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into Court on the simple case, which was entirely disproved, that Raika never was in possession at all.

Now, on the findings of the Court of first appeal, if the Full Bench decision in *Ram Kali* v. *Kedarnath* was right, the order of the lower Court was right. If that decision has been impliedly overruled by the decision of the Privy Council to which we have referred, the defendants were entitled to move the Court of first appeal to dismiss the appeal to that Court. The Full Bench decision in *Ram Kali* v. *Kedarnath* was based on a Full Bench decision of the Calcutta Court in *Srinath Kur* v. *Prosunno Kumar Ghosh* (1). It appears to us that their Lordships of the Privy Council in the case of *Lachhan Kunwar* v. *Anant Singh*, to which we have referred, have impliedly overruled the Full Bench decision of this Court, and that article 141 of the second schedule to Act No. XV of 1877 does not apply where a trespasser has held, as against the widow of a sonless and separated Hindu, adverse possession, and that adverse possession must in such a case be counted, for the purposes of limitation, from the time when such trespasser or other person first began to hold adversely to the widow. In our opinion the law on this point and on article 141 is explained clearly by our brother Burkitt in *Hanuman Prasad Singh* v. *Bhagauti Prasad* (2). We allow this appeal with costs, and, setting aside the order under appeal, we dismiss the appeal to the Court of first appeal with costs, and restore and affirm the decree of the first Court dismissing the suit with costs.

*Appeal decreed.*

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*July* 16

## APPELLATE CIVIL.

*Before Mr. Justice Knox and Mr. Justice Burkitt.*

HUSENI BEGAM AND OTHERS (DEFENDANTS) *v.* THE COLLECTOR OF MORADABAD (PLAINTIFF).*

*Civil Procedure Code, section 539—Trust—Suit for removal of trustee—Parties—Alienees of trustees not necessary parties.*

A suit may properly be brought and a decree made under section 539 of the Code of Civil Procedure for the removal of a trustee. *Narasimha* v. *Ayyan*

* First Appeal No. 36 of 1896, from a decree of G. J. Nicholls, Esq., District Judge of Moradabad, dated the 1st May 1895.

(1) I. L. R., 9 Calc., 934. (2) I. L. R., 19 All., 357.

*Chetti* (1), *Sathappayyar* v. *Periasami* (2), *Rangasami Naickan* v. *Varadappa Naickan* (3), *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (4), *Tricumdass Mulji* v. *Khimji Vullabhdass* (5), *Sayad Hussein Mian* v. *The Collector of Kaira* (6), *Sajedur Raja* v. *Baidyanath Deb* (7), *Mohi-ud-din* v. *Sayid-ud-din* (8), and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (9) referred to. *Subbayya* v. *Krishna* (10) followed.

In such a suit as above it is not necessary to make the alienees from the trustee defendant parties to the suit. *Bishen Chand* v. *Syed Nadir* (11) *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (4) and the *Attorney General* v. *The Port Reeve and others of Avon* (12) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellants.

Mr. *E. Chamier*, for the respondent.

BURKITT, J. (KNOX, J., concurring).—The suit out of which this first appeal has arisen was instituted by the Collector of Moradabad (under instructions from the Local Government) under the provisions of section 539 of the Code of Civil Procedure.

The case for the plaintiff is that one Miran Shah, the ancestor of all the defendants, had, before his death some fifty years before suit, made a *waqf* of mauza Haibatpur for religious and charitable purposes, for the up-keep of a mosque and *imambara* he had founded, for the expenses of an annual "*urs*" or religious assembly to commemorate the Pir Ghaus Azam, to feed the poor at the "*urs*" and to keep his (Miran Shah's) tomb in repair. It is admitted that mauza Haibatpur had been granted revenue-free to Miran Shah, who was a man of great piety and sanctity among Musalmans; that the revenue-free grant was made by the Oudh Government, and that the village still remains *muafi*, not having been resumed at either of the two settlements which have taken place since the British Government came into possession. It was alleged for the plaintiff that the village came into the possession

(1) I. L. R., 12 Mad., 157.
(2) I. L. R., 14 Mad., 1.
(3) I. L. R., 17 Mad., 462.
(4) I. L. R., 15 Bom., 612.
(5) I. L. R., 16 Bom., 626.
(6) I. L. R., 21 Bom., 48.
(7) I. L. R., 20 Calc., 397.
(8) I. L. R., 20 Calc., 810.
(9) I. L. R., 24 Calc., 418.
(10) I. L. R., 14 Mad., 186.
(11) L. R., 15, I. A., 1.
(12) 33 L. J., N. S. Ch. 172.

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of Miran Shah's heirs as trustees, and that they for a considerable time performed properly their duty as such; but latterly (having become Shiahs) they have, in breach of the trust, treated the trust property as their own, have mortgaged and otherwise alienated some portions of it, and have pulled down some of the trust buildings and appropriated to their own use the value of the materials. The plaintiff accordingly prayed for the appointment of new trustees—which of course implies the dismissal of the existing trustees; that the property be declared to be *wakf*, and that the defendants be required to furnish accounts and to pay sums which they had improperly appropriated in breach of the trust. It was also prayed that a scheme for the management of the trust should be settled.

Those of the defendants who appeared first of all raised a plea of limitation to the effect that they had been dealing with the property as their own for more than twelve years. There does not seem to have been any discussion as to this plea at the hearing. Clearly, once the trust was established, such a plea could not prevail. They next pleaded want of parties, that their transferrees should have been made parties. This plea was overruled by the lower Court. In the fourth paragraph of the writtten statement the defendants deny the fact of the endowment, alleging that "the property in dispute was never endowed for charitable purposes as alleged by the plaintiff on behalf of any party, *i.e.* for the purposes set forth in the plaint." This paragraph, while denying the plaintiff's case as to the trust, may perhaps be regarded as an admission that the objects of the alleged *waqf* as set forth in the plaint are charitable purposes. In subsequent paragraphs the defendants deny that the income of the property in dispute was ever applied to the purposes mentioned in the plaint. They also deny the demolition of an *imambara* in Haibatpur and of an ancestral house in Sambhal. The first portion of this plea—like the first paragraph of the written statement—takes advantage of a blunder in the plaint, afterwards amended. The *imambara*, mosque, &c., were not in

Haibatpur, but in an adjoining mohalla of the town of Sambhal. There is nothing in the plaint about an ancestral house. The seventh paragraph of the written statement is important. In that paragraph the defendants admit that the property in dispute descended to them from Miran Shah, and they add that they spend money on the mosque, *imambara* and tomb according to their respective positions, a statement which at the hearing of this appeal was explained to mean that they were not legally bound to spend any money on such purposes, but did so of their own free will and pleasure. These are the only pleas which call for notice.

The District Judge gave the plaintiff a decree. The defendants appeal.

The first plea argued for them was that the suit was bad because the transferrees from the defendants had not been impleaded. That plea was overruled, and we think rightly, by the learned District Judge. In support of this contention the learned advocate for the appellants cited the case of *Bishen Chand* v. *Syed Nadir* (1), in which, at p. 9, their Lordships found themselves unable, in a suit in which all the parties interested were not before them, to decide the extent of certain trusts, and whether any surplus remained over to the *mutawalli* for his private use. We cannot see that this case is any authority for the proposition that to a suit for the execution and administration of a trust the alienees of the trust property, who have an interest adverse to the trust are necessary parties. In the case of *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (2), which was a suit under section 539 of the Code of Civil Procedure for the execution and administration of a trust and for removal of the trustees, who had incumbered and alienated a large portion of the trust property, the incumbrancers and alienees were not considered necessary parties. And in the case of *The Attorney General* v. *the Port Reeve and others of Avon* (3), it was held by the

(1) L. R., 15 I. A., 1. (2) I. L. R., 15 Bom., 612.
(3) 33 L. J., N. S. Ch., 172.

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Lords Justices that persons claiming title adverse to a trust cannot be made parties to a suit for the execution of the trust. No case has been shown to us in which, in a suit under section 539 of the Code of Civil Procedure, the alienees or incumbrancers have been made parties, and indeed it does not appear what relief could be granted against them under that section. We think that a prayer for recovery of possession from such persons could not be entertained under that section. The plaintiff in this suit could not institute a suit for possession. Such a suit could be instituted only by the trustee. We therefore overrule this plea.

Next it is contended that the *waqf* set up by the plaint is bad, as it is not for public religious or charitable purposes. The briefest consideration of the purposes of the *waqf* set out above is in our opinion abundantly sufficient to show that they are public charitable and religious purposes. That plea also fails.

The last plea of law raised by the appellants is that the suit is bad because a suit to remove a trustee cannot be entertained under section 539 of the Code. As far as we can ascertain the first doubt whether such a suit would lie was suggested by an *obiter dictum* in the case of *Narasimha* v. *Ayyan Chetti* (1), where the learned Judges are reported to have said that "it is not at all clear that a suit to remove a trustee can be maintained under section 539." The question was not decided in the next case, *Sathappayar* v. *Periasami* (2), as it was held that that case did not come under section 539, the object of the endowment being for private religious purposes, namely to perpetuate the spiritual family of a *guru*. But in the case of *Subbayya* v. *Krishna* (3) the question was very elaborately argued before a Bench of three Judges, and it was held by a majority of the Court that a suit to remove a trustee could be maintained under section 539 of the Code of Civil Procedure. The same question again came before the Madras High Court in *Rangasami Naickan*

(1) I. L. R., 12 Mad., 157. (2) I. L. R., 14 Mad., 1.
(3) I. L. R., 14 Mad., 186.

v. *Varadappa Naickan* (1), when a Bench of three Judges (one of whom was the dissentient Judge in the case of *Subbayya* v. *Krishna* just mentioned) held that a suit to remove a trustee could not be maintained under section 539 of the Code. In *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (2), a case already cited, the question was not raised. It appears to have been taken for granted that such a suit could be maintained. In the case *Trcumdass Mulji* v. *Khimji Vullabhdas* (3), which was a suit to administer a public charitable trust, to compel a trustee to account, and for the removal from office of that trustee and for the appointment of a new trustee, it was held, following the decision of the majority of the Bench in *Subayya* v. *Krishna* (4), that the suit came under section 539, and could not be maintained, as the sanction of the Advocate-General had not been obtained. The most recent case in the Bombay Court is that of *Sayad Hussein Mian* v. *The Collector of Kaira* (5), and in it the decision in the previous case following the ruling of the majority of the Judges in *Subayya* v. *Krishna* was affirmed. There are also two cases in the 20th volume of the Indian Law Reports, Calcutta Series, namely, *Sajedur Raja* v. *Baidyanath Deb* at p. 397 and *Mohiuddin* v. *Sayiduddin* at p. 810, the rule laid down in which is to the same effect as in the Bombay cases and in *Subbayya* v. *Krishna* (4). The case of *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (6), the report of which was published after we had reserved judgment in this appeal, follows and approves of the decision of the majority of the Bench in *Subbayya* v. *Krishna* (4).

In this conflict of authority there is undoubtedly a preponderance of judicial decisions in favour of the proposition that a suit to have a trustee removed and another appointed in his place is a suit which is covered by the provisions of section 539 of the Code of Civil Procedure. We have considered and studied the elaborate judgments of the Madras High Court in the cases in

(1) I. L. R., 17 Mad., 462.
(2) I. L. R., 15 Bom., 612.
(3) I. L. R., 16 Bom., 626.
(4) I. L. R., 14 Mad., 186.
(5) I. L. R., 21 Bom., 48.
(6) I. L. R., 24 Calc., 418.

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the 14th and 17th volumes of the Madras Reports. After mature consideration our opinion is in conformity with that expressed by the majority of the Bench in *Subbayya* v. *Krishna* (1) We entirely concur in the elaborate judgment of Mr. Justice Weir and in the reasons he gives for the conclusion at which he arrived. We feel we can add nothing to it. We hold therefore that this suit is not bad because of the prayer for the removal of the existing trustees.

On the merits we are of opinion that the appellants have failed to make out their case. That mauza Haibatpur was granted free of revenue to Miran Shah, though a Sūnni, by the Shiah Government of Oudh, on account of his character for holiness and sanctity is not denied. It is also admitted that the British Government has continued the *muafi* to Miran Shah's family up to the present day. The exhibits Record Nos. 18C. and 19C. show the reason why Government at the last settlement, instead of resuming the *muafi* grant (as it might have done), allowed it to continue. The first paragraph of the *wajib-ul-arz* No. 18C. shows the reason for the continuance of the *muafi* to be because mauza Haibatpur is a mahal "appropriated to charitable expenses in connection with a mosque, *imambara* and '*urs*' of Ghaus Azam." And the same reasons for the continuance of the *muafi* are given in Record No. 19C. drawn up some three years later. We think these facts are most significant and important. It is admitted that Miran Shah left no son living at his death and that he was succeeded by his daughters (three in number), whose descendants are now in possession of Haibatpur. Why should the grant have been continued to them revenue-free, unless because of Miran Shah having dedicated Haibatpur to charitable and religious purposes? It is not even suggested that these descendants of Miran Shah in the female line had any personal claims to receive a revenue-free grant at the hands of the British Government, nor is it suggested that, either at the settlement of 1846 or at the subsequent

(1) I. L. R., 14 Mad., 186.

settlement of about 1874-75, any such personal claims were put forward. Clearly the *muafi* was continued at settlement because of the reasons stated in Record Nos. 18C. and 19C. Here we would refer to the attested copy (Record No. 74C.) of a deposition by Sayyed Hasan, a pleader who appeared for Musammat Huseni Begam (one of the appellants here), in a partition case, in which it was sought to have mauza Haibatpur partitioned among the descendants of Miran Shah in 1889. The pleader in that deposition on behalf of his client, the defendant-appellant Musammat Huseni Begam, in the clearest terms declared mauza Haibatpur to be endowed property, the income of which was applied to the mosque, the *imambara* and the "*urs*," and that it was so applied by his client as *mutawalli* jointly with the other *mutawallis*. To the same effect is a petition, No. 75C of the record, filed in the same partition proceedings by Musammat Muhamdi, one of the defendants to this suit, now deceased. The genuineness of the petition is proved by the evidence of Muhammad Husen, son of Musammat Muhamdi. This petition is much to the same effect as the deposition just mentioned above. It states that mauza Haibatpur is endowed property, and that it was granted *muafi* in 1840 to Miran Shah for charitable purposes. No. 76C of the record is an attested copy of another deposition made by the pleader Sayyed Hasan in July, 1889, on behalf of Musammat Huseni Begam in the partition case. This deposition emphasizes the pleader's former statement, and further makes mention of papers relating to the settlement of 1846, copies of which papers the witness produced to the official making the partition. The appellants have not attempted to produce any of the papers just mentioned, though, as they were produced by Musammat Huseni's pleader in 1889, it may be presumed she has possession of them now. There are further on record two petitions, Nos. 78C and 79C, dated the 21st of January and 24th of February 1890, filed by Sayyed Asghar Hasan (one of the defendants-appellants) before the revenue authorities in mutation of names proceedings, in both of which he asserts that

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mauza Haibatpur is an endowed village, the revenue of which is devoted to the mosque, *imambara, urs* of Ghaus Azam and support of the *mutawallis*. In No. 78C it is alleged that the *wajibularz* (record No. 18C) was prepared as proof of those facts. The documentary evidence detailed above establishes in our opinion a very strong case in favour of the plaintiff respondent.

The defendants appellants did not produce any documentary evidence. They have contented themselves with calling four witnesses, three of whom are worthless, while the deposition of the fourth, Intizam Ali, is more favourable to the respondent's case than to the appellants'.

The respondent has called three witnesses, Kazi Imam Ali, Sheikh Wilayat Ali and Masiat-ullah, all of whom were acquainted with Miran Shah. Their evidence most strongly supports the respondent's case, showing as it does that Miran Shah himself built the mosque and *imambara* and expressed his intention of dedicating the income of Haibatpur to their support. One of the witnesses professes to know of, and to have been present at, the execution of the *waqf* by Miran Shah. Two of them also speak of how the descendants of Miran Shah have now discontinued the charities and demolished the buildings.

Having now discussed all the material evidence in the case, it appears to us that there is a great mass of evidence in favour of the plaintiff which the appellants have in no way attempted to rebut. We have no hesitation in finding, concurring therein with the Court below, that Miran Shah did before his death dedicate mauza Haibatpur as a *waqf* for the religious and charitable institutions mentioned in the plaint, which he had established, the mosque, the *imambara* the "*urs*" of Ghaus Azam, &c. We find that mauza Haibatpur devolved on the daughters of Miran Shah and on their descendants in trust for the performance of the religious and charitable purposes to which Miran Shah had dedicated the village. We concur with the lower Court in holding that the plaintiff is entitled to the declaration he has obtained as

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to mauza Haibatpur being *waqf* property, and in the finding that the defendants are in possession as trustees of the *waqf* and have no proprietary rights in Haibatpur. We find that the trustees have grossly violated their duties as such, that they have failed to apply any portion of the income of the village to the purposes of the trust, that they have appropriated the income to their own private purposes and that they have dilapidated and dismantled the buildings constructed by Miran Shah, and have put into their own pockets the value of the materials of the *imambara*. We further find that they have wrongfully alienated portions of the endowed property and that they have denied that they are trustees and claim to be proprietors of Haibatpur in their own right. Such trustees should not in our opinion be permitted to remain any longer in possession of the trust property. We therefore direct their removal and that possession of the trust property be transferred to the *mutawalli* who has been nominated by the learned District Judge. We may add that, as no observations were addressed to us on either side either for or against the scheme for the administration of the trust prepared by the District Judge, we refrain from making any remarks as to it. The only questions argued before us are those which we have discussed in this judgment. We dismiss the appeal with costs.

*Appeal dismissed.*

## FULL BENCH.

1897
*December* 14.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.*

QUEEN-EMPRESS *v.* AMBA PRASAD.*

*Act No. XLV of* 1860 *(Indian Penal Code), section* 124*A.—Exciting disaffection—Meaning of term "disaffection" explained.*

Any one who, by any of the means referred to in section 124A of the Indian Penal Code, excites, or attempts to excite, feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in section 124A. Such feelings are necessarily inconsistent

* Criminal Appeal No. 1461 of 1897