

(1937) 09 MAD CK 0019
In the Madras High Court

Alam Khan Sahib

APPELLANT

Vs

A.L.M. Karuppannaswami Nadan and Others

RESPONDENT

Date of Decision : 28-09-1937

Acts Referred:

Citation : AIR 1938 Mad 415 : (1938) 47 LW 165 : (1938) 1 MLJ 113

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—This appeal raises two important questions, first as to limitation and adverse possession in suits by trustees of religious institutions and secondly, as to a presumption in support of titles from long enjoyment. The suit has been brought for the recovery of nearly 60 items of immovable property from about as many defendants. The plaintiff (the appellant) claims them as the present trustee of an institution known as the Bairam Khan Thaikkal. The lower Court has upheld the plaintiff's contention that there was a valid wakf and that the gift of the lands, by whomsoever made, was confirmed in 1865 after the inam inquiry. The original trustee was said to be a holy saint, an ancestor of, the plaintiff, who may be called Bairam Khan I. Nothing is known of the subsequent history of the Thaikkal till the trusteeship was assumed by Bairam Khan II, the father of the plaintiff. He was a long-lived man, who after alienating the bulk of the trust property, died in the year 1914. The plaintiff brought this suit in 1926, that is, just on the eve of the, expiry of 12 years from his father's death. The suit lands, as, the learned trial Judge points out in his careful judgment, fall under two groups : (1) the lands of those defendants who trace their title to Bairam Khan II and (2) those who held

under alienations (mostly dating from a period anterior to him), made by persons whose connection with the Thaikkal has not been shown. The

second group may be further subdivided into (a) such of those defendants as gave positive evidence of their possession requisite under Article 144

and (b) those in whose case this evidence was lacking, they having remained ex parte in the lower Court.

2. All the properties claimed fall under the one or the other of the categories mentioned above. The law governing the present case is, as it stood,

before the recent amendment of the Limitation Act, which in 1929 enacted three new Articles 134-A to 134-C. It is unnecessary to show how the

law was gradually developed by the decisions of the Judicial Committee, as it would quite suffice to state the principles which may now be taken as

established by authority.

1. Notwithstanding that property devoted to religious purposes is as a rule inalienable, it is well settled law that a trustee has got power to incur

debts and to alienate the trust property to the same extent as the manager of an infant heir see *Sri Vidya Varuthi Thirtha Swamigal v. Balusami*

Aiyari (1921) 41 M.L.J. 346 : L.R. 48 IndAp 302 : ILR 44 Mad. 831 (P.C.). His alienations can be justified by proof of necessity for the

preservation of the endowment or institution. *Srimath Daivasikhamani Ponnambala Desikar v. Periyanan Chetti* (1936) 71 M.L.J. 105 : L.R. 63

IndAp 261 : ILR 59 Mad. 809 (P.C.).

2. Where the disposition by the trustee is of the "math and its properties" (which apparently means the institution itself), it is wholly void and would

in law pass no title, with the result, that the possession of the assignee would be adverse from the moment of the attempted assignment. See *Ram*

Charan Das v. Naurangi Lal (1933) 64 M.L.J. 505 : L.R. 60 IndAp 124 : ILR 12 Pat. 251 (P.C.).

3. Where the assignment is of one or more of the properties of the mutt, as distinguished from the institution, adverse possession will commence to

run from the cessation of the office of the alienating mahant. The reason is, that though the grant purports to be for a longer period, it is good to the

extent of the Mahant's interest, so that no question of adverse possession can arise during the period when the grant is effective. (See the same

case, pages 130 and 131.) This rule will be stated more fully later on.

4. If a suit by the predecessor is barred, his right is extinguished and the succeeding trustee is equally without title. This is definitely laid down by

Gnanasambandha Pandaram's case (1899) 10 M.L.J. 29 : L.R. 27 IndAp 69 : ILR 23 Mad. 271 (P.C.), where the contention that there was a

creation of successive life-estates was refuted on the ground that Tagore v. Tagore (1872) L.R. IndAp (Supp.) 47 is as much ""applicable to a

hereditary office and endowment as well as to other immovable property"".

3. As observed by Banerjee, J., in Nilmony Singh v. Jagabandhu Roy ILR (1896) Cal. 536:

The succeeding shebait forms a continuing representation of the idol's property. To hold otherwise, it would lead to a most anomalous result; for

then it would follow...the eleventh shebait, it may be after a hundred years or more would still be in time to institute a suit for recovery of

possession. See also Chidambaram Chetti v. Meenammal (1898) 9 M.L.J. 8 : ILR 23 Mad. 439 and Mitra on Limitation, Vol. I, pages 215 and

216.)

5. When, unlike case No. 3, the disposition amounts to a negation of the trust, the statute would run from the very date of the alienation. The

principle underlying this is, that the disposition is not made by the trustee as such, but the property is treated as his private property and the act is

adverse to the trust, with the result, that the period of limitation would commence from the date of the disposition. This is illustrated by Subbayya v.

Mustapha (1923) 45 M.L.J. 588 : L.R. 50 IndAp 295 : ILR 46 Mad. 751 (P.C.) where the property was sold in execution, but the rule equally

applies to a voluntary sale. Debendra Nath Sadhukhan and Others Vs. Naharmal Jalan and Others, and the judgment of Ramesam and Stone, JJ.,

in appeal (not reported).

6. These rules are not confined to Madathipathis and Mutawallis, but extend to other trustees as well, of religious institutions, such as

Dharmakarthas and shebaites of family idols. Srimath Daivasikhamani Ponnambala Desikar v. Periyanan Chetti (1936) 71 M.L.J. 105 : L.R. 63

IndAp 261 : ILR 59 Mad. 809 (P.C.).

3. In regard to the operation of the principle embodied in propositions three and four above, two cases may be referred to in particular. In Vidya

Varuthi's case (1921) 41 M.L.J. 346 : L.R. 48 IndAp 302 : ILR 44 Mad. 831 (P.C.), the plaintiffs instituted the suit in 1913, basing their claim

upon a permanent lease of 1891. The facts are these. The plaintiffs were let into possession by the Mahant No. 1 under the lease aforesaid, which

purported to be a permanent lease, but which under the law could enure only during the latter's lifetime. With regard to the Mahant No. 2 he was

vested with power similarly limited. The receipt of rent by him was properly referable to a new tenancy created by himself. His administration

lasted until 1906 and the plaintiffs' possession never became adverse until his death. It was therefore held that the plaintiffs had acquired no title

and their suit was dismissed. Turning to the next case Srimath Daivasikhamani Ponnambala Desikar v. Periyanan Chetty (1936) 71 M.L.J. 105 :

L.R. 63 IndAp 261 : ILR 59 Mad. 809 (P.C.) it illustrates the same principle, although the result was different. There a perpetual cowl of the

temple land was granted in 1865 to two Chetties. The suit was brought in ejectment in 1918 by the receiver appointed to manage the temple. The

case is instructive, though the facts are somewhat complicated. The manager who granted the cowl died in 1875. There was a succession of

dharmakartas down to Arumuga, who died in 1893 and was succeeded by Thandavaroya, who died in 1902. From that time Nataraja was the de

facto manager, until he was removed by a decree of the High Court in 1913. What happened between the death of the first manager in 1875 and

the assumption by Nataraja in 1902 is not clear. But the Judicial Committee asks the question, ""when Nataraja succeeded in 1902, what was the

position?"" It was open to him either to create a ""new tenancy"", as did Mahant No. 2 in Vidya Varuthi's case (1921) 41 M.L.J. 346 : L.R. 48

IndAp 302 : ILR 44 Mad. 831 (P.C.) and accept the cowl rent as payable under that tenancy, or to treat the permanent lease as binding and on

that footing, to receive the rent. It was the latter alternative that found favour with their Lordships. Granting then that each of the preceding

managers created a tenancy which could enure for his period, so far as Nataraja was concerned, he did no such act, and the statute began to run

from the date of his management. The title therefore of the cowledars became perfect and the receiver's suit brought in 1918 was dismissed.

4. These two cases bring out the principle very clearly. The alienation in each case, which purported to be for a longer period would be effective

only during the alienating trustee's tenure of office. It was competent to the succeeding trustee or trustees to make similar limited dispositions and

these two cases recognise that when that has been done, the alienee's adverse possession commences under Article 144 from the cessation of the

office of the last of such trustees. In short, whether there is one trustee or a succession of trustees, the rule is the-Same, namely, that possession

will not be adverse during the continuance in office of the alienating trustee or trustees.

5. Now, how do the facts stand here? So far as the alienations made by Bairam Khan II the preceding trustee are concerned, the suit is clearly in

time as the lower Court has held; it has been brought, as already stated, by Bairam Khan's successor within 12 years of Bairam Khan's death.

6. Then the question arises, were these alienations of Thaikkal property by Bairam Khan II made for purposes binding on the trust? All of them

were dispositions by way of sale and the learned Judge has upheld them, excepting two with which we shall presently deal, on the ground that

necessity has been proved. He has done so, notwithstanding that there was no direct evidence, applying the doctrine relating to ancient

transactions, so repeatedly laid down. In the case of some alienations deeds were produced with the essential recitals and Mr. K. Rajah Aiyar has

stated that he does not press his case in regard to such items. *Dhur Biswas v. Jagat Kishore* (1916) 31 M.L.J. 563 : L.R. 43 IndAp 249 : ILR 44

Cal. 186 (P.C.).

7. Even, where the deeds produced did not contain the necessary recitals, the learned Trial Judge applied the same rule. The question then arises,

does the principle cease to apply where first the deed produced does not contain the recital and secondly, where no deed is forthcoming at all. In

Bawa Magniram Sitaram v. Kasturbhai Manibhai (1921) 42 M.L.J. 501 : L.R. 49 IndAp 54 : ILR 46 Bom. 481 (P.C.) the validity of a permanent

lease granted by a shebait came into question nearly 100 years after the grant. Although the lease deed was produced, there were no recitals which

could be relied on and their Lordships observe that it became ""completely impossible to ascertain what were the circumstances which caused the

original grant to be made"". They declare that it ought to be assumed that the grant was lawfully made, it being the policy the Courts always adopt,

to secure as far as possible quiet possession to people who are in apparent lawful holding of an estate. In *Mohammad Mazaffar-al-Musavi v.*

Jabeda Khatun (1930) 58 M.L.J. 641 : L.R. 57 IndAp 125 : ILR 57 Cal. 1293 (P.C.) their Lordships refer to the above mentioned case and

emphasise this particular aspect of it. This decision contains a very valuable exposition of this doctrine. The sanad appointing the mutawalli of the

wakf prohibited the grant of permanent tenancies. Their Lordships observe that the prohibition in the sanad merely stated the rule of the

Muhammadian Law and did not abrogate the discretion of the Kazi to relax its operation. The question was, whether or not the permission of the

Kazi was to be presumed in the absence of any evidence. The principle is very succinctly stated by the Judicial Committee: the presumption of a

lawful origin in support of proprietary rights, long and quietly enjoyed, is not a branch of the Law of Evidence, but a presumption arising in law in

the absence of evidence. "It is the completion of a right", their Lordships go on to observe, "to which circumstances clearly point, where time has

obliterated any record of the original commencement". In *Venkata Reddi v. Rani of Wadhwan* (1919) 38 M.L.J. 393 : L.R. 47 IndAp 6 : ILR

Mad. 541 (P.C.) the same presumption was applied by the Privy Council to support a sale by a Hindu widow, and in that case it is noticeable that

no deed was forthcoming see the argument of Mr. De Gruyther as reported in *Venkata Reddi v. Rani of Wadhwan* (1919) 38 M.L.J. 393 : L.R.

47 IndAp 6 : ILR Mad. 541 (P.C.). Then again, it is wrong to think that there is an inflexible rule as to the period that must elapse. Their Lordships

point out in *Mahammad Mazaffar-al-Musavi v. Jabeda Khatun* (1930) 58 M.L.J. 641 : L.R. 57 IndAp 125 : ILR 57 Cal. 1293 (P.C.) already

quoted, that in one of the earlier decisions of the Judicial Committee *Murugesam Pillai v. Manickavasaka Pandaram* (1917) 32 M.L.J. 369 : L.R.

44 IndAp 98 : ILR 40 Mad. 402 (P.C.) where this doctrine was invoked, the interval between the impugned grant and the suit which challenged it,

was only 25 years (page 129). So the question is independent of such factors, as, the length of time, the presence of recitals or the production of

the deed, the doctrine being invoked where there is failure of evidence owing to lapse of time. We may also refer to three decisions of our own

Court where the principle under discussion has been fully explained *Somayya v. Venkayya* (1924) 48 M.L.J. 224, *Kumarasami Mudaliar v.*

Narayanasami (1932) 36 L.W. 186 and Raman Thirumumpu v. Karunakara Menon (1932) 38 L.W. 843. Bhojraj v. Sitaram (1935) 70 M.L.J.

225 (P.C.) on which Mr. Rajah Aiyar relies, does not in the least assist him. All that has been held there is that presumptions not to supplement but

to contradict the evidence would be out of place.

8. Paragraph 59 of the lower Court's judgment deals with cases where the deeds contain the requisite recitals and paragraph 60, where no such

recitals are to be found in the deeds produced. In both sets of cases the learned trial Judge, has, for reasons which appear to us valid, confirmed

the alienations. We entirely agree with his conclusion.

9. Then as regards the two alienations to which we have referred, which the learned Subordinate Judge has refused to uphold (paragraph 61 of the

judgment), we are unable to agree with his view. In making the sales, Bairam Khan dealt with the properties as his own and his act amounts to a

repudiation of the trust. In such cases, the possession of the vendee, as already observed (see Rule No. 5) would be adverse from the date of the

alienation. One of the sales in question was made in 1897 and the other in 1912 and the suit having been filed in 1926, the plaintiff's claim in regard

to these two items is barred. The lower Court's judgment to this extent is set aside. So much for the alienations that fall under the Group I

mentioned at the commencement of this judgment.

10. Next, under Group II the first set of alienations is those covered by sub-division (a). The defendants here have adduced, as already observed,

positive evidence of their possession for the requisite period and the lower Court has in respect of these items disallowed the plaintiff's claim. Mr.

Rajah Aiyar does not seriously contend that its view is wrong and the decision of the Court below is accordingly upheld.

11. Then as to the sub-division (b) in Group II, the question has been raised whether Article 142 or 144 applies. As regards all the defendants, the

case set up by the plaintiff in his plaint is that they were his tenants. The lower Court has found, and rightly, that the plaintiff has hopelessly failed in

proving tenancy of any sort. The defendants with whom we are here concerned, as already observed, not having appeared, no evidence was

adduced on their behalf. But even the plaintiff's witnesses depose that the suit properties were never to their knowledge in the possession of the

Thaikkal (P.W. 3) but, on the contrary, strangers were in possession (P.W. 2). This evidence of course falls short of what would be requisite

under Article 144. That the plaintiff was out of possession would not suffice; the admission that strangers were in possession, would be equally

insufficient, for, it might mean that there were independent trespasses not connected as of right. But the cases cited by Mr. S. Panchapakesa Sastri

in the admirable argument he has addressed to us in this appeal, show that Article 142 is the right provision applicable and not Article 144. It is

unnecessary on the facts here to deal with the broad question, whether in a suit in ejectment when the plaintiff's title is proved, there rests no

further duty upon him and the burden shifts to the defendants to prove affirmatively adverse possession under Article 144 (see the observation of

Sir John Edge in *Dharani Kanta Lahiri v. Garbar Ali Khan* (1912) 25 M.L.J. 95 (P.C.); see also the judgment of Phillips, J., in *Kuppuswami*

Mudaliar Vs. Chockalinga Mudaliar, ; see further *Shiva Prasad Singh v. Hira Singh* (1921) 62 I.C. 1 and *Bindhyachal Chand v. Ram Gharib*

Chand ILR (1934) All. 278. That broad question does not arise here, for as above stated, the case set up by the plaintiff was one of tenancy. That

is tantamount to saying that the defendants, when they repudiated his title as landlord, dispossessed him, so that here is in effect an assertion of

possession and dispossession, precisely what is contemplated under Article 142. In *Maddali Venkatarayudu (deceased) and Others Vs. Movva*

Sankarayya, (decided by White, C.J. and Miller, J.), there was a false recital in the plaint that the defendant was the plaintiff's tenant (see the

argument of Mr. C.R. Thiruvenkatachariar) and that was held not to exclude the application of Article 142; the lower Court had there held that

Article 144 applied, but its decision was reversed. In *Gopal Chunder Chuckerbutty v. Nilmoney Mitter* ILR (1884) Cal. 374 also (decided by

Garth, C.J. and Cunningham, J.) the tenancy alleged in the plaint was found to be false and the case was treated as one for recovery of property as

upon a dispossession. Garth, C.J., referring to the false assertion regarding the letting, observes:

If a mere allegation of that kind could relieve a plaintiff from the burthen of proving, that he or those under whom he claims, had been in possession

within twelve years, that device might always be resorted to for the purpose of evading the law of limitation.

12. To the same category belongs Behari Lal v. Sundar Das ILR (1935) Lah. 442. There too, the plaintiffs alleged that the defendant was put in

possession as their tenant. From this assertion the necessary inference, as the learned Judges point out, is that possession and dispossession is

alleged, Mr. Rajah Aiyar for the appellants, however, relies on the following four cases : Periya Jeeyangarswami v. Esoof Sahib (1924) 21 L.W.

398, Sulaiman Rowther v. Davood Khan Sahib (1935) 42 L.W. 593, Ramanujachariar v. Sundarachari (1926) 25 L.W. 127 and (Mayyikaran

Kalikakath) Kunhi Moidin Vs. Kalandarakath Pakkar Kutty Karnavan and Another, of which the first two are decisions of the same single Judge,

the third was also decided by a Judge sitting singly and the fourth contains no discussion of the principle involved. In Periya Jeeyangarswami v.

Esoof Sahib (1924) 21 L.W. 398 the first of the aforesaid cases, though the lease set up was found against, it was held that Article 144 applied, as

the plaintiff could rely on his title and the onus of establishing adverse possession lay on the defendant under that article. The learned Judge relies

inter alia upon Jai Chand Bahadur v. Girwar Singh ILR (1919) All. 669, which, as pointed out in Behari Lal v. Sundar Das ILR (1935) Lah. 442,

already referred to, has been dissented from in a later Full Bench decision of the same Court. Moreover, Phillips, J., in Kuppuswami Mudaliar Vs.

Chockalinga Mudaliar, , already cited, doubts the correctness of Periya Jeeyangarswami v. Esoof Sahib (1924) 21 L.W. 398, which has also been

dissented from the Lahore decision, Behari Lal v. Sundar Das ILR (1935) Lah. 442. With great respect, we are unable to follow the four cases

relied upon by the appellant. The lower Court's decision, disallowing this part of the plaintiff's case, is therefore correct.

13. The result is that the appeal is dismissed with costs; of the 40th respondent (one set); of the 30th to 32nd respondents (one set); and of the

respondents 5, 9, 20, 26, 28, 41, 64 and 65 (one set). As regards the memorandum of objections (which deals with the two excepted items

considered above) that is allowed, with costs of the first respondent which will include the out-fees paid for the purchase of the printed papers in

the appeal. The appellant will pay the court-fee payable to the Government on the Memorandum of appeal.