely because the property is vested in the trustee or the legal owner, the trustee is not entitled to sell the same. He is not the full owner of the property in the real sense of the term, because there is a beneficial interest and the ownership therein carved out in the property. The legal ownership which vests in the trustee

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is for the purposes of the trust and the administration of the provisions of the trust. Because the beneficiary, until the trusts are carried out, is not entitled to deal with the property. The trustee is the person who is empowered to deal with the same, but he can only deal with it in accordance with the provisions of the deed of trust. If one looks at s. 36 of the Indian Trusts Act, one finds it laid down there that—

> "In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument,.....a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust property, and for the protection or support of a beneficiary who is not competent to contract."

There is no express power conferred by the Act upon the trustee to sell the trust property. The instrument of trust which is the *vyavasthapatra* in the suit, also does not confer on the executor or even the executor *de son tort* the power to sell the same, as we have already indicated. Unless, therefore, it was contended that the sale of the property was a step towards the realization, protection or benefit of the trust property, and for the protection or support of a beneficiary who was not competent to contract, the sale could not be justified. The powers of the trustee are really limited and, as a matter of fact, it is laid down in the further provision contained in s. 36 of the Trusts Act that—

> "Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained."

This limitation on the power of the trustee is suggestive and goes to show that far from there being any power in the trustee to absolutely deal with the trust property in the manner suggested, even the right to give a lease of the trust property for a term exceeding twenty-one years is denied to him unless and until he obtains the sanction of the Court in that behalf. It follows, therefore, from the above discussion that the trustee as such has no right to sell the trust property. If he has no such right, the vendee does not get any title thereto which is unimpeachable by any person claiming to be entitled to that property. This argument would, therefore, not avail Mr. Bhalerao.

Mr. Bhalerao, however, went on to argue that even though by virtue of s. 63 of the Indian Trusts Act the trust property came into the hands of a third person inconsistently with the

trust and the beneficiary would be entitled to require him to admit formally, or to institute a suit for a declaration, that the property was comprised in the trust, the defendant was a transferee in good faith for consideration without having notice of the trust either when the purchase-money was paid or when the conveyance was executed, within the meaning of that term as used in s. 64 of the Act and was, therefore, entitled to the protection thereof. The defendant, therefore, being a transferee who fell within this category, was protected, and the plaintiff was not entitled to succeed against him. Mr. Dharap objected to this argument being addressed to us by Mr. Bhalerao. He contended that under the rulings of this Court in *Shripad* v. *Shivram*[1] and *Sattappa* v. *Mahomedsaheb*[2] it was not open to Mr. Bhalerao to urge any contention which had not been urged by him before Mr. Justice Chainani, this being a Letters Patent appeal. Mr. Bhalerao, however, made a statement before us that he was really going to argue the point before Mr. Justice Chainani and no doubt was seeking to develop it in the course of his reply, when he was stopped by Mr. Justice Chainani from doing so in view of the fact that on the contention which was raised by him in the first instance and which had been dealt with by Mr. Justice Chainani in his judgment, Mr. Justice Chainani was in his favour. Mr. Dharap relied upon his notes which he had made at the time when the arguments proceeded before Mr. Justice Chainani and pointed out to us the fact that this argument was not addressed by Mr. Bhalerao before Mr. Justice Chainani in the first instance. There Mr. Bhalerao is in agreement with Mr. Dharap. But if this particular aspect of the question was present before his mind's eye, as it should have been, and if regard be had to the grounds taken in the memo of appeal filed on behalf of his client, we would not really prevent him from arguing it before us. It was pointed out to us, however, that the passage from Mr. Justice Chainani's judgment which we have quoted above does not make any mention whatever of this argument which, if it had really been advanced even in embryo, would certainly have been noted by the learned Judge. Strictly speaking, we would not be entitled to take any statements from the bar if they were not supported by the judgment which has been delivered by Mr. Justice Chainani conscientiously recording each and every argument which was advanced by the advocates before him and we would

[1] (1934) 36 Bom. L. R. 1052.

[2] (1935) 60 Bom. 516, s.c. 38 Bom. L. R. 221.

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be quite right in rejecting this argument which is sought to be advanced by Mr. Bhalerao before us. It was, however, urged by Mr. Bhalerao that the ban was against the appellant's raising any new contention in this manner and not against the respondent because he argued that though the appellant could not impeach a judgment on any grounds which he had not taken, it was certainly open to the respondent to support the judgment on any grounds which were available to him. We are, however, of the opinion that in a Letters Patent appeal it is not only the appellant but the respondent also who must be held to the arguments and the contentions which have been advanced before the Court of appeal, and Mr. Bhalerao would not, under the circumstances, be within his rights if he wanted to argue a point which he had not argued before Mr. Justice Chainani. We would have, therefore, prevented Mr. Bhalerao from taking up this contention but for the fact that even before us he stated that he was going to argue the point when he developed his argument on this contention of his, namely that the defendant being a transferee from a trustee, who had a right to sell the property, acquired a title thereto which was unimpeachable by anybody claiming to have an interest in the property. Even though in the argument, as it was first advanced before us, we had not the slightest inkling of Mr. Bhalerao taking up this contention that his client was protected under s. 64 of the Indian Trusts Act, he told us that in the course of the discussion that point was brought out and he really relied upon the same. We are not prepared to discount this statement made by Mr. Bhalerao from the bar, and we have, therefore, thought it fit to allow him to urge this contention before us.

As regards this contention, however, the difficulty in Mr. Bhalerao's way is that according to the submission of Mr. Dharap, the question as to whether the defendant was a *bona fide* transferee for value without notice is a question of fact and it is not open to us in second appeal to canvass the same, the lower appellate Court having recorded its definite finding in this behalf, namely, that the defendant was not a *bona fide* transferee for value without notice. Mr. Dharap drew our attention in this behalf to the decision in *Pundit Ram Ratan Lal* v. *Musamat Akhtari Begam*,[1] where the learned Judges held that the question whether or not a certain transferee is a *bona fide* transferee for consideration is a question of fact. The learned Judges there followed a decision of our High Court in

[1] (1939) 14 Luck. 621.

Bhagwant v. *Kedari*.[1] The case of *Bhagwant* v. *Kedari*[1] was a case where the point at issue was whether the transfer in question was within the mischief of s. 53 of the Transfer of Property Act. The Courts below had dismissed the plaintiff's suit holding that the sale to the vendee was valid although made with the object of defeating the anticipated attachment of the plaintiff's property. The High Court confirmed the decree because it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration. In the course of the judgment it was observed (p. 228):—

".....The question of *bona fides* is one of fact and as shown in *Darvill* v.*Terry*[2] would in England be left to the jury. It is, therefore, one on which this Court cannot pronounce in second appeal; nor can an objection involving questions of disputed facts as incidental to a point of law be taken in second appeal—*Gavdappa* v. *Girimallappa*.[3] The plaintiff, if he wished to challenge the good faith of the transaction notwithstanding consideration passed, should have raised the point at an earlier stage. He cannot do so now. The lower Courts have found against him on the issue which he did raise as to consideration, and there is nothing in the undisputed facts to afford the basis for an inference that the dominant motive of the transferee was to serve the interest, of the debtor rather than his own."

These observations are sufficient to show that the question of *bona fides* was treated by our own High Court to be a question of fact. Mr. Bhalerao, however, urged before us that there were three ingredients necessary in the case before us, namely, *bona fides*, purchase for value and want of notice, and even though the purchase for value and the *bona fides* may be treated as questions of fact, the question whether the transfer was without notice would still be a question of an inference of law to be raised from proved facts. The notice may be actual or constructive and, even if an actual notice may be a question of fact, a constructive notice, in so far as it rested upon a legal inference to be raised from proved facts, would be a question of mixed fact and law, and not merely a question of fact. We are afraid we cannot accept this contention. Whether a notice, actual or constructive, is given to a particular party is nonetheless a question of fact, though evidence may have got to be led in order to show what were the circumstances attendant upon the transaction. The question of *bona fides* and the question of want of notice really stand on a par with each other. We have, therefore, come to the conclusion that the question whether the defendant was a *bona fide* transferee for consideration without

[1] (1900) 25 Bom. 202.
[2] (1861) 30 L. J. Exch. 355.
[3] (1894) 19 Bom. 331.

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notice is a question of fact, and this question, unfortunately for the defendant, is concluded by the finding in that behalf arrived at by the lower appellate Court. Much as we may, on a prima facie reading of the judgment of the lower appellate Court, disagree with certain observations which the lower appellate Court has made therein, particularly the one that the defendant's brother being a pleader must have known or must be deemed to have known what the contents of Govind's will were and that, therefore, the defendant also must have known or must be deemed to have known the contents thereof, we cannot get away from the fact, that, however erroneous it may be, it is a finding of fact arrived at by the lower appellate Court and the defendant is not entitled to canvass the same before us. We have, therefore, come to the conclusion that the defendant is not entitled to the protection of s. 64 of the Indian Trusts Act and by virtue of the provision contained in s. 63 of the Act, the transfer being one in favour of a third person inconsistently with the trust, the plaintiff, who derives title from the proving executor, is entitled to a declaration, in any event, of her right and title to one half of the property in suit and is also entitled to a partition and possession of the same as decreed in her favour by the lower appellate Court.

Mr. Bhalerao next urged before us that the plaintiff's suit was barred by the law of limitation. He urged that the alienation of the suit property was made by Martand in favour of the defendant on April 11, 1933, and the suit was filed on April 18, 1940, that is more than six years after the date of the alienation. He submitted that this was really a suit for partition and should have been filed under art. 120 of the Indian Limitation Act within six years from the date when the cause of action accrued to the plaintiff. He relied upon a decision of our appellate Court in *Bai Shevantibai* v. *Janardan Warick*: *Janardan Warick* v. *Bai Shevantibai*,[1] where a purchaser of the interest of a member of a joint Hindu family, who was not entitled either to joint possession or to a partition of only the right, title and interest of his vendor in the particular property, filed a suit for general partition, and his claim was held to be barred under the residuary art. 120 of the Limitation Act because at the date of the suit more than six years had elapsed since the date of the sale or the date of the death of the vendor, whichever date be considered the starting point for limitation. He further contended that the executors of Govind's will knew

[1] (1939) 41 Bom. L. R. 631.

as far back as 1915 that Govind's share was not being set apart and that Martand and Janardan claimed to be the sole owners of all the properties which they divided among themselves. He contended that from the year 1915 up to the year 1940 as many as twenty-five years had elapsed and that, therefore, the plaintiff's suit was barred by the law of limitation because the plaintiff in fact derived title from the executors of Govind's will.

The answer given by Mr. Dharap to this argument of Mr. Bhalerao was that art. 120 of the Limitation Act really did not come into operation at all. This was a suit for recovery of possession of immoveable property, and even though art. 134 of the Act might not apply in terms, there was the residuary art. 144 in respect of suits for possession of immoveable property or any interest therein not otherwise specially provided for, under which the period of limitation prescribed was twelve years beginning to run from the date when the possession of the defendant became adverse to the plaintiff. In this case, so far as Govind's share was concerned, it was the executors who were entitled to recover the same, and so long as Martand and Janardan continued to administer the properties which came to Govind's share as trustees, there would be no question of there being any exclusive possession of the properties which came to Govind's share. The possession of Martand and Janardan could not be considered to be adverse to that of the executors of Govind's will, and, therefore, under art. 144 of the Indian Limitation Act the limitation did not begin to run against the plaintiff and the suit was well within time. The alienation made by Martand would be the first indication, if any, of his claiming this property adversely to the estate of Govind, and that alienation was made by him only on April 11, 1933, so that the suit which was filed on April 18, 1940, was well within the period of time prescribed in art. 144 of the Act. We accept the contention of Mr. Dharap that this was clearly a case for the recovery of possession of immoveable property and would fall within art. 144 of the Limitation Act and that art. 120 of the Act would not come into operation at all. If the case did not fall within the purview of art. 144 of the Act, it may be necessary to consider whether it fell within the purview of art. 120. But so far as we are of the opinion that it fell within the purview of art. 144, art. 120 does not come into play at all. The point of time when the limitation commences under art. 144 is when the defendant's possession becomes adverse to that of the plaintiff and in this case it cannot be said that in any event up to April

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11, 1933, the possession of Martand was in any manner adverse to the estate of Govind. That being the position, we reject Mr. Bhalerao's contention that the plaintiff's suit is barred by the law of limitation.

The result, therefore, is that the judgment of Mr. Justice Chainani will be reversed, Second Appeal No. 608 of 1948 will be dismissed and the judgment of the lower appellate Court will be restored and a decree passed in favour of the plaintiff accordingly.

In regard to Second Appeal No. 1110 of 1948, Mr. Dharap has urged before us that the lower appellate Court was wrong in allowing the plaintiff mesne profits only from the date of payment of Rs. 2,085 being the plaintiff's share of the costs of improvements effected by the defendant to the suit property. He contends that the defendant being in wrongful possession of the suit property must be ordered to pay to the plaintiff mesne profits from the date of the suit. We, however, find from the judgment of the lower appellate Court that on the facts of the case before it, it ordered that the plaintiff was entitled to recover a half share in the suit property on payment of Rs. 2,085 and not otherwise. It will be only on the payment of Rs. 2,085 by the plaintiff that she would be entitled to recover possession of that half share of hers in the suit house. In the circumstances, we do not think that the order made by the lower appellate Court in regard to mesne profits was in any manner wrong. We, therefore, dismiss Second Appeal No. 1110 of 1948.

The result, therefore is that Second Appeal No. 608 of 1948 will be dismissed. Second Appeal No. 1110 of 1948 also will be dismissed, but so far as the costs of the hearing before Mr. Justice Chainani are concerned, each party will bear and pay its own costs thereof. So far as the costs before us are concerned, the respondent, i. e. the defendant, will pay the plaintiff's costs and bear his own.

VYAS J. I agree with the judgment delivered by my learned brother, and would like to make certain observations. The facts from which this letters patent appeal has arisen have been stated fully by my learned brother and I will not state them again. The provisions of the will of Govind have also been set out in details by my learned brother and I will not state them in any greater details than may be necessary to do so.

One of the important questions round which the decision of this appeal turns is, as to on whom is the onus to prove what?

is it for the plaintiff to prove that Survey No. 554, Shanivar Peth, Poona, was purchased by Martand, the vendor of the present defendant, from the funds belonging to the estate of Govind, the deceased husband of the plaintiff, or is it for the defendant to prove that it was purchased by Martand from the funds of his own estate. Mr. Dharap for the plaintiff appellant in this Letters Patent appeal contends that it is for the defendant to prove that Survey No. 554 was purchased by Martand from his own moneys and that as he has not proved it, the suit was rightly decreed by the lower appellate Court, namely, the Court of the Judge, Small Causes, Poona, with appellate powers. On the other hand, it is submitted by Mr. Bhalerao for the defendant that it is for the plaintiff to prove that Survey No. 554 was purchased by Martand from the moneys belonging to the estate of Govind, and that as that has not been proved, the suit was rightly ordered to be dismissed by the learned trial Judge in Civil Suit No. 470 of 1940 and by Mr. Justice Chainani in Second Appeal No. 608 of 1948.

For deciding the question as to on whom what onus lies, it is necessary to deal first with certain other points. The first such point is whether Martand and Janardan were trustees in respect of the estate of Govind and the second point is whether Martand and Janardan had amalgamated or mixed up or confounded the estate of Govind with their own estate; for if they were trustees of Govind's estate and if as such trustees they had confounded the estate of Govind with their own estate, the burden would be on the defendant to show that Martand had purchased Survey No. 554 from the moneys of his own estate.

Now, regarding the first point whether Martand and Janardan were trustees of Govind's estate, we have the undoubted facts:—

(1) that they managed the whole estate, namely their own estate and the estate of Govind as one unit throughout;

(2) that they made recoveries in respect of the money-lending business treating that business as one unit;

(3) that they purchased properties, *e.g.*, 12 annas share and 10 annas share in the village of Pangri and Padali respectively and Survey No. 554 of Shaniwar Peth, Poona; and

(4) that they spent the whole income of the entire estate less the sum of Rs. 1,500 which they had to pay annually to the plaintiff out of the income of the landed estate and Rs. 500 annually to her out of the income of the money-lending business.

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which would show that they were executors *de son tort*. Now, an executor *de son tort* occupies the position of a trustee *qua* the estate. Therefore, in our opinion, there is no doubt that Martand and Janardan were trustees of the estate of Govind. In this context a reference to the memo, of appeal filed by the defendant in his Second Appeal No. 608 of 1948 in the High Court will be useful. Ground No. 3 of the grounds mentioned in that memo of appeal was in the following terms:—

"That assuming that the deceased Govind had a share in the suit property, even so the same having been disposed off by Martand who was in the position of a trustee there remained nothing which could be conveyed to plaintiff."

This would show that it was the defendant's own admission in Second Appeal No. 608 of 1948 that Martand was in the position of a trustee of Govind's estate. Also, a reference to certain extracts from the judgment of the lower appellate Court will not be out of place in this connection. In the body of his judgment the learned Judge of the Court of Small Causes, Poona, observed as under:—

"The undisputed facts are that after the death of Govind, his half share went into the possession of Trimbak and his two sons Martand and Janardan, that they blended the two shares in the estate and that they ultimately partitioned it. Plaintiff's case is that the management of the half share in the estate even after the death of Trimbak went over to his sons Martand and Janardan as trustees of Govind's half share and out of the entire income of the estate subsequent acquisitions were made and, therefore, Govind had half share in the suit property also. In the lower Court, defendant seriously contested and fought out this important point and the learned trial Judge accepted that contention and held that Martand and Janardan were not the trustees of Govind's half share in the estate after their father's death but they were in possession simply as the heirs of the trustee, that as such they were not liable to account as trustees, that they were not required to show that the suit house was acquired out of their exclusive funds, that plaintiff should definitely prove that the suit property was purchased from the Trust funds and that she had failed to do so. It is obvious from the above reasoning of the lower Court, that the above inferences and conclusions were based on the assumed proposition that Martand and Janardan were not the trustees of Govind's half share in the estate. But all these conclusions lose their force and become untenable in view of the admitted position in this appeal that even the sons of Trimbak were the trustees of Govind's half share. Respondent's pleader fairly conceded in the beginning of his arguments that after the death of Trimbak, his sons became trustees as his heirs and there was also a mention in the will that his sons should do the management. So then all the obligations under a trust and all the legal incidents of a trust property remain intact....."

It is, therefore, perfectly clear, in our opinion, that Martand and Janardan were trustees of the estate of Govind.

The next point is whether as trustees they (Martand and Janardan) amalgamated or confounded the two estates, i. e., their own estate and the estate of Govind. Here also, the position is perfectly clear that the whole estate was managed as one unit, that is, no differentiation whatever was made between the estate of Govind and the estate of Martand and Janardan. Out of the income of the entire landed estate Rs. 1,500 were to be paid annually to the plaintiff and out of the income of the entire money-lending business Rs. 500 were to be paid annually to the plaintiff. Subject to these payments, the entire estate, movable and immovable, was managed as one unit. Govind's estate was not differently dealt with. No separate accounts were kept for it. It is to be noted that Martand was summoned by the plaintiff four times to give evidence with his accounts, but Martand did not appear in the witness-box nor did he produce the accounts. It would be justifiable, in these circumstances, to draw an inference that if the accounts were produced, they would have shown that the two estates, namely, the estate of Govind and the estate of Martand and Janardan, had been amalgamated or confounded.

In this context also we may with advantage refer to the judgment of the trial Court wherein the learned Judge has observed as under:—

"But the fact that he (Trimbak) accepted the executorship did not oblige him, or at least he so thought, to keep his own interest in the family estate distinct from that of Govindrao. So far as the income from the lands was concerned he was obliged to pay Rs. 1,500 to the plaintiff and he could keep the rest to himself. So there was no need to divide the landed properties by metes and bounds. As regards the houses, the plaintiff was living with him and so there was no need to partition them. Regarding the money-lending business, the transactions must have been so various and complicated that to partition them would have been a difficult task, if not positively harmful to the interest of nimself and the estate of Govindrao. Further, Govindrao had directed by paras. 6 and 7 of the will that the plaintiff was to get only Rs. 500 annually out of the interest derived from the money-lending business and the rest of the income was to be taken by Trimbakrao and his sons. So far as the corpus of the money-lending business is concerned, the testator did not make any specific disposition. In the circumstances, therefore, Trimbakrao, even honestly,—and there is nothing suggested to the contrary—might have taken the view that as long as he carried out his principal responsibilities towards the plaintiff and her daughters, there was no urgency of separately dealing with his own interest and that of Govindrao in the family properties."

Then the learned Judge of the lower appellate Court also said in the course of his judgment that Martand and Janardan had

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blended the two shares in the estate, i. e., the estate of themselves and the estate of Govind, and that they had ultimately partitioned it. Again he observed in the course of his judgment that Martand as a trustee of Govind's half share had blended that share with his and his brother's half share.

In this context a reference to paragraph 19 of the award decree which was passed in the litigation of 1915 between Martand and Janardan will be of advantage. We find from paragraph 19 of that decree that Rs. 44,014-2-6 were drawn by Martand and Rs. 23,504-7-6 were drawn by Janardan from the joint stock, i. e., the amalgamated estates of their own and Govind. At the time of the award decree the sum of Rs. 44,014-2-6 with interest had become Rs. 61,136-5-0 and Rs. 23,504-7-6 with interest had become Rs. 30,110-4-6. This disparity was equalized by asking Martand to pay Rs. 15,513 and odd to Janardan. This conduct of Martand and Janardan of drawing the moneys from the amalgamated estates of their own and Govind would also show, in our opinion, that they had mixed up their own estate with the estate of Govind.

In our opinion, therefore, it is perfectly clear that the two estates were confounded together and this, we have no doubt, amounted to a breach of trust by Martand and Janardan. We have read carefully the will of Govind and it is clear to us that Govind had really intended to partition the estate by metes and bounds but could not do so. The reasons for his not doing the partition of the estate by metes and bounds, we think, were, firstly, that he was not in good health then and was expecting to die at any moment, and, secondly, that the properties concerned were very large and the money-lending business was also very extensive. But reading the will as it stands, there is no doubt that Govind specifically mentioned therein that his share in the corpus of the money-lending business was to be invested separately, which meant that he did intend, as quickly as possible, to partition the estate by metes and bounds. If we turn to the will itself we find that Govind called his brother Balkrishna to Kashi where he himself had gone on pilgrimage, and we have no hesitation in accepting the argument of Mr. Dharap for the appellant that Govind would not have put his brother to the trouble of travelling to Kashi unless he had himself wanted to partition the estate by metes and bounds. Proceeding further, we find recitals in the will which state this:—

"Later on I returned from Kashi to Poona. I called Chiranjiv Trimbak Balkrishna *alias* Bapurao Gadre from Shedani to Poona and told him

that our entire family property, moveable and immoveable, should be divided."

Here again we agree with the submission of Mr. Dharap that unless Govindrao, who was in failing health, had desired that the estate should be partitioned, he would not have sent for Trimbak from Shedani to Poona and told him that the entire family property consisting of movable and immovable property should be divided. Then again we find that the reason for not being able to effect the partition by metes and bounds immediately is also stated in the will. It is stated in this manner:—

"It would take a long time to effect an equitable partition and fearing that in the meanwhile my health would get worse day by day....."

This again would show that Govind had in his mind the idea of effecting a partition by metes and bounds but could not do so at once on account of his ill-health. Then comes an important recital in the will which was this:—

"I informed this to Trimbak Balkrishna whereupon he requested that the property should not just then be divided actually into separate lots....."

We have no doubt that the words "should not just then be divided actually into separate lots" would lose their meaning unless we hold that it was the intention of Govind that at some time, not too distant, but in reasonably near future, the partition of the estate by metes and bounds was to be effected. Proceeding further, we find that Govindrao stated this:—

"Therefore, I make a Vyavastha of my property as follows:—"

Here again we have no difficulty in agreeing with the submission of Mr. Dharap that there was no point in drawing up a *vyavasthapatra* then, unless the intention of Govind was that the property should be divided by metes and bounds at some future time as it was not possible to do so immediately for reasons of ill-health and also on account of the extensive character of the estate.

If we turn to the remaining portions of the will, we find that Govindrao stated thus in paragraph 6:—

"From the income of the money lending business appertaining to my share that may remain over after payment of the gifts specified in clause four, Rupees five hundred shall be paid each year to Soubhagyavati Ramabai."

Then in paragraph 10 he went on to say:—

"If the original principal sum in respect of the money-lending business is recovered then it shall be first applied towards the payment of the debt and whatever amount is realised thereafter the same shall be

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spent in payment of the gifts. The original principal sum in respect of the money-lending business is recovered, then the sum appertaining to my one-half share shall be invested in promissory notes or shall be deposited with some other good institution, and out of the interest that may be received income as mentioned above shall be given to Soubhagyavati Ramabai."

From this an argument is made by Mr. Dharap for the appellant-plaintiff that Govind must have intended that his share in the estate should be demarcated, for without demarcation it would not have been possible to know the income of Govind's share in the money-lending business or what would remain after paying off the gifts. Also, the investment of Govind's half share in the money-lending business would not have been possible unless the estate was demarcated by metes and bounds. Thus, therefore, we have no doubt in our minds that although actual partition by metes and bounds had not been made during the lifetime of Govind, Govind did clearly desire that it should be made some time in the future.

Having come to the conclusion (1) that Martand and Janardan were trustees of Govind's estate, (2) that they confounded the two estates, and (3) that they committed a breach of trust by so confounding the two estates, the decision in *Tulasamma* v. *Venkatasubbayya*[1] will come into operation. It was a case in which the plaintiff had sued, as the widow of one Lanka Narasayya, to recover the properties of her late husband which were taken possession of by defendant No. 1 who was his son-in-law. Defendant No. 1 had, after Narasayya's death been in management of his estate on behalf of the plaintiff and in the course of his management had collected outstandings belonging to Narasayya and had got renewals of his pro-notes, bonds, etc., in his own name, and had mixed up his own funds with those of Narasayya. It was there held by their Lordships that where a trustee, or a person who put himself in the same position of accountability as a trustee, such as an executor *de son tort* by virtue of his intermeddling with the estate of another, was proved to have amalgamated moneys of the testator with his own, and especially if he could be reasonably suspected of having destroyed the evidence which would, otherwise, be available to separate the two estates, on a suit being instituted by the beneficiary to recover the property from the intermeddler alleging that the property formed part of the estate the burden of proof was on the intermeddler to show that the

[1] (1925) 48 Mad. 597.

property did not belong to the plaintiff's estate but to himself. Then, again turning to page 225 of 1950 edition of Lewin on Trusts we find that the learned author has said this:—

"The trustee, wherever the trust property may be placed, must always be careful not to amalgamate it with his own, for, if he do, the *cestui qui trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own."

We have no doubt, in view of the above mentioned authorities, that in this case the onus would be on the defendant to show that Martand had purchased Survey No. 554, Shaniwar Peth, Poona, from the funds of his own estate. That onus clearly is not discharged. Martand never stepped into the witness-box, nor did he produce the accounts of his management of the estate of Govind. The defendant himself naturally could not have personal knowledge as to the manner in which the management of the estate was done by Martand. In these circumstances, there is no doubt whatever, as the record stands before us, that the above mentioned onus of proof has not been discharged by the defendant and, therefore, the plaintiff must succeed in the suit brought by her.

The next point which has been urged before us by Mr. Bhalerao for the defendant is that a trustee is competent to sell the trust property, and if he does sell it, a beneficiary may bring a suit to have the alienation set aside, but the alienation itself cannot be treated as null and void. We have considered this contention, but have no hesitation in coming to the conclusion that it has no substance. If we turn to s. 36 of the Indian Trusts Act, we find that it lays down:—

"In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of s. 17, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust property, and for the protection or support of a beneficiary who is not competent to contract."

We have not been pointed out any express provision in the Trusts Act to the effect that a trustee is competent to sell the trust property, and if we turn to the instrument of trust, the will in this case, we do not find any provision therein empowering the trustees to alienate any portion of the estate. It has never been contended at any stage in this case that the sale of Survey No. 554, Shaniwar Peth, Poona, by Martand to the defendant was for the protection or support of the beneficiary,

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or was for the protection or benefit of the trust property. If we turn to s. 37 of the Trusts Act we find that it says:—

"Where the trustee is empowered to sell any trust-property, he may sell the same, etc., etc."

As we have just pointed out above, there is no provision in the will empowering Martand to sell any portion of the estate which he was holding in trust.

In these circumstances, we do not see any force in the contention of Mr. Bhalerao that Martand had competence to sell the suit property to the defendant and that the only remedy which was available to the plaintiff was to bring a suit to set that alienation aside.

Proceeding further, Mr. Bhalerao sought to challenge the finding of the lower appellate Court that the defendant was not a *bona fide* purchaser for value without notice. His contention was that even if Martand committed a breach of trust and even if it was not legal for Martand to sell the house, Survey No. 554 Shaniwar Peth, Poona, to the defendant, even so, the defendant was protected by s. 64 of the Trust Act. When we turn to s. 64 we find that this is what is laid down therein:—

"Nothing in s. 63 entitles the beneficiary to any right in respect of property in the hands of—

(*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, etc., etc."

Mr. Dharap has objected to this contention being raised in this letters patent appeal before us on two grounds: (1) that the present respondent not having taken this point in the second appeal before Mr. Justice Chainani, he cannot do so in this letters patent appeal which has arisen out of that second appeal; and (2) that the finding of the lower appellate Court that the defendant was not a *bona fide* purchaser for value without notice being a finding of fact, it is conclusive and the question could not have been raised even in the second appeal, much less could it be raised in the letters patent appeal which has arisen out of the second appeal.

Regarding the first objection, Mr. Dharap has contended that the respondent did not raise a point before Mr. Justice Chainani that he was a *bona fide* purchaser for value without notice and, therefore, could not raise it before us in this letters patent

appeal. Our attention is drawn to the judgment of Mr. Justice Chainani in which Mr. Justice Chainani said as follows:—

"In the view I take of the matter, it is not necessary to go into two other questions, which have been raised in this appeal by Mr. Bhalerao and these are that Martand was, in his capacity as a trustee competent to sell the property to the defendant and that the plaintiff cannot consequently challenge that transaction and that the plaintiff's suit is also barred by limitation."

It is clear, therefore, that the respondent did not contend before Mr. Justice Chainani that he was a *bona fide* purchaser for value without notice. He raised only two points, namely, (1) that it was competent to Martand to sell the property to the defendant and the plaintiff could not subsequently challenge that transaction, and (2) that the plaintiff's suit was barred by limitation. It is quite true of course that in his memo, of appeal in Second Appeal No. 608 of 1948 we find ground No. 8 which is in these words:—

"That it should have been held that defendant was a purchaser, *bona fide*, for value, and without notice."

But in view of the fact that the respondent did not raise that point actually in the course of the hearing of the second appeal before Mr. Justice Chainani, we have no doubt that he must be deemed to have given up that point.

Now, in *Shripad* v. *Shivram*[1] it was held that in an appeal under the letters patent, the appellant would not be entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal had been preferred. Also in *Sattappa* v. *Mahomedsaheb*[2] it was observed by Mr. Justice Broomfield as follows (p. 548):—

".....But that particular point has not been taken in any of the lower Courts and in accordance with the usual practice we have declined to allow it to be taken in the Letters Patent appeal. Mr. Kane, who appears for the appellant, cited *Prabhu Lal* v. *Badri*[3] in support of his right to argue the point before us. In that case some decisions of the Privy Council have been referred to, but we do not think that there is anything in these cases which affects the power of the High Court to decide what matters they will consider in a Letters Patent appeal. A full bench of the same High Court in *Mahabir Singh* v. *Dip Narain Tewari*[4] has recognized the practice according to which new points are not to be allowed to be raised in such appeals, though it was held that

[1] (1934) 36 Bom. L. R. 1052.

[2] (1935) 60 Bom. 516, S. C. 38 Bom. L. R. 221.

[3] (1934) 57 All. 77.

[4] (1931) 54 All. 25, F. B.

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that practice does not mean any absolute prohibition. In *Shripad* v. *Shivram*,[1] our own High Court has held that in an appeal under the Letters Patent the appellant is not entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal has been preferred."

Accordingly, Mr. Justice Broomfield did not permit a new point to be raised by the appellant in the letters patent appeal. The Courts of law would not treat the appellant and respondent differentially and what was said of the appellant must apply equally to the respondent. In our view, having regard to the above mentioned decisions in *Shripad* v. *Shivram* and *Sattappa* v. *Mahomedsaheb* the respondent is precluded from agitating before us that he was a *bona fide* purchaser for value without notice, as he did not raise that contention during the course of the Second Appeal No. 608 of 1948 before Mr. Justice Chainani.

Adverting to the second objection of Mr. Dharap, namely, that the finding of the lower appellate Court that the defendant was not a *bona fide* purchaser, being a finding of fact, it is conclusive under s. 100 of the Code of Civil Procedure and that question cannot be agitated in second appeal, much less in a letters patent appeal which arises out of a second appeal, Mr. Dharap's submission is that the conclusion whether the defendant was a *bona fide* purchaser or not was a question of fact which the learned Judge of the lower appellate Court had answered from the evidence and circumstances on record before him. Mr. Bhalerao, on the other hand, pressed into service his contention that the question whether a transferee is a *bona fide* purchaser or not is a matter of legal inference to be drawn from facts proved on evidence and is, therefore, a point of law.

This aspect of the case was very strenuously argued before us by both sides. Mr. Bhalerao drew our attention to the observations in the commentary of Sir Dinshah Mulla under s. 100 of the Code of Civil Procedure (11th edn.) at page 370 which are in the following words:—

"Though a second appeal does not lie from a finding of fact, yet where a *legal* conclusion is drawn from the finding, a second appeal will lie under cl. (*a*) of the section on the ground that the legal conclusion was erroneous. Thus, the question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed question of law and fact."

Mr. Bhalerao also referred us to the case of *Khushalchand Bhagchand* v. *Trimbak Ramchandra*,[2] which was decided by

[1] (1934) 36 Bom. L. R. 1052.

[2] [1946] Bom. 984, s. c. 48 Bom. L. R. 586.

Mr. Justice Lokur sitting singly. In that case a suit was filed by the plaintiff for recovering possession of Survey No. 802/1 of Sangamner together with mesne profits and costs. The land in suit originally belonged to one Chintaman Vinayak. He gifted it in favour of Ramchandra, father of plaintiff No. 1, by a registered deed dated August 17, 1927. The deed provided that the donor Chintaman was to remain in possession and to enjoy the income of the land during his life time and that the donee Ramchandra should take possession of it after his death. Soon after the deed of gift was passed, Chintaman appeared to have changed his mind and executed another registered deed on May 18, 1928, revoking the gift. Ramchandra died on August 27, 1928, leaving Trimbak, plaintiff No. 1, as his son. Plaintiff No. 2 Martand Balwant was Ramchandra's father and plaintiff No. 3 Gangadhar was his brother. In September 1932 Chintaman sold the land to defendant No. 1. Defendant No. 1 mortgaged the land to defendant No. 3 by deed dated January 4, 1937, and gave the land into the mortgagee's possession. In January 1937 Chintaman died and plaintiff's became entitled to the land in suit. In March 1939 they filed a suit to recover possession of the land from the defendants. The Civil Judge held that defendant No. 1 had failed to prove that she was the *bona fide* purchaser for value without notice, that the deed of gift could not be revoked in law and that even if it was not acted upon, the title would pass to the plaintiffs. The Civil Judge, therefore, passed a decree declaring plaintiffs as owners of the suit property subject to the incumbrance created by defendant No. 1 in favour of defendant No. 3. On appeal, the Assistant Judge held that even the mortgagee (defendant No. 3) failed to prove that he was a *bona fide* transferee for value without notice of the deed of gift; that he made no inquiry to find out what right Chintaman had when he transferred the property to Laxmibai (defendant No. 1); that he did not inquire from whom defendant No. 1 had purchased the property, nor did he make any inquiry in the registry nor take any search. The Assistant Judge, therefore, allowed the appeal and held that the plaintiffs were entitled to recover possession free of the incumbrance in favour of defendant No. 3. Defendant No. 3 appealed to the High Court. In the second appeal it was contended for the plaintiffs that the finding of the lower appellate Court that defendant No. 3 had not taken reasonable care to ascertain that defendant No. 1 had power to mortgage the land was a finding of fact and must be accepted in second appeal. In

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the body of his judgment Mr. Justice Lokur observed as follows (p. 994):—

> ".....the question whether a particular section of an Act does or does not apply to the facts as found is a question of law. The finding as to what the transferee did or did not do to ascertain the power of the transferor to effect the transfer is one of fact, but whether from that finding it can be said that reasonable and sufficient inquiry was made by the transferee as to attract the application of s. 41 of the Transfer of Property Act is a question of law."

What was held, therefore, in that case was that what was reasonable or not was a question of law and, therefore, whether the care which was taken was reasonable or not was also a question of law. But the matter would assume a different aspect altogether if it was held as a finding of fact that a transferee, as a matter of fact, knew that his vendor had no power to sell or was not entitled to sell and yet purchased the property from him. In that case the question that the transferee was not a *bona fide* purchaser would be a question of fact. In the case before us the lower appellate Court did find, however erroneous that finding might be, that the defendant was aware of the terms of the will of Govind and was also aware that Martand was a trustee of the estate of Govind and yet purchased the property from Martand. The relevant portions of the judgment of the learned Judge are:—

> "Defendant admits in his deposition that he came to know Martand from 1915-1916 and since then the Gadre family was managed by Martand and Janardan..... Thus defendant has sufficient knowledge of almost all the affairs of Gadre family..... These admissions of Defendant and these surrounding circumstances conclusively impute a fairly definite knowledge to defendant of Govind's will..... But regard being had to the common course of human affairs, the average intelligence of a man of ordinary prudence and the normal working and reading of the mind of a man on such occasions and matters, it is impossible to believe that defendant had either no knowledge of Govind's will and the trust thereunder or he failed to make the enquiry."

As the learned Judge of the lower appellate Court came to the finding that the defendant had knowledge of the trust and yet purchased the property from Martand and was, therefore, not a *bona fide* purchaser for value without notice, the said finding must be held to be a finding of fact, and it would not be open to the defendant-respondent to go behind it or agitate against it in this letters patent appeal. In the circumstances, we are of the opinion that the case cited by Mr. Bhalerao does not really assist him.

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On the other hand, Mr. Dharap argued that the learned Judge of the lower appellate Court had, as the result of appreciation of evidence as to facts and circumstances, concluded that the defendant was not a *bona fide* purchaser, and that conclusion was, therefore, a finding of fact as distinguished from a finding of law. He also referred us to Sir Dinshah Mulla's commentary under s. 100 of the Code of Civil Procedure at page 367 and submitted that there was no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error might seem to be. Sir Dinshah Mulla observed that no doubt a second appeal would lie where there was a substantial error or defect in procedure, but an erroneous finding of fact was a different thing from an error or defect in procedure, and where there was no error or defect in procedure, the finding of the first appellate Court upon a question of fact was final, if the Court had before it evidence proper for its consideration in support of the finding. Mr. Dharap also relied on certain authorities and the first case which he referred to was *Bhagwant* v. *Kedari*.[1] In that case the plaintiff filed a suit against Ganpati, as manager of the family, to recover the debt due to him, and on the same day he obtained an order for attachment before judgment of the property in dispute; but before the attachment was actually effected, Martand sold that property along with other property to Kedari Kashinath (defendant No. 1), transferring to him the interests of the whole family in the said property. The plaintiff obtained a money decree against Ganpati in the above mentioned suit, and subsequently filed a suit praying for a declaration that the sale of the property to the defendant was fraudulent and collurable, intended to defeat the execution of his decree and, herefore, void, and that the property conveyed by the saleleed was liable to attachment and sale in execution of his decree against Ganpati. The Court of first instance held that, though the object of the sale was to defeat an anticipated execution, the sale was effected for a valuable consideration and was valid, and that the property was not liable to attachment and sale in execution of plaintiff's decree. This decision was upheld in appeal by the District Court. Against it the plaintiff preferred a second appeal to the High Court. In the second appeal it was held by the High Court that the question of *bona fides* was one of fact and, as shown in *Darvil* v. *Terry*,[2] would in England be left to the jury and it was, therefore, one on which

[1] (1900) 25 Bom. 202.

[2] (1861) 30 L. J. Exch. 355.

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the High Court could not pronounce in second appeal; nor could an objection involving questions of disputed facts as incidental to a point of law be taken in second appeal. It was observed further that the plaintiff, if he wished to challenge the good faith of the transaction notwithstanding consideration passed, should have raised the point at an earlier stage, but could not do so in second appeal. Mr. Dharap relies on this authority in order to submit that the question whether the defendant was a *bona fide* purchaser for value without notice or not is a question of fact, and that being so, the same point could not be agitated in the second appeal, the learned Judge of the lower appellate Court having already found it against the defendant.

The next case to which our attention was invited by Mr. Dharap was *Nafar Chandra Pal* v. *Shukur*.[1] It was observed by their Lordships of the Privy Council in that case as follows (p. 187):—

> "Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact."

From this an argument is advanced by Mr. Dharap that the learned Judge of the lower appellate Court has found it as a matter of fact, however, grossly erroneous that finding might be, that the defendant was aware of the terms of the will of Govind and was also aware of the trust, i. e., the fact that Martand was holding the estate of Govind in trust, and that on the basis of those findings he came to the conclusion that the defendant was not a *bona fide* purchaser for value without notice. In these circumstances, it is argued by Mr. Dharap that in this particular case the finding that the defendant was not a *bona fide* purchaser for value without notice would be a finding of fact and it would not be open to the defendant to agitate it again in this letters patent appeal.

The next case to which we were referred by Mr. Dharap was *Pundit Ram Ratan Lal* v. *Musammat Akhtari Begam*,[2] in which also it was held that the question whether or not a certain transferee was a *bona fide* transferee for consideration

[1] (1918) L. R. 45 I. A. 183. [2] (1939) 14 Luck. 621.

was a question of fact. In delivering the judgment their Lordships had also referred to the authorities in *Bhagwant* v. *Kedari*, and *Daulat Ram* v. *Ghulam Fatima*.[1]

The last case to which our attention was invited by Mr. Dharap was the case of *Ambabai* v. *H. R. Dani*,[2] in which it was observed by Mr. Justice Pollock as follows (p. 509):—

> "The third question is whether the transferees are protected by s. 41 of the Transfer of Property Act. They pleaded that they were *bona fide* transferees for value. They did not specifically plead that they took reasonable care to ascertain that the transferor had power to make the transfer, and there is very little evidence of any such inquiry. Here again there are concurrent findings of the lower Courts that the transferees did not act in good faith, and that finding must be accepted here."

On the authority of this case also it is submitted by Mr. Dharap that the question whether the defendant was a *bona fide* purchaser for value without notice or not was a question of fact, and the learned Judge of the lower appellate Court having already found it against the defendant, it was not open to the defendant to agitate it again in the letters patent appeal.

Having carefully considered the various authorities to which our attention was invited in this appeal, we are of the opinion that the learned Judge of the lower appellate Court having come to the conclusion from the evidence before him that the defendant was not a *bona fide* purchaser for value without notice, that finding is a finding of fact which it would not be open to us to go behind in this letters patent appeal. It is argued by Mr. Dharap, and rightly, that although a presumption to be drawn from an extract from the Record of Right is a point of law, the question whether it is rebutted or not is a question of fact. Similarly, although the consequence which may arise from the conclusion that a transferee is a *bona fide* transferee for value without notice would be a point of law, the conclusion itself would be a question of fact particularly in the circumstances of the present case, and this is what was meant, we think, by Sir Dinshah Mulla when he observed at page 370 of his commentary under s. 100 of the Code of Civil Procedure that the legal conclusion from proved facts is a point of law. In the present case the proved fact would be that the defendant was not a *bona fide* purchaser and the legal conclusion from it would be that he was, therefore, not entitled to the protection of s. 64 of the Trusts Act.

[1] (1924) 89 I. C. 953.

[2] [1948] Nag. 506.

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The last point raised by Mr. Bhalerao for the defendant was that the plaintiff's suit was barred by limitation under art. 120 of the Indian Limitation Act. Now, art. 120 relates to suits for which no period of limitation is provided elsewhere in the schedule to the Act. We really are unable to understand how art. 120 of the Act can be invoked in the present case. If we turn to art. 134 of the Act we find that it relates to suits to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration. It is to be noted that the present case with which we are dealing is a case of claiming possession of property from a person who is a transferee from a trustee. Therefore, in our opinion, art. 134 which expressly relates to suits for recovering possession of immoveable property which has been transferred by a trustee would be the proper article which would apply in this case. Alternatively, we are of the opinion that art. 144 would apply. Article 144 relates to suits for possession of immovable property or any interest therein not otherwise especially provided for. This being a suit by the plaintiff for recovering possession of the suit property from the defendant, art. 144 would clearly apply alternatively if art. 134 does not apply. Only in cases which would not be governed by art. 134 or by art. 144 would the question arise of the applicability of art. 120. That being so, we really cannot understand how art. 120 can be invoked in this case. The period of limitation under art. 134 or art. 144 is twelve years. In this case, the sale took place on April 11, 1933. The suit was filed on April 18, 1940, that is nearly seven years after the sale. Accordingly the suit would be within time. In the circumstances, we reject the contention raised by Mr. Bhalerao that the suit was barred by limitation.

In the result, this letters patent appeal must be allowed and the Second Appeal No. 608 of 1948 must stand dismissed. The judgment of the lower appellate Court will stand restored and the plaintiff's suit will stand decreed as ordered by the lower appellate Court.

In regard to Second Appeal No. 1110 of 1948, it is to be noted that although the suit property was purchased by Martand in the year 1907, the plaintiff sat quietly for nearly 33 years and did not do anything by way of challenging the conduct of Martand as a trustee. It is also to be noted that although the sale of the suit property to the defendant took place in the year 1933, the plaintiff thereafter did nothing for a period of seven

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years. In the meantime, that is to say, during the period of seven years, the defendant made substantial improvements in respect of this property. In these circumstances, we are of the opinion that the learned Judge of the lower appellate Court rightly passed an order that the mesne profits should be calculated from the date of the payment of the amount of Rs. 2,085, which was directed to be paid by the plaintiff in respect of the improvements made by the defendant in regard to the suit property. We are of the opinion that the discretion exercised by the learned Judge of the lower appellate Court in this behalf was properly exercised and accordingly Second Appeal No. 1110 of 1948 must also stand dismissed.

Regarding costs, I am in entire agreement with the order proposed by my learned brother.

Appeal allowed

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas.

PROVINCE OF BOMBAY (ORIGINAL DEFENDANT), APPELLANT *v.* MADHUKAR GANPAT NERLEKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

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Government of India Act, 1935 (26 Geo. V, c. 2) ss. 240 (3), 243—Charges of misconduct against Police Sub-Inspector—Departmental enquiry by District Superintendent of Police—Order of dismissal—Order passed without issuing notice to show cause against it—Jurisdiction of Court to examine decision—Bombay District Police Act (Bom. IV of 1890), s. 27—Rules regarding conduct of departmental enquiry—Breach of rules—Validity of dismissal order—Suit for damages for wrongful dismissal—Plaintiff entitled to what relief—Breach of rule whether furnishes cause of action.

The right of dismissal of a police officer of a subordinate rank is a condition of service within the meaning of s. 243 of the Government of India Act, 1935, and, therefore, the right can be exercised in the manner indicated by the Police Act. In the rules framed under s. 27 of the Bombay District Police Act, 1890, there is no provision that before dismissing a police officer he should be given a notice to show cause against his proposed dismissal. Where, therefore, an order of dismissal is passed against a Sub-Inspector of Police without issuing to him a notice to show cause against it, the order cannot be challenged on the ground that it offends against the mandatory provisions of s. 240 (3) of the Government of India Act, 1935.

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* First Appeal No. 31 of 1948 with Cross F. A. No. 52 of 1948.