PRIVY COUNCIL

ALLAH RAKHI AND OTHERS *v.* MUHAMMAD ABDUR RAHIM AND OTHERS

J.C.*
1933
December, 18

[On appeal from the High Court at Allahabad.]

Limitation Act (IX of 1908), section 10; articles 139, 144—Suit to recover wakf property—Property vested in trust for a specific purpose—Adverse possession—Land settled with mujawars—Dismissal of mujawars.

In 1926 the *sajjadanashin* of an ancient wakf, comprising a village dedicated for the maintenance of a shrine, sued to recover possession of land in the village from defendants with whose ancestors the land had been settled as *mujawars*, i.e. sweepers and caretakers of the shrine. In 1898 the *sajjadanashin* had dismissed the defendants from being *mujawars* of the shrine, as he was held entitled to do, but they had remained in possession of the land and had continued to act as caretakers of two other shrines. The High Court affirmed a decree for possession, holding that the land was vested in trust for a specific purpose within the meaning of section 10 of the Indian Limitation Act, 1908, and that therefore the defendants could not contend that the suit was barred by that Act:

Held, that the suit having been instituted before the amendment of section 10 by Act I of 1929, section 10 did not apply; but that the decree for possession should be affirmed, as the defendants had failed to prove adverse possession within article 144, the facts being consistent with their possession being by leave and licence, and as article 139, upon which also they relied, did not apply.

Vidya Varuthi Thirtha v. *Balusami Ayyar* (1) followed, as to section 10.

Decree of the High Court affirmed upon a different ground.

APPEAL (No. 17 of 1932) from a decree of the High Court (July 24, 1930) affirming a decree of the first Subordinate Judge of Saharanpur (January 19, 1927).

In 1926 the first respondent, as a *sajjadanashin* of a wakf, instituted a suit against the appellants and the other respondents (joined in the appeal *pro forma*) for possession of certain land in the village of Piran Kalliar

Present: Lord ATKIN, Lord RUSSELL of KILLOWEN, Lord MACMILLAN, Lord WRIGHT and Sir LANCELOT SANDERSON.

(1) (1921) I.L.R., 44 Mad., 831; L.R., 48 I.A., 302.

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Sharif. The village had been dedicated as wakf during the Moghul Empire for the maintenance of a shrine there situate and the support of the *sajjadanashin*. At some date earlier than 1758 the *sajjadanashin* had settled the lands in suit with the ancestors of certain of the defendants as *mujawars* (sweepers and attendants) of the shrine; the other defendants were transferees from the *mujawars* under transfers made within twelve years of the suit. In 1898 the plaintiff's predecessor as *sajjadanashin* had dismissed the *mujawars* from service and appointed others; in a suit brought by them the High Court, affirming the lower court, had held that the dismissal was in accordance with law.

Various defences were raised, among them that the property in suit had not been dedicated in wakf, and that the suit was barred by limitation.

The facts appear more fully from the judgment of the Judicial Committee.

The High Court affirmed a decree for possession made by the trial Judge. The learned Judges (BANERJI and KING, JJ.) agreed with his finding that the whole village had been dedicated, also with his view that section 10 of the Indian Limitation Act, 1908, applied and precluded the defence of limitation.

1933. November 27, 28, 30. *De Gruyther*, K. C. and Sir *Thomas Strangman*, for the appellants: The suit being before Act I of 1929, which amended section 10 of the Limitation Act, the property in suit was not "vested in trust for a specific purpose" within the meaning of section 10 and the section did not apply: *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), *Annamalai Chettiar* v. *Muthukaruppan Chettiar* (2), *Mohunt Bhugwan Ramanuj Das* v. *Ramkrishna Bose* (3). As in the case last mentioned the suit was barred by article 139. The *mujawars* were merely servants and their

(1) (1921) I.L.R., 44 Mad., 831; L.R., 48 I.A., 302. (2) (1930) I.L.R., 8 Ran., 645; L.R., 58 I.A., 1.
(3) (1919) 26 Cal. W. N., 722 (P.C.).

holding a lease within the definition in section 105 of the Transfer of Property Act, 1882; as the suit was not brought within twelve years of their dismissal it was barred by article 139. Alternatively, the suit was barred under article 144 by adverse possession for over twelve years. *Bilas Kunwar* v. *Desraj Ranjit Singh* (1) is distinguishable, because in that case the defendant's case was that the plaintiff never had a title, not that his right to possession had become barred.

Dunne, K. C. and *Jinnah*, for respondent No. 1: Even if, having regard to the judgment of the Board in *Vidya Varuthi's* case (2), section 10 of the Act does not apply, the decree was right. The title of the plaintiff was established and the suit was not barred by limitation. Article 139 does not apply, as there was no tenancy within that article. It is only upon this appeal that the article has been relied upon, and the contention that it applies is entirely inconsistent with the adverse possession which was pleaded. The onus was upon the defendants, and having regard to the facts it was not established that their possession after 1900 was adverse to the title of the plaintiff. The facts are more consistent with the view that they were allowed to remain in possession as attendants at the other two shrines in the village.

De Gruyther, K. C., replied.

December 18. The judgment of their Lordships was delivered by Sir LANCELOT SANDERSON:

This is an appeal by defendants, and the representatives of defendants who have died since the institution of the suit, against the judgment and decree dated the 24th July, 1930, of the High Court of Judicature at Allahabad, confirming the decree of the first Subordinate Judge of Saharanpur dated the 19th January, 1927.

The question which falls for determination in the appeal is whether the plantiff's suit to recover possession

(1) (1915) I.L.R., 37 All., 557: L.R., 42 I.A., 202.

(2) (1921) I.L.R., 44 Mad., 831; L.R., 48 I.A., 302.

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of certain lands from the defendants is barred by limitation. Both the Courts in India held that, in view of the provisions of section 10 of the Limitation Act, 1908, the suit was not barred. The result was that the Subordinate Judge decreed the plaintiff's suit, and the defendants' appeal therefrom to the High Court was dismissed with costs.

The plaintiff's case is that "The entire village Piran Kalliar Sharif, pargana and tahsil Rurki, district Saharanpur, has been made wakf of generation after generation and womb after womb from the time of the rule of the Moghal Emperors for the expenses of the *dargah* (shrine) of Hazrat Makhdum Ala-ud-din Ali Ahmad Sabir Saheb 'Quds-allah Sirrabulaziz' (May God sanctify his cause) situate in the aforesaid village and for maintenance of the *sajjadanashin* of the shrine generation after generation and the plaintiff as *sajjadanashin* is the manager of the wakf", and that all the defendants except certain named defendants are *mujawars*. It was alleged that the predecessors of the plaintiff settled the ancestors of the *mujawars* in the said village and the *sajjadanashin* for the time being, in return for their services in connection with the shrine, allowed the *mujawars* to occupy the lands in suit, being part of the wakf lands, for their maintenance.

The plaintiff is the present *sajjadanashin* of the said wakf property, and the other parties to the suit were at one time *mujawars*, i.e. servants of the shrine and their assigns.

Both Courts have held, and it is not now disputed, that the entire village was dedicated in wakf for the maintenance of the above-mentioned shrine and for the maintenance of the *sajjadanashin*.

It appears that in 1758 the ancestors of the *mujawars* executed an agreement in favour of the then *sajjadanashin*. This was obviously entered into for the protection of the wakf and as a safeguard against the assertion of any adverse title by the *mujawars*. The following

passage therein is material as showing the relations and positions of the respective parties:

"We do not in any way interfere with the village or the monastery. The *sajjadanashin* is owner of the entire village and the shrine. If hereafter we make any sort of claim, it shall be false under the holy Muhammadan law. We relinquish our right to the 100 bighas *pukhta* of *amlak* land and the half share of sugar and bread which had been given by the *sajjadanashin's* ancestors to our grandfather, because the *sajjadanashins* are the proprietors of the village and the monastery. If they allow us to continue to sweep the holy shrine, they are the proprietors, and if they dismiss us and appoint another to sweep it in our place, they are the proprietors. We have no claim of any sort."

The Courts in India having held that the entire village was included in the wakf, that the plaintiff was the *sajjadanashin*, and that the defendants (other than their transferees) had been in possession of the lands in suit as *mujawars* of the shrine, came to the conclusion that the *mujawar* defendants could not set up adverse possession, although they had been dismissed from their appointment as *mujawars* of the shrine in 1898, i.e. about 28 years before the suit was brought, and had remained in possession of the lands in suit until the date of the suit, viz., 29th January, 1926.

The ground of their decision, as already stated, was that section 10 of the Limitation Act, 1908, applied. The section is as follows:

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

Section 10 was amended by section 2 of the Indian Limitation (Amendment) Act, 1929, which provided as follows:

"2. In section 10 of the Indian Limitation Act, 1908 (hereinafter referred to as the said Act), the following paragraph shall be inserted, namely:—

'For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable

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endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.'"

It was provided by section 1(2) that the said Amendment Act should come into force on the 1st January, 1929.

The suit, which is the subject of this appeal, was brought on the 29th January, 1926, and the question whether it was then barred by limitation must depend upon the law of limitation which was applicable to the suit at that time. The provisions, therefore, of the Amendment Act of 1929 are not applicable, and the question is whether the unamended section 10 of the Limitation Act of 1908 is applicable to this suit.

In order to bring the suit within that section it would be necessary for the plaintiff to show that the lands in question had become vested in the defendants in trust for a specific purpose, or that they were the assigns of the *sajjadanashin,* in whom the lands had become vested for such purpose.

Now, it had been held by this Board in the judgment which was delivered by Mr. AMEER ALI in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1) that the Muhammadan law relating to trusts differed fundamentally from the English law. It was said that—

"It owes its origin to a rule laid down by the Prophet of Islam, and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewun Doss Sahoo* v. *Shah Kubeerooddin* (2), that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the *mutwalli,* the governor, superintendent, or curator. In *Jewun Doss Sahoo's* case the Judicial Committee call him 'procurator'. That case related to a *khankah,* a Muhammadan institution analogous in

(1) (1921) I.L.R., 44 Mad., 831 (840); (2) (1840) 2 Moo. I.A., 390. L.R., 48 I.A., 302 (312).

many respects to a *math* where Hindu religious instruction is dispensed. The head of these *khankahs*, which exist in large numbers in India, is called a *sajjadanashin*. He is the teacher of religious doctrines and rules of life, and the manager of the institution and administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary *mutwalli*. But neither the *sajjadanashin* nor the *mutwalli* has any right in the property belonging to the wakf; the property is not vested in him and he is not a 'trustee' in the technical sense."

After a reference to the provisions of section 10 of the Limitation Act, 1908, the judgment proceeds as follows:

"The language of section 10 gives the clue to the meaning and applicability of article 134. It clearly shows that the article refers to cases of specific trust, and relates to property 'conveyed in trust'. Neither under the Hindu law nor in the Muhammadan system is any property 'conveyed' to a *shebait* or a *mutwalli*, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Muhammadan law, the moment a wakf is created all rights of property pass out of the wakif, and vest in God Almighty. The curator, whether called *mutwalli* or *sajjadanashin*, or by any other name, is merely a manager. He is certainly not a 'trustee' as understood in the English system."

It was stated that the amendment hereinbefore mentioned of section 10 by the Act of 1929 was effected in consequence of the above-mentioned decision. Their Lordships are of opinion that, in view of the above-mentioned decision (which apparently was not brought to the attention of the learned Judges who adjudicated upon this case), it must be held that the suit did not come within the provisions of section 10 as it stood unamended at the time of the institution of the suit, and consequently that the decision of the Courts in India cannot be supported on the above-mentioned ground.

It was argued by the learned counsel for the appellants defendants that if section 10 did apply to this suit, the defendants were assigns of the plaintiff for valuable consideration, and that therefore the section did not

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apply. In view of the above-mentioned conclusion of their Lordships, it is not necessary to express any opinion on this argument.

The learned counsel for the plaintiff, however, argued that although the plaintiff could not succeed on the above-mentioned point, he could uphold the judgment of the Courts in India on another ground. It was urged by him that inasmuch as the defendants relied upon article 144 of the first schedule of the Limitation Act, 1908, it was necessary for the defendants to show that they had been in adverse possession of the lands in suit for more than 12 years prior to the institution of the suit. The learned counsel drew attention to the fact that the fourth issue settled in the trial court was as follows, "Whether the defendants have been in possession for more than 12 years, and has their possession become adverse and proprietary, and is the suit therefore not maintainable?" and that the defendants had not succeeded in obtaining a decision in their favour on that issue by either of the Courts in India.

It is clear that the learned Judges of the High Court did not decide this issue; they based their conclusion on section 10 of the Limitation Act, and therefore it was not necessary for them to go further. The learned Subordinate Judge referred to the said fourth issue and the question of adverse possession, but he too held that section 10 of the Limitation Act, 1908, was applicable to the case, and that therefore no question of limitation arose.

In view of the absence of any findings by the Courts in India upon the above-mentioned material issue, their Lordships have considered whether the case should be remitted to the Courts in India in order that a specific finding might be arrived at in this respect. But having regard to the fact that the suit was instituted nearly eight years ago, that the value of the lands in suit is not very large, and that, as far as they are aware, no evidence, beyond what appears in the record, could be produced,

their Lordships have come to the conclusion that the issue should be disposed of upon the evidence which is now before them.

The main argument on behalf of the appellants in respect of this part of the appeal related to article 144 of the schedule of the Limitation Act, 1908, and to the allegation that the possession of the defendants *mujawars* had been adverse for more than twelve years before the institution of the suit. The learned counsel for the appellants referred to article 139 as well as article 144. It may be noted at once that the appellants' plea of adverse possession is obviously inconsistent with the application of article 139, which relates to the case of a landlord suing to recover possession from a tenant.

The grounds mainly relied upon as supporting the plea of adverse possession were as follows:

In May, 1894, the *mujawars* brought a suit against Zahur-ul-Hasan, who was then the *sajjadanashin*, praying for a declaration that "the plaintiffs are the owners of two out of five shares in 20 biswas (i.e. the entire 20 biswa village being divided into five shares, the plaintiffs are the owners of two of them)." The plaintiffs claimed further to be *mutwallis* of the shrine of Ala-ud-din. The Subordinate Judge dismissed the suit. The *mujawars* appealed to the High Court of Judicature at Allahabad, which dismissed the appeal with costs in 1897.

In 1898 Zahur-ul-Hasan, the then *sajjadanashin*, dismissed the *mujawars* from service at the said shrine of Ala-ud-din, and appointed others in their places. The *mujawars*, however, were allowed to remain in possession of the lands now in suit. It appears that there are two other shrines in the said village, and that the *mujawars* claimed to be attendants of all three shrines and to be entitled to perform the services connected therewith.

In 1901 the *mujawars* brought a suit against Zahur-ul-Hasan alleging their right to act as attendants of the three shrines, that Zahur-ul-Hasan, the *sajjadanashin*,

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had obstructed them in the performance of their duties in one shrine (i.e. the shrine of Ala-ud-din), and that he threatened to interfere with the performance of their duties in the other two shrines, and they claimed an injunction to restrain the defendant from obstructing the plaintiffs in the performance of their duties and collection of fees. The Munsif, who tried the case, dismissed the suit with costs, and this decision was affirmed on appeal. It was held that the *mujawars* were liable to be dismissed and had been properly dismissed from their office in respect of the said shrine of Ala-ud-din. This was in 1903. It is to be noted that in this last-mentioned litigation no claim was made by the *mujawars* to be owners of the lands occupied by them or that they were *mutwallis*. Their claim was limited to a right to perform services as attendants at the shrines.

This litigation and the allegations therein of the *mujawars*, in their Lordships' opinion, are quite inconsistent with the *mujawars* setting up a title to the lands occupied by them adversely to the *sajjadanashin*. On the other hand, they are consistent with the contention of the plaintiff that the *mujawars* had acquiesced in the decrees of the courts in the 1894 suit, which decided that the *mujawars* were not owners of the lands, and that consequently in the 1901 suit the *mujawars* were asserting a right to act as attendants at the shrines under the supervision of the *sajjadanashin* and no more.

On behalf of the appellants reliance was placed upon an agreement alleged to have been made in January, 1815, between the *mujawars* and the then *sajjadanashin*, by which the village was divided into five shares, of which the *mujawars* were to have two shares, and upon the fact that the *mujawars* were subsequently recorded as the proprietors of such shares. It is difficult to understand how this came about, for the lands in the village were undoubtedly wakf, and the *sajjadanashin* could not convey any valid title in such lands to the *mujawars*, and as long as the *mujawars* remained in possession of

the lands by reason of the services which they rendered to the shrines, no question of possession adverse to the *sajjadanashin* could arise.

It is not necessary for their Lordships to refer in further detail to the evidence, except to notice that no witness was called to support the case of the appellants *mujawars,* who relied entirely on the documentary evidence.

Their Lordships, having considered all the evidence in the case, are of opinion that the *mujawars* in or about the year 1894 undoubtedly did assert their title to the lands in suit adversely to the predecessor of the plaintiff in this suit, the then *sajjadanashin,* but when the suit, which was brought by the *mujawars,* was decided against them, they did not persist in their contention that they were owners and *mutwallis;* they were content to occupy the position of attendants and servants of the shrines, and they then limited their contention to an assertion of their right to perform the services in connection with the three shrines without obstruction from the then *sajjadanashin.* When this further contention was decided against them in 1903, they were allowed to remain in occupation of the lands by the *sajjadanashin.*

In considering the effect of this continued occupation of the lands it must be remembered that the *mujawars,* the predecessors of the appellants defendants, had been let into possession of the lands in consideration of their services as attendants at the shrine of Ala-ud-din, and though they were dismissed from attendance at that shrine, they claimed to be entitled to render services and to collect fees, as *mujawars,* at the other two shrines in the village, and apparently they were permitted so to do.

Their Lordships are of opinion that the facts relating to the period subsequent to the year 1903 are consistent with the occupation of the lands by the appellants defendants being by the leave and licence of the *sajjadanashin,* which was induced through the *mujawars*

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continuing to perform the services at two of the shrines in the village.

There is no doubt that the title to the lands was in the plaintiff, and the *onus* was on the appellants defendants to prove the adverse possession relied on.

In the words of Lord ROBERTSON, when delivering the judgment of the Board in *Radhamoni Debi* v. *Collector of Khulna* (1), "The possession required must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor."

Their Lordships for the reasons above-mentioned are of opinion that the appellants defendants have not discharged that *onus*.

It is necessary to refer to one other matter, viz. the fact that certain transfers were made by some of the *mujawars*; but the Subordinate Judge stated, and it has not been disputed, that the transfers which have been impeached were made within twelve years of the institution of the suit and so no question of limitation arises as to them. There were apparently other transfers of older date, but these were transfers between the *mujawars inter se* and it has not been shown that any of such transfers was made with the knowledge of the *sajjadanashin*, so that such transfers cannot be relied on as showing that the possession of the *mujawars* was adverse to the *sajjadanashin*.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Douglas Grant and Dold.*

Solicitors for respondent No. 1: *Hy. S. L. Polak and Co.*

(1) (1900) I.L.R., 27 Cal., 943 (956); L.R., 27 I.A., 136 (140).