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become adverse. It was held that the suit was not barred and that there was no adverse possession. The ground of the decision was that, in the case of a co-sharer holding after redemption, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title to the knowledge of the person excluded, and by submission on his part to the title thus set up. That is also the law enunciated by this Court in *Gangadhar v. Parashram*⁽¹⁾, where Jenkins, C. J., said that "to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster." The present is not a case of co-sharers to attract to it the application of that law. Plaintiff's suit must be held barred by limitation.

We must, therefore, reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with the costs of the appeal in the lower Court and of this second appeal on the respondents.

Decree reversed.

R. R.

(1) (1905) 29 Bom. 300

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Russell
and Mr. Justice Rao.*

1911.

June 28.

*IN RE ABDULLA HAJI DAWOOD BOWLA ORPHANAGE.**

Indian Stamp Act (II of 1899), section 2 (2d), Schedule I, Article 7—Instrument declaring trust—Fund composed of two parts—Absence of previous disposition in one part—Settlement—Disposition for charity of the other part—Appointment—Stamp duty.

An instrument was prepared for the purpose of declaring trusts of certain funds devoted to charity. The funds amounted to about Rs. 3,00,000 and came to the hands of the trustees from two sources. About Rs. 1,00,000 was the result of appeals to various persons and the rest was provided by the executors of the will of one A.H. The instrument declaring the trusts was engrossed on

* Reference No. 3 of 1911.

a stamp paper of Rs. 15 and a question having arisen as to whether the instrument was properly stamped.

Held, that so far as the fund of Rs. 1,00,000 was concerned, there being no previous disposition in writing of any part of it though some of the contributions were accompanied by letters from the donors expressing their wishes with respect to the funds contributed, the instrument was a settlement according to the definition in section 2 (24) of the Indian Stamp Act (II of 1899) and was chargeable with duty on Rs. 1,03,200 at the rate of 8 annas per cent.

Held also, that so far as the fund of Rs. 2,00,000 was concerned, the provisions of the will of A.H. amounted to a disposition for a charitable purpose, and the instrument was an appointment chargeable with a duty of Rs. 15 under Schedule I, Article 7 of the Indian Stamp Act (II of 1899).

REFERENCE by E. L. Sale, Superintendent of Stamps, Bombay, under section 57 of the Indian Stamp Act (II of 1899).

One Abdulla Haji Dawood Bowla made a will, dated the 15th July 1901, and died on the 11th November following. He appointed Hormasji N. Vakil and Haji Sulleman Abdul Wahed executors under the will which, *inter alia*, provided as follows:—

I bequeath the sum of rupees two lakhs unto my said trustees upon trust for the disposal of the same for establishing and maintaining such a charitable institution as the acting trustees or trustee of this my will shall in their or his absolute and uncontrolled discretion think fit, provided always that if during my lifetime I myself establish any charitable institution this bequest shall be deemed to be void to the extent of the amount which shall be spent or laid out in respect of such institution, though I shall not have expressly revoked it by a codicil or other writing.

Mr. S. M. Edwardes, the Police Commissioner of Bombay, being anxious to make some provision for destitute female children of the Mahomedan community of Bombay, wanted to raise funds for the establishment of an orphanage. He, therefore, wrote to the said executors for assistance and they agreed to devote the said bequest to the purpose. He also published an appeal for funds in newspapers and addressed letters to some leading Mahomedan residents in Bombay asking for donations. Some of the addressees responded to the appeal by sending in funds accompanied in some cases by letters indicating the donors' wishes in the matter. The funds thus collected amounted to Rs. 1,00,000 or thereabouts. The whole fund aggregated to

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Rs. 3,00,000, that is, Rs. 2,00,000, the bequest under the will of Abdulla Haji Dawood Bowla, and about Rs. 1,00,000 collected as donations.

On the 17th December 1910 an indenture was executed between Messrs. Edwardes, Hormasji N. Vakil and Haji Sulleman Abdul Wahed whereby the said sum of Rs. 3,00,000 was settled on an orphanage called "The Abdulla Dawood Bowla Mahomedan Female Orphanage," and conveyed the amount to the trustees thereby appointed. The instrument was engrossed on a stamp of Rs. 15 as declaration of trust under Article 64 (A), Schedule I of the Indian Stamp Act (II of 1899) and was presented for registration.

The Superintendent of Stamps, being doubtful as to whether proper stamp duty was paid on the instrument, made the present reference under section 57 of the Indian Stamp Act (II of 1899) observing as follows :—

In my opinion the said instrument is a 'settlement' within the meaning of section 2 (24) of the said Stamp Act as amended by section 2 of Act XV of 1904 in that it is a non-testamentary disposition in writing of property made for a charitable purpose and that it is accordingly chargeable with stamp duty to the amount of Rs. 1,555 under Article 58(A).

I am advised, however, that even if the said instrument be regarded as merely recording the terms of a disposition of property made for a charitable purpose, still inasmuch as there had not been any previous disposition of the said funds or any of them, in writing, in the same terms as those contained in the said instrument, the said instrument is chargeable as aforesaid.

The attorneys of the trustees contend that the said instrument is merely chargeable with duty as a declaration of trust and that it is, under the circumstances, duly stamped.

Strangman (Advocate-General) with *E. F. Nicholson* (Government Solicitor) for the Government.

Cohen with *Little & Co.* for the trustees.

SOOBY, C. J.:—The instrument upon which we have to adjudicate was prepared for the purpose of declaring the trusts of certain funds placed in the hands of trustees for the establishment, maintenance and management, of a home or homes for poor and destitute female children and waifs of the Mahomedan community in Bombay. The funds amounting to about three

lakhs of rupees came into the hands of the trustees from two sources. About one lakh was the result of appeals by Mr. Edwardes, the Commissioner of Police, for funds for a female Mahomedan Orphanage. The rest was provided by the executors and trustees of Abdulla Haji Dawood Bowla to whom a sum of two lakhs was bequeathed by their testator for the establishment and maintenance of such a charitable institution as the trustees should in their absolute discretion think fit.

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The question of Stamp duty has been argued as relating to two distinct matters which for the purposes of duty may be dealt with separately under section 5 of Act II of 1899.

Dealing first with the funds resulting from Mr. Edwardes' appeal we are unable to hold that any previous disposition has been made in writing of any portion of those funds. It is no doubt true that some of the contributions were accompanied by letters from the donors expressing their wishes, with regard to the funds contributed, but such letters were not in themselves dispositions. The disposition would be by delivery of a cheque or money passing the sum contributed to Mr. Edwardes. We hold, therefore, that the instrument before us is an instrument recording by way of declaration of trust the terms of the disposition of the fund collected by Mr. Edwardes. It is thus a settlement according to the definition in section 2 (24) and is chargeable with duty on Rs. 1,03,200 at the rate of 8 annas per cent.

Turning now to the funds brought in by the Bowla trustees, we hold that the provisions of the will amount to a disposition for a charitable purpose of the two lakhs of rupees from which the funds in question have accrued. The instrument before us relates not to 'free property' to adopt the expression of the Court in *Massercene and Ferrard v. Commissioners of Inland Revenue*⁽¹⁾, but to property already held upon a general charitable trust. See *Pocock v. Attorney-General*⁽²⁾. The trustees in appropriating the money to the trusts declared by the instrument in question are exercising the power of appointment

(1) [1900] 2 L. R. 138.

(2) (1876) 3 Ch. D. 342.

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conferred upon them by the will. The disposition was by the testator by the will and not by the trustees by this instrument. See *Bai Motivalu v. Bai Mamubai*⁽¹⁾. The instrument *qua* the Bowla funds is an appointment chargeable with a duty of Rs. 15 under Schedule I, Article 7.

Answer accordingly.

G. B. R.

(1) (1897) 21 Bom. 799.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911.

July 11.

THE SECRETARY (OF STATE FOR INDIA IN COUNCIL (ORIGINAL APPLICANT), APPELLANT, *v.* NARAYAN KASHIRAM SHET (ORIGINAL OPPONENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 13—Civil Procedure Code (Act XIV of 1883), section 412—Suit in forma pauperis—Settlement of suit out of Court—Court passing no order for payment of Court-fees—Government applying for the payment—Practice and procedure.

A suit for partition brought in *forma pauperis* was settled out of Court. On the 7th October 1908 the Court dismissed the suit, but made no order for the payment of Court-fees under section 412 of the Civil Procedure Code of 1882. At that date Government had ninety days' time within which to apply to the High Court under its extraordinary jurisdiction. Before the expiry of the period the new Civil Procedure Code came into force. The Government, thereupon, applied to the Court under O. XXXIII, r. 12, for an order as to payment of Court-fees, but the Court declined to make the order. On appeal:—

Held (1) that the order passed by the Court under O. XXXIII, r. 12, was an order within the meaning of section 47 and it was therefore appealable;

(2) that, before the expiry of the period within which the Government could have applied to the High Court under the old Code, the new Code had come into force, and by it the Government were enabled to apply to the Court for an order under r. 12 of Order XXXIII;

(3) that the suit having been dismissed there was a failure of it, and the right accrued to Government to have the Court-fee from the party defeated.

APPEAL from an order passed by G. B. Laghate, First Class Subordinate Judge of Ratnagiri.

* First Appeal No. 208 of 1910.