

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

1919,
February,
5 and 7.

v.

GULAM MAHABOOB KHAN SAHIB (THIRD PLAINTIFF),
RESPONDENT.*

Inam—Resumption of—Grant by Nawab for a mosque, services therein and feeding the poor—Confirmation by British Government—Misappropriation by trustees—Alienation by trustees on mortgage and on long lease—Performance of services on lower scale—Mosque kept in good repair—Power of Government to resume inam—Terms of confirmation, construction of—Suit by trustee against Secretary of State—Suit for declaration and possession—Limitation Act (IX of 1908), art. 14 or 144, applicability of.

An inam, granted by the Nawab of the Carnatic in 1775 for the upkeep of a mosque, the performance of services and ceremonies therein and the feeding of travellers and the poor, was 'confirmed' by the British Government, 'permanently so long as the service was performed.' Owing to persistent misappropriation of the income by the grantees' successors and alienations by some of them of two of the villages included in the inam, one on a usufructuary mortgage in 1883 for thirty years and the other on a long lease of twelve years in 1894 for purposes not binding on the charity, the Government resumed the inam in 1903 and credited the assessment to its general revenues. It appeared, however, that the mosque was maintained in good repair, services and ceremonies were regularly performed there though on a smaller scale. The present trustee, disputing the power of the Government to resume the inam, sued in 1913 the Secretary of State for India in Council for a declaration that the resumption was invalid and for recovery of possession of the inam villages; the latter contended that the resumption was valid and that the suit was in any event barred by limitation under article 14 of the Limitation Act.

Held, (1) that, as the charity did not fail altogether, the performance of the charity was not wholly discontinued and the alienations (mortgage and lease) did not permanently deprive the charity of the use of the property, the Government was not authorized, under the terms of the grant, to resume the inam in the circumstances of this case; and

(2) that, the resumption being a nullity the suit for possession was not barred by limitation, as article 144 and not article 14 of the Limitation Act applied to the case.

On a reasonable construction of the words of the grant, any default in the performance of services of however minor a character would not entitle the Government to resume the grant, but what was contemplated was that if the

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL

charity failed altogether or substantially as through the disappearance of the mosque or of persons who would resort to the institution for prayers, etc., or if the charity was entirely discontinued, then the Government would be entitled to resume the grant.

GULAM
MAHABOOB
KHAN SA HIB.

APPEAL against the decree of K. SUNDARAM CHETTIYAR, the temporary Subordinate Judge of Nellore, in Original Suit No. 14 of 1916.

The suit was instituted by the present trustees of a mosque and tomb at Anamasamudrampeta against the Secretary of State for India in Council for a declaration that the defendant had no right to resume the two suit villages in 1903 and for recovery of possession of the villages together with mesne profits for faslis 1321 to 1324. The suit villages together with some other villages were granted as inam by the Nawab of the Carnatic in 1775 for the upkeep of a mosque and a tomb, etc., in good repair, for celebrating certain annual and monthly ceremonies therein, for distributing food to travellers and fakirs and others, and for payment of salaries to servants and maintenance allowance to the members of the family of Hazarath who was the original founder and trustee of the charities. The inam was confirmed by the British Government permanently so long as the services were performed. The successors in the office of Sajjada misappropriated the income and alienated the trust properties for purposes not binding on the trust, and frequent complaints were made to the Collector. Among these alienations, one was a usufructuary mortgage in 1883 of one of the suit villages for a period of thirty years after which period the property was to be restored to the trustee without payment, and another was a lease in 1894 of the other village for a long period of twelve years; the Collector ordered that the Sajjada should redeem the mortgage and cancel the lease within one year, and that, on his failure to do so, the two villages would be attached and taken possession of by the Government. As the trustee failed fully to obey the order, the villages were resumed and actual possession was taken by Government, as found by the Subordinate Judge, only after the 10th September 1903. Subsequently a suit was brought by two worshippers, Original Suit No. 21 of 1906 in the District Court of Nellore, to remove the then trustee, and it was decreed and a Receiver was appointed to manage the properties of the charity. Later on, another suit was filed for a scheme (Original Suit No. 36 of 1912)

and two new trustees, namely, the present first and second plaintiffs, were appointed and a scheme was drawn up. These latter applied to the Collector to return the resumed villages to the trust in respect of which a proper scheme of management had been made, but the Government refused to give back the villages. The trustees thereupon filed the present suit against the Secretary of State for a declaration that the resumption was invalid and that the defendant should deliver possession of the two villages on behalf of the trust together with past mesne profits. It was found by the Subordinate Judge, who tried the suit, that the mosque and tomb were kept up in good repair, that the services and ceremonies and the feeding of travellers, etc., were performed though on a smaller scale at the time of the resumption of the inam by the Government in 1903. The Subordinate Judge held that the resumption of the villages was not justified by the terms of the grant and that the suit for recovery of possession was not barred by limitation, and he accordingly decreed delivery of possession of the two villages to the plaintiff together with mesne profits for four faslis. The Secretary of State preferred this appeal to the High Court.

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHABOOB
KHAN SAHIB.

The *Acting Government Pleader (V. Ramesam)* for the appellants.

T. V. Venkatarama Ayyar for the respondent.

ABDUR RAHIM, J.—The appellant, the Secretary of State for India, was sued by the respondents for recovery of two villages of Ganduvaripalle and Akbarabad in the district of Nellore. The Government purported to resume these villages which are described as dharmadayam inams by an order passed some time in 1903. These two and eight other villages were made wakf for the maintenance of a mosque, and for feeding the poor and similar purposes in the days of the Carnatic Nawab, Wallajah. The history of the grant is set out in the enclosure to the Inam Register, Exhibit I. There was a man called Rahimtulla Sahib Pirzada, otherwise described as the Hazarath, who was regarded as a holy man and it was to him that the Foujdar of Nawab, Wallajah, at first made a grant of two villages,—not those with which we are concerned,—so that he might feed Saiyid Muhammadans and other poor men and “ ascribe its virtue to Prophet-Muhammad.” Then it appears eight other villages including the two in question were purchased by the Hazarath

ABDUR
RAHIM, J.

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHBOOB
KHAN SAHIB.
—
ABDUR
RAHIM, J.

at a nominal price from the then Jaghirdar of Udayagiri and he made a gift of them for charitable purposes. He was in possession and enjoyment of the properties in his lifetime and was succeeded after his death, he having died without any issue, by a relation of his wife. The dedication to charity was made some time in the year 1775. After the death of the original founder the properties were held by his successor and the latter's descendants. In a previous suit instituted under section 92 of the Civil Procedure Code, the whole history of the institution has been reviewed and it was found that the then incumbent of the office of trustee or 'Sajjada' as he was called, one Muhammad Yusuf Sahib, was not fit to hold the office having been guilty of gross mismanagement, misappropriation, and misapplication of trust funds. Even before his time, there had been persistent mismanagement of the trust properties. Some of the previous trustees and he himself made alienations of some villages either by mortgaging them or by granting long leases. The two villages in question, Ganduvaripalle and Akbarabad, were also similarly alienated by the predecessor of the trustee who was the main defendant in the suit under section 92 of the Civil Procedure Code above referred to. Ganduvaripalle was leased for twelve years in 1894 and Akbarabad was usufructuarily mortgaged for thirty years in April 1883. The question for decision is whether these two alienations amount to a violation of the conditions in the inam patta so as to entitle the Government to resume the villages. As regards Ganduvaripalle, the lease practically expired some time in 1906, and the usufructuary mortgage of Akbarabad had still about ten years to run at the date of the resumption if the mortgage debt was not paid in the meantime. The inam title-deed itself is not forthcoming, but we have the inam register and there, in column 21, the entry over the signature of Mr. Chentsal Rao is :

"I recommend the villages to be confirmed permanently so long as the service is performed."

And looking at column 8, the service there meant is :

"for feeding the travellers and poor men and for maintaining an efficient establishment for the services in the mosque at Anama-samudrampeta and for performing the usual festivals, service performed."

The order of the Inam Commissioner, Mr. Taylor, is as follows:—

“Although there is no sanad or entry in the old accounts in support of 8 of these villages the undoubted and uninterrupted possession of them all as inams for nearly a century must be respected.

“The ten villages are confirmed in one deed and continued to the parties in column 16 for the maintenance of the religious objects for which they were granted.”

Admittedly this is not what is called a personal inam; nor is it an inam in which the grant is made to a person on condition of his performing certain services of a religious character. The learned Government Pleader conceded that it was a charitable inam or dharmadayan, that is to say, that it was an inam for the maintenance and support of certain charitable and religious objects. What is granted here, so far as the Government is concerned, is the Government assessment; that is to say, the British Government confirmed the grant and exempted the villages from payment of the Government revenue. I might mention that Mr. Venkatarama Ayyar appearing for the respondents argued that this was not an inam which the Government was entitled under any circumstance to resume, because it comes within the description of the inams specified in section 2 of the Regulation 31 of 1802. Under that section the inams which are declared to be non-resumable are certain grants for holding lands exempt from the payment of public revenue. But the question whether the present grant is one of that category, having been exempt from payment of public revenue at the date mentioned therein, was not raised before the Court of trial, and as pointed in *Sikkandar Rowthen v. The Secretary of State for India*(1) this is a question which should not be entertained for the first time in this Court if it was not properly raised in the Court of trial. I shall proceed on the assumption that the case is not covered by section 2 of Regulation 31 of 1802, but that the villages were liable to be resumed if the condition on which the villages were held had been violated. I will also assume that the recommendation of Mr. Chentsal Rao forms part of the order of the Inam Commissioner, the effect of which would be that the grant was to continue so long as the services mentioned are performed. It

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
o.
GULAM
MAHABOOB
KHAN SAHIB.

ABDUR
RAHIM, J.

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHABOOB
KHAN SAHIB.

ABDUR
RAHIM, J.

will be noticed that some of the charitable objects are of an interminable character, such as feeding the travellers and poor men. One of the main objects of the grant is the maintenance of the mosque. It appears that on the death of the founder of these charities his tomb became an object of considerable veneration in the locality and by a long course of usage the proper maintenance of that tomb, the celebration of 'urs' and other ceremonies in commemoration of that holy personage became incorporated with the objects of the wakf.

The learned Subordinate Judge has gone into the evidence and come to the conclusion that the mosque is maintained in good repair and the services are regularly performed there and similarly the Hazarath's tomb is properly maintained and the services in connexion with the tomb are observed. But there has undoubtedly been considerable mismanagement for a long time and it may be taken that the religious and charitable observances have not been uniformly performed either on the scale or in the manner in which they should have been. At the same time there can be no doubt whatever upon the evidence that there has been a substantial performance of the charitable and religious objects of the foundation in spite of misapplication and misappropriation of trust moneys from time to time by the trustees for the time being. In this connexion it may be pointed out that in addition to the income of the ten villages some income is derived also from presents made at the tomb of the Hazarath. Further it has already been held in the suit under section 92 of the Civil Procedure Code that the maintenance of the descendants of the second Muttawalli or sajjadanishin is also one of the objects of this charitable foundation. Alienation of these two villages and misapplication of the trust funds such as there have been would not in my opinion strictly be a breach of the condition of the inam grant, "so long as the service is performed." As found by the Subordinate Judge the services are performed though not to the full extent of the income actually derived or which could be derived from the properties. It is, however, argued by the learned Government Pleader that the alienation of the two villages, although not of a permanent character, is a diversion of the inam villages to purposes alien to the grant and therefore the villages have become resumable. No doubt in a case where inam villages are

alienated in a manner so that they are lost to the charity and the charity cannot be maintained without their income the forfeiture clause would in my opinion come into operation. But I am not prepared to go so far as to hold that a temporary alienation, although for a number of years and as such beyond the power of the trustee for the time being, necessarily amounts to a violation of the condition of the grant. The fact cannot be overlooked that this is not a personal grant.

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHABOOB
KHAN SAHIB.
ARDUR
RAHIM, J.

The grant is to a charity of a permanent character. It is inconceivable that it should have been intended that any act of mismanagement or malfeasance on the part of a trustee of a charity like this should result in the resumption of the grant. If that was the intention one would have expected that the condition would have been to the effect that an attempt of any character at alienation by the trustee would make the inam liable to resumption. In the case already mentioned in *Sikkandar Rowthen v. The Secretary of State for India*(1) it has been suggested that

“a mere alienation of the trust property may not entail a forfeiture if the trustees kept the mosque clean and in good repair, put up the lights and kept it as a place fit for worship in the usual manner.”

It is not necessary for us to lay down any such general proposition, for here the alienation was not such as to deprive the charity of the use of the properties. It was further pointed out by Mr. Venkatrama Ayyar, the learned vakil for the trustee-respondent, that the lease and the mortgage of the villages in question were not binding on the charity and that the trustee Muhammad Yusuf Mia Pirzada in fact took steps to get back the villages from the lessee and the mortgagee. The evidence on that point is to the effect that he managed to obtain possession of the villages by getting the tenants to attorn to him by executing muchilkas. It is, however, found that the mortgage amount due on Akbarabad was not paid, but the trustee or sajjadanishin contends that the charity was not bound to pay inasmuch as the debt was not incurred for the benefit of the charity. It seems to me that we must put a reasonable construction upon the language of this grant which is of an extremely laconic character. All that is said is

“the villages to be confirmed permanently so long as the service is performed.”

(1) (1917) 5 L.W., 402.

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHABOOB
KHAN SAHIB.

ABDUR
RAHIM, J.

It cannot possibly mean that any default in the performance of the service of however minor a character would come within these words. Putting a reasonable construction on these words what is contemplated is that if the charity fails altogether, or substantially for instance, through the disappearance of the mosque or of persons who would resort to the institution for prayer, etc., or if the charity is entirely discontinued then the Government would be entitled to resume the grant. And that seems to be the interpretation placed on such grants by the Board of Revenue which is the highest revenue authority in the Presidency as noticed in the Standing Orders placed before us. See Standing Order No. 54 of the old Order, pages 120 to 122, paragraphs 2 and 3. Paragraph 2 says :

“Religious and charitable inams may be resumed on the ground that the land in respect of which the title-deed was issued has been alienated or otherwise lost to the institution or service to which it once belonged or that the terms of the grant are not observed.”

Then it says in paragraph 3 :

“In cases of abandonment or discontinuance of service, all reasonable endeavours should be made to secure a continuance or revival of religious and charitable institutions and services before proceeding to the resumption of inams attached to them.”

That implies that the resumption is to be made only in cases of abandonment or discontinuance of service. Similarly in paragraph 4 it is said :

“Proposals for the resumption of religious and charitable inams should be submitted to the Board of Revenue except in cases of inams or money allowances attached to temples, mosques, etc., which have been abandoned or in ruins for twelve years or more.”

We are not bound by any interpretation of the Board of Revenue. But I allude to it as showing that that is the customary interpretation which the Board of Revenue has placed on these and similar words of grant and which in my opinion accords with the proper interpretation of the grant in question in this case. I might here mention that what the Government has done in this case is not to order the revenue to be assessed upon resumption to be paid to the charity but has directed the assessment to be credited to the general revenues. The Government might be entitled to do that if they had a right to

resume the grant, but I might here refer to paragraph 7 of the Standing Order already referred to.

“When the land has been alienated but the institution or service is still maintained, the inam will be resumed, converted into a heriz deduction and reassigned to the working incumbent or trustee.”

The assessment is to be credited to the general revenues only in the case of a service inam, originally granted for the benefit of an institution or service if it has been resumed on account of the disappearance of the institution or cessation of the service which it is found cannot be restored. Here it is found that the services are still maintained though they are not as efficiently as they ought to be and some of the objects at least are of an unfailing character. Our attention has been drawn to a well-known decision of this Court in *Gunnaiyan v. Kamakshi Ayyar*(1) where there is a dictum of BHASHYAM AYYANGAR, J., to the effect that in cases of dharmadayam or devadayam there is no room for the application of the doctrine of cy près execution. It is unnecessary for us to consider here such a general question. In this case there are certain objects such as feeding the poor and the travellers which it is not alleged have come to an end, or could become extinct. And I am not at present prepared to say that where there is a general charitable object mentioned in the grant, the doctrine of cy près execution can have no application to charitable inams. And it seems that all that the learned Judge meant to lay down by that general dictum was that if the charity be of a specific character and it disappears, then the Government would be justified in resuming the grant altogether and crediting the assessment to public revenue. The learned Government Pleader also relied upon an unreported decision of a Bench of this Court in *Mohanadas Bavajee v. Secretary of State for India*(2) where it was held that a partial diversion may justify resumption. But in this case the alienation was not such as to render the villages unavailable to the charity. On that ground alone I think the present case may be distinguished from the unreported decision. I am of opinion that the conclusion of the Subordinate Judge on this point is correct.

The next question argued is as to limitation. It is contended on behalf of the Secretary of State that article 14 of

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL

GULAM
MAHMOOD
KHAN, SAHIB.

ABDUL
RAHIM, J.

(1) (1908) I.L.R., 26 Mad., 339. (2) Appeal No. 342 of 1915 (unreported).

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHABOOB.
KHAN SAHIB.
—
ABDUR
RAHIM, J.

the Limitation Act applies and that therefore the suit not having been instituted within one year of the order passed by the Board of Revenue it was barred. Article 14 says that for suits to set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for, the period of limitation is one year from the date of the act or order. I think that the Subordinate Judge is right in saying that whatever may be the form of the prayer, the object of the suit is to recover possession of the villages from the Government and that the order of resumption must be treated as a nullity, as the contingency on which alone the Government was entitled to make the resumption did not arise. If the plaintiff did not seek to recover possession of the villages but only wanted the order of the Board of Revenue to be set aside and to obtain any relief in consequence of that order, as in the case of *Subbanna v. The Secretary of State for India*(1), the suit would come within the article 14. I think the proper article applicable in a case of this nature is article 144, and it is not disputed that the suit was brought within twelve years of the Government taking up the villages. I would therefore dismiss the appeal with costs.

SPENCER, J.

SPENCER, J.—I too am of opinion that the Government Order of the 18th March 1903 resuming the grant in this case cannot be justified on the facts which are before us. The terms of the grant as they appear from the Inam Register, Exhibit I, are that the inam was to continue so long as the services which consisted of (1) feeding travellers and the poor, (2) maintaining an efficient establishment for the services in the mosque at Anamasamudrampeta and (3) performing the usual festivals continued to be rendered. The Subordinate Judge has found that there has been no cessation or discontinuance of the services specified in the Inam Register. He says that the 'nrs' and other usual festivals have been performed without break, though on a less grand scale than before, and there is no reason to question the correctness of this finding. In fact, shortly before the passing of the Government order, the Collector, Mr. Butterworth, reported that religious worship was kept up, although the expenditure in recent years had been considerably curtailed,

(1) (1915) M.W.N., 915.

and that the mosque and appurtenant buildings were then maintained in good repair. He did not recommend the resumption of the inam. But he considered that the directions of a Court for framing a scheme of administration was necessary and he asked for orders whether he should himself take action in this direction. The Board of Revenue left the matter in the hands of the Government, and the Government decided that those portions which had been mortgaged, leased or otherwise alienated and not redeemed within one year should be resumed. In no sense can it be said that there has been an entire failure of the trust in respect of this inam, but it appears that the Government resolved to resume the two villages which formed a part of the endowment of the trust on account of the act of one of the former trustees in temporarily alienating them and thus diverting the income from the purposes of the trust. A list of the villages alienated is attached to the Collector's report, dated February 1st, 1901; and from his subsequent report of the 18th May 1903, it appears that all these villages except two were redeemed and freed from encumbrances by the trustee. The two exceptions are the villages of Akbarabad and Ganduvaripalle. The village of Akbarabad was mortgaged with possession for thirty years from 1893 with the condition that at the close of the mortgage period the mortgagee was to give up the property unconditionally and free of debts. The village of Ganduvaripalle was mortgaged with possession and then the mortgage was converted into a lease for twelve years from fasli 1303. The terms for which these villages were alienated expired long before the suit. There was no permanent dissipation of the endowed property of the trust.

Now that a scheme has been prepared by this Court in Appeals Nos. 191 and 236 of 1914 and in No. 200 of 1917, it is unlikely that any further abuses of the trust and acts of mismanagement by the trustee will occur. It would not be doing justice to the intention of the founder to allow the institution to suffer for the fault of the office-holder for the time being. Moreover the resumption that was ordered in 1903 would be contrary to the spirit of the Board's Standing Orders as amended and brought up to date in 1913, which lay down directions for dealing with cases of religious and charitable inams held on title-deeds. This is neither a case of a mosque abandoned or in

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
v.
GULAM
MAHABOOB
KHAN SAHIB.
SPENCER J.

THE
SECRETARY
OF STATE FOR
INDIA IN
COUNCIL
G. LAM
MAHABOOB
KHAH SAHIB.

SPENCER, J.

ruins; nor is it one of a permanent loss of title to the land forming the endowment of the institution in which cases the rules provide for the permanent resumption of the inam. I, therefore, agree with my learned brother that the judgment of the lower Court must be supported on this point. I also agree with him that the respondent is entitled to the mesne profits awarded to him in the lower Court's decree, that article 14 of the Limitation Act has no application to the facts of this case, and that the appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Ayling.*

VASUDEVA KAMATH AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

1918,
December,
5 and 6.

v.

LAKSHMINARAYANA RAO AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS.*

Provincial Insolvency Act (III of 1907), sec. 16 (2) (b)—Effect of order of adjudication on institution of suits by creditors to set aside fraudulent alienations by insolvent.

The effect of an order adjudicating a person an insolvent under section 16 (1) of the Provincial Insolvency Act is to vest the administration of his estate including the realization of his assets under the control of the Court. Hence after such an order a creditor (whether decree-holder or otherwise) is by section 16 (2) (b) of the Act prevented from instituting, without the leave of the Court of Insolvency, a suit to set aside a transfer made by the insolvent as being in fraud of creditors.

APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Original Suit No. 4 of 1917.

Plaintiffs Nos. 1 to 3 filed this suit against defendants Nos. 1 to 4 who were members of an undivided Hindu family and the fifth defendant who was the Official Receiver of South Kanara to set aside, under the following circumstances, a sale made in 1913 by the first defendant of his share of the family properties in favour of the family idol managed by the defendants Nos. 1 to 4. Plaintiffs Nos. 1 to 3 were some of the

* Appeal No. 82 of 1918.