sound. The registe[illegible] rulings of this Court doubtless is, [illegible] which it contains, but it would be pushing [illegible] constructive notice beyond all bounds to hold that it is [illegible] of the unregistered documents under which the holders of registered documents derive their title.

Lastly, it is contended that the alleged constructive possession of Harichand of the premises under the kabuláyat, Exhibit 41, gave constructive notice of Harichand's purchase to the defendant No. 3. That kabuláyat, however, if genuine, was for a year, and expired in 1879, so that as a fact the sons of Vithoba were not holding as tenants under it in 1894; but even if they were, they were in apparent possession, and the constructive possession, which would be in Harichand or his grantees by reason of the kabuláyat, was not possession of such a nature as to be notice to the defendant No. 3 of their prior title—*Moreshwar* v. *Dattu*[1].

Decree confirmed with costs.

Decree confirmed.

(1) I. L. R., 12 Bom., 569.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1896. *April* 15.

LAKSHMANDAS RAGHUNATHDAS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* JUGALKISHORE (ORIGINAL DEFENDANT), RESPONDENT.*

Trustee—Charity—Suit against de facto manager or trustee by de jure trustees—Dismissal of such suit as barred by limitation—Subsequent suit against same defendant by Advocate General under Section 539 of Civil Procedure Code—Such suit not affected by first suit—Civil Procedure Code (Act XIV of 1882), Sec. 539—Res judicata.

In 1887 certain persons alleging that they had been appointed trustees of a temple and its property by its founder Purshotam, brought a suit to evict Purshotam's son from the premises, alleging that he had been their gumásta, but that they had dismissed him and that he refused to give up the property. The High Court dismissed that suit on the ground that it was barred by limitation.

*Appeal, No. 139 of 1895.

...of the Ad-...of the Civil Procedure Code (Act XIV of ...ant, alleging that after Purshotam's death the defend... ...ed into possession of the property and for some years had carried out the trusts created by his father Purshotam; but that latterly he had claimed the property as his own and refused to perform the trusts. They prayed that trustees might be appointed and the property made over to such trustees. The defendant contended that the plaintiffs in both the suits were the same, *viz.*, persons representing the same *cestues que trustent*, *i. e.*, the devotees of the temple or the general public; that they sued in the same right, and that as the plaintiffs in the former suit were held barred by limitation, the plaintiffs in the present suit were also barred.

Held, that the present suit was not barred. The plaintiffs in the former suit had no general warrant, such as is conferred on plaintiffs suing under section 539 of the Civil Procedure Code, to represent the public, the objects of the charity. They based their title to sue on their particular appointment by Purshotam, and when it was found that they had by limitation lost their rights to the title derived from that appointment they ceased to represent the public just as though they had been removed from their office. The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate General or the temple.

APPEAL from the decision of A. Steward, District Judge of Poona, in Suit No. 6 of 1894.

The plaintiffs sued with the consent of the Advocate General under section 539 of the Civil Procedure Code (Act XIV of 1882), alleging (*inter alia*) that one Purshotam, the father of the defendant, built a temple of Shri Nivdunga Vithoba in the city of Poona for the use of the public and assigned certain property as a gift in charity for the expenses of the idol and devasthán; that on the 18th December, 1850, he executed a deed of gift which was duly registered, and constituted himself trustee for life for the management of the property and also appointed trustees for management after his death; that the defendant was in possession of the property and neglected to perform the duties connected with the idol and devasthán; that the defendant was dealing with the property as owner; that all the trustees appointed by Purshotam were dead; that plaintiff No. 3 was the *pujári* (worshipper) of the idol and that the remaining plaintiffs being its devotees had an interest in the continuance

of the the registe

the property, moveable and immu

thán should be handed over to them, o on-

appoint other trustees, &c., &c.

The Judge found that the plaintiffs were not entitled to sue under section 539 of the Civil Procedure Code; that the defendant was in possession of the property as owner; and that the claim for his removal, or to recover the property from him, was time-barred. He, therefore, dismissed the suit. The following is an extract from his judgment:—

"The main point for decision in this suit is whether there was a trust as regards the possession and *vahivat* of certain properties alleged to have been dedicated by one Purshotam Ambaidas to the idol in the temple of Nivdung Vithoba at Poona. Defendant urges that he was the owner of the property. I have declined to take fresh oral evidence on this point, as I think that this and all other questions connected with this case can be decided by a reference to the judgment of Mr. Fernandez, First Class Subordinate Judge, which was confirmed by the High Court in P. J., page 155, of 1892 (Ap. 86 of 1889). The plaintiffs urge that these judgments are not admissible in evidence, but I would hold, on the contrary, that these judgments are admissible as a piece of evidence under section 42 of the Indian Evidence Act. I would even go further and hold that the decree of Mr. Fernandez, which was confirmed by the High Court, operates as *res judicata* between the parties before us, because the matter in issue has been directly and substantially in issue in a former suit between parties litigating under the same title. The plaintiffs in the former suit called themselves trustees, but as no trust was proved, they were not more than devotees of the idol, and that is what the present plaintiffs allege themselves to be. In the former case to prove that a trust had been created, a deed of gift said to have been passed in June, 1859, and a will alleged to have been passed about eight years later were produced. Mr. Fernandez held that the deed of gift was proved, but had never been acted on, and he held that the will had not been proved. He held further that it had not been proved that the property in suit was acquired by Purshotam alone without the aid of any ancestral property. On this point their Lordships did not agree with him, for they assumed that the property had been self-acquired, and they do not expressly record any finding on the *dánpatra* or the will. They do not, however, quarrel with his decisions on these points, but confirm the decree, from which I gather that their opinion as to the unreliability of these two documents was the same as that of the Subordinate Judge. The judgment of the High Court goes on to say, 'whether the defendant can be regarded, in fact, as a trustee for the temple, and can be removed for misconduct, is not now before the Court.' But I will show to the best of my ability that neither plaintiffs nor defendant were trustees for the

... that the defendant has always ...perty adversely to the Panch ever since his ... possession of the property was adverse, he could not hav... ...ustee. Then as regards the so-called Panch, if the judgment of the First Class Subordinate Judge holds good,—and I say that it must hold good, as it has been confirmed by the High Court,—the deed of gift was never acted on, and the will has never been proved; therefore, there was no trust as regards them, and it is clear that defendant Bapubhai has all along enjoyed the property in his own right as owner and not as gumásta, as held by Mr. Fernandez. I hold, then, that no trust was created by Purshotamdas, and that no Panch was appointed by him, and that the son of Purshotamdas had *vahivat* in his own right and not as gumásta. I, therefore, decide the first point against the plaintiffs and hold that they are not entitled to sue under section 539, Civil Procedure Code, for the removal of the defendant."

Plaintiffs appealed.

Nagindas T. Marphatia, for the appellants (plaintiffs).

Shamrav Vitthal, for the respondent (defendant).

FARRAN, C. J.:—This is a suit filed by the plaintiffs with the consent of the Advocate General under section 539 of the Civil Procedure Code (*inter alia*) to have trustees appointed for the management of the property specified in the plaint—a temple and its accessories—and to have the property made over to such trustees.

Their allegation is that Purshotam, the father of the defendant, validly dedicated the property in question to public religious uses, and during his lifetime managed the same, and that after his death the defendant, his son, entered into possession of it, and that for some time the trusts created by his father were recognised and carried out, but that latterly the defendant has claimed it as his own, and refused to perform the trusts or allow them to be carried out. The plaint specifies various documents and makes other allegations, but the above is its substance.

The District Judge has rejected the claim altogether and dismissed the suit without recording evidence, on the ground that it is *res judicata* by the decision in *Kupuswami* v. *Jugalkishore*[1]. That was a suit by certain persons alleging that they had been appointed trustees of the charity by Purshotam, and seeking to

(1) P. J. for 1892, p. 155.

of the [illegible] The registe[illegible]

the property, moveable and immo[illegible]

been appointed by them as [illegible] had over to them, or [illegible] missed him, and that he refused to give [illegible]

The High Court, without specifically finding whether the plaintiffs in that suit had been appointed trustees by Purshotam or not, dismissed the suit on the ground that their claim to recover possession of the property from the defendant was barred by limitation. The High Court expressly refrained from deciding whether the defendant could be regarded as, in fact, a trustee of the temple and could, as such, be removed for misconduct. The present suit is framed for seeking relief on that footing. It is contended that the plaintiffs in the former suit being the trustees appointed after his death by Purshotam both by the original deed of gift and by his alleged will represented the *cestues que trustent* the devotees of the temple or the general public, and that the present plaintiffs also represent the same *cestues que trustent*, and are, therefore, suing in the same right as the trustees in the former suit, and that thus the parties to the two suits are the same. It is further contended that as it was held in the former suit that the claim of the trustees to recover the property from the defendant was barred, the claim of the *cestuis que trustent* to recover the same property must also be barred. What, however, was held in the former suit was that the particular plaintiffs in that suit had, by the operation of the law of limitation, lost their right (if they had ever possessed one) to represent the charity and to evict the defendant. The plaintiffs in that suit had no general warrant such as is conferred on plaintiffs suing under section 539 of the Civil Procedure Code to represent the public as the objects of the charity. They based their title to sue on their particular appointment by Purshotam, and when it was found that they had by limitation lost their right to the title derived from that appointment, they ceased to represent the public just as though they had been removed from their office. The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate General or the public. The present suit is not, therefore, we think, barred by the proceedings in the former suit.

reasoning based ... Subordinate Judge has arrived at the ... it must be held that the judgment of the High Court decides more than is above set out, but when an appellate Court dismisses a suit on the ground of its being barred by the law of limitation it must be taken that the merits of the suit are not dealt with even though the decree of the lower Court is formally confirmed.

It is objected that the relief sought in this suit is not within the provision of section 539. It is not necessary to consider that objection at present. Portion of the relief sought is clearly within the section upon the most limited view of its scope.

We reverse the decree of the District Judge and remit the case for retrial on the merits. Costs, costs in cause.

Decree reversed and case remitted.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

RAMCHANDRA RAGHUNATH KULKARNI (ORIGINAL DEFENDANT AND OPPONENT), APPELLANT v. KONDAJI (ORIGINAL PLAINTIFF AND APPLICANT), RESPONDENT.*

1896. *April* 15.

Dekkhan Agriculturists' Relief Act (Act XVII of 1879), Secs. 15 (B) and 20(1) —Redemption suit—Instalment decree—Mortgagee in possession under the decree for a specified time—Mortgagor cannot redeem before the specified time.

Where under a decree passed in a redemption suit brought under the provisions of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) a mortgagee is continued in possession of the mortgaged property for a definite time, he is

* Second Appeal, No. 4 of 1896.

(1) Sections 15 (B) and 20 of the Dekkhan Agriculturists' Relief Act:—

15 (B) (1). The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section three, clause (*y*) or clause (*z*) or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.