APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

1912. *August 22.*

MAHAMADGAUS WALAD DADASAHEB KANTHI (ORIGINAL DEFENDANT 1), APPELLANT, *v.* RAJABAKSHA GURU ROSHANBAKSHA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 2), RESPONDENTS.*

Land assigned to support religious service—Alienation by holder—Lease—Adverse possession—Limitation—Suit to recover possession of vatan land on the ground that the mortgage by the previous holder ceased to be effective on his death—Defence of tenancy for a term—Dismissal of suit—Subsequent suit to recover possession on the ground that the deceased holder had no right to alienate the land in any manner—Res judicata.

In the case of a lease for a term of years by the holder for the time being of lands assigned to support services rendered to a Makan and religious community by successive holders, time begins to run not from the commencement of the tenancy of the person claiming to hold as a tenant, but from the date when the claims of the parties became openly and undoubtedly adverse.

Tekait Ram Chunder Singh v. *Srimati Madho Kumari*(1) and *Trimbak Ramchandra* v. *Shekh Gulam Zilani*(2), referred to.

The plaintiff brought a suit on the ground that the alienation by way of mortgage of certain service vatan lands ceased to be effective on the death of the alienor, the previous holder. The defendant contended that the document of alienation was a lease and not mortgage. The suit was dismissed on the ground that the plaintiff failed to establish his contention as to the character of the document upon which he had elected to go to trial.

In a subsequent suit the plaintiff asserted that the lands in suit being Sarv-Inam continuable in the plaintiff's family in the succession of disciples, the plaintiff's deceased predecessor had no right and power whatever to pass in writing those lands by way of mortgage or lease or in any other manner so as to let the writing continue in force after his death.

Held, that the subsequent suit was not maintainable owing to the bar of *res judicata*. The complaint in both the suits was the unlawful retention by the defendant of the lands after demand for delivery free of incumbrances. The matter of the retention of possession of the lands by defendant upon the terms asserted by him had been heard and finally decided in the first suit and could not be raised again.

* First Appeal No. 140 of 1911.

(1) (1885) L. R. 12 I. A. 188 at p. 197. (2) (1909) 34 Bom. 329.

Woomatara Debea v. *Kristokamini Dossee*(1), referred to.
Naro Balvant v. *Ramchandra Tukdev*(2), distinguished.

FIRST appeal against the decision of G. V. Patvardhan, First Class Subordinate Judge of Dharwar, in original suit No. 11 of 1910.

The plaintiff sued for a declaration that the lands in suit being the property of the Fakirs of Malapur Makan descendible to their disciples belonged to plaintiff and to recover possession of the same from the defendants with Rs. 2,500 as mesne profits for the past five years and future mesne profits. The plaint alleged that the lands were Sarv-Inam and belonged to the plaintiff's family as Fakirs of the Malapur Dodd Makan, that plaintiff's grandfather Rajabaksha was a Fakir of the Makan and as such owned the lands, that on Rajabaksha's death his son and disciple Roshan enjoyed the same till about the year 1904 when he died, that plaintiff being the son and disciple of Roshan was owner of the property, that defendants were in possession under a self-liquidating mortgage executed by Roshan in 1891 to defendant 1's father for a term of 75 years in satisfaction of an old debt of Rs. 7,000, that Roshan had no right to alienate the lands beyond his life-time and that the cause of action arose on Roshan's death in 1904.

Defendant 1 answered that the suit was barred by *res judicata* by reason of the decision in suit No. 155 of 1907, that it was also barred by limitation because the plaintiff's cause of action arose on the date of the alienation by Roshan, namely, on the 28th May 1891, as the property was the endowment property of the Makan; that one Dilavarkhan had an interest in the lands under an award between his wife Davalatbi and the defendant, hence he should be joined as a party, that the property did not belong to the plaintiff's family but to

(1) (1872) 18 W. R. 163 (2) (1888) 13 Bom. 326

1912.

MAHAMADGAUS v. RAJABAKSHA.

the Makan and was descendible from one Fakir to another as his disciple, that the alienation by way of lease made by plaintiff's father in favour of defendant 1's father in 1891 for a term of 75 years was binding on the plaintiff as it was for the benefit and protection of the Makan and that the lease was binding on the plaintiff by reason also of the decision in suit No. 155 of 1907.

Defendant 2, Dilavarkhan, replied to the same effect and denied his liability for mesne profits as he was not in possession.

The Subordinate Judge found that the suit was not time-barred and that it was also not barred by *res judicata* by reason of the decision in suit No. 155 of 1907. He, therefore, allowed the plaintiff's claim for declaration of ownership and possession and awarded to him Rs. 1,500 for past mesne profits. Future mesne profits he directed to be determined under Order XX, Rule 12 of the Civil Procedure Code.

Defendant 1 appealed.

Coyaji with *K. H. Kelkar* for the appellant (defendant 1).

G. G. Nadkarni with *A. G. Desai* for respondent 1 (plaintiff).

G. S. Mulgaokar for respondent 2 (defendant 2).

SCOTT, C. J. :—The only two points argued in this appeal are limitation and *res judicata*.

The property in suit consists of lands at Malapur and Dharwar which the plaintiff claims by right of succession to his deceased father and Guru Roshan who was a Fakir of the Makan of Malapur and held also the office of Surguro. The lands in suit had been alienated by the previous holder of the office of Surguro in favour of the ancestors of defendant 1. The last alienation was made by Roshan in 1891 by way of lease in favour of

defendant 1's father for a term of 75 years in satisfaction of an old debt of Rs. 7,000. The plaintiff's case is that Roshan had no power to alienate the property beyond his life-time and he claims to recover possession on the footing that since Roshan's death the lease is no longer binding.

It is admitted that the property descends to the disciple of each holder of the office of Surguro in succession, and that according to custom the son of the last holder is appointed disciple, successor and Surguro. It is found as a fact and the finding is not challenged in appeal that the plaintiff is the disciple nominated by Roshan to succeed him. It is also found that the lands in suit were granted for the support of the office of Surguro. This finding also has not been seriously attacked. It is not now contended that the lease was granted by Roshan for a necessary purpose so as to bind the property in the hands of successive holders. Roshan died in 1904 and the plaintiff contends he is entitled to challenge the alienation at any time within twelve years of that date. The defendant contends that time ran in his favour, as lessee for a term, from the date of the lease and that the suit is barred. In support of this argument the defendant placed reliance chiefly upon the judgment of the Privy Council in *Gnanasambanda* v. *Velu Pandaram*[1]. That was a case of sales of an office which were void *ab initio* and it was held that time ran in favour of the purchaser from the date of the sales and the vendor's right and the right of his son who would succeed to the office by inheritance was barred after twelve years. In the present case however we have no sale of an office but a lease for a term of years by the holder for the time being of lands assigned to support services rendered to the Makan and a religious community by successive holders. The rule in such cases is

(1) (1899) L. R. 27 I. A. 69.

1912.

MAHAMAD-GAUS v. RAJABAKSHA.

that the holder of the lands may alienate them for his own life or any shorter period but cannot separate them permanently from the duties to which they are annexed so as to bind his successor: see Mayne's Hindu Law, section 401 (7th Edn.).

In a recent judgment in somewhat similar case the Judicial Committee held that a lease granted by a Mohunt whose predecessor had received the land as a gift for the service of particular idols whose Shebait he was, was valid only during his life-time and was recoverable by his successor suing within twelve years of the death of the lessor Mohunt: *Abhiram Goswami* v. *Shyama Charan Nandi*[1].

It is contended for the defendant that this class of cases is distinguishable as here the property is heritable by sons subject only to their nomination by their father as disciples. The right of the plaintiff would then however be regulated by the rule, which has been applied in the case of Ghatwali tenures in *Tekait Ram Chunder Singh* v. *Srimati Madho Kumari*[2] and in the case of saranjams in *Trimbak* v. *Shekh Gulam Zilani*[3], viz., that time would begin to run not from the commencement of the tenancy of the person claiming to hold as a tenant but from the date when the claims of the parties became openly and undoubtedly adverse. On this footing there was no adverse possession during Roshan's life-time. For these reasons we think the plea of limitation fails.

It is otherwise however with the plea of *res judicata*.

In suit No. 155 of 1907 the plaintiff by his next friend sued the defendants for possession of the lands now in suit free of incumbrances.

It was alleged that the document by way of lease under which the defendant claimed to retain the land was

(1) (1909) L. R. 36 I. A. 148. (2) (1885) L. R. 12 I. A. p. 197.
(3) (1909) 34 Bom. 329.

in reality a mortgage, that having regard to the fact that the defendants' father had been previously in possession of the lands as usufructuary mortgagee under an earlier mortgage, there was in fact nothing due by the plaintiff and therefore being an agriculturist he was entitled to sue for redemption prior to the expiration of the agreed term: his plaint then proceeded as follows: "Moreover the said lands being Inam lands and person who *took* (gave ?) a mortgage of them in writing being dead the defendant is bound to surrender them gratis under the Watan Act. Therefore this suit is filed."

The allegation of mortgage by an agriculturist was no doubt resorted to in order to avoid the plea that the suit was premature while the allegation that the alienation by way of mortgage was void after the death of the mortgagor was deliberately put forward as a second line of attack. The cause of action was stated to have arisen on the 15th of March 1907 when the plaintiff demanded delivery free of incumbrances and the defendant refused. The written statement in that suit set up the case that the document in question was not a mortgage but a lease, that the alienation did not fall under the Watan Act and that the suit was barred as having been instituted more than twelve years from the date of the lease.

In the present suit the plaintiff's case is stated in para. 3 of the plaint as follows:—

> The said lands being Sarv-Inam lands which are to continue with the plaintiff's family in the succession of disciples in the capacity of Malapur Makandar Fakirs the deceased Roshanbaksha had no right and power whatever to pass in writing those lands by way of mortgage or lease or in any other manner so as to let them continue in force after his death. There is no reason for the land to continue with the defendant but if the defendant is asked to relinquish the lands he does not relinquish them. Therefore it became necessary to file this suit.

The complaint in both suits was the unlawful retention by the defendant of the lands after demand for

1912.

MAHAMAD-GAUS v. RAJABAKSHA.

delivery free of incumbrances. In both suits the point was put forward by the plaintiff that the alienation ceased to be effective after the death of Roshanbaksha. In the first suit the defendant expressly alleged that the document of alienation was a lease and not a mortgage, but the plaintiff who had the conduct of the proceedings deliberately declined to accept that view of the document or to assert his right in the alternative on that basis.

The first suit was dismissed by the Court on the ground that the plaintiff failed to establish his contention as to the character of the document upon which he had elected to go to trial. The matter of the retention of possession of the land by the defendant upon the terms asserted by him has been heard and finally decided in the first suit and cannot be raised again. See *Woomatara Debea* v. *Kristokaminee Dossee*[1].

It was argued by Counsel for the plaintiff that the Court had no jurisdiction by reason of the provisions of the Court-Fees Act to try any issue in the first suit except the question of the plaintiff's right as an agriculturist to redeem. We have not been referred to nor are we aware of any authority for the contention. The plaintiff by his next friend was *dominus litis* and the Court-Fees Act did not prevent him from having his case shaped in the way considered most advantageous to him.

The case of *Naro Balvant* v. *Ramchandra Tukdev*[2] relied upon for the plaintiff is clearly distinguishable. It presents none of the essential features of the present case. The two suits there were not concerned with the relations of the plaintiff and defendant arising under one and the same document. There was no alternative line of attack in the first suit deli-

(1) (1872) 18 W. R. 163.

(2) (1888) 13 Bom. 326.

berately abandoned by the plaintiff; on the contrary the plaintiff asked for and was refused in the first suit permission to change his suit to one in ejectment.

We are of opinion that this suit is not maintainable owing to the bar of *res judicata*. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

BEAMAN, J. :—I entirely concur.

Decree reversed and suit dismissed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

RANGACHARYA BIN APPAYACHARYA PANDURANGI VATMUKTIAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* DASACHARYA SANKALPACHARYA NAVRATNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1912. *September 5.*

Limitation—Adverse possession—Title—Bombay Regulation V of 1827, section 1 †*—Rule of positive law—Limitation Act (XIV of 1859), section 2* ‡*—Limitation Act (IX of 1871), section 2* §*—Repeal of section 1 of Bombay Regulation V of 1827—Effect of repeal—Construction of statute—Rule of positive law not affected by law of limitation—Endowment of village for the purpose of performing Karpur Mangalarti—Trustee—Alienation by trustee—Adverse possession by alienee.*

In 1678 a village was given in Inam to the then Swami of the Uttaradhi Math for the purpose of meeting the expenses of a religious service called the Karpur Mangalarti at the temple of the Math. A successor of the Swami gave

---

* First Appeal No. 130 of 1911.

† The material portion of the section runs as follows :—

Possession of land, etc., for more than thirty years a good title.

1. Whenever lands, houses, hereditary offices, or other immoveable property have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs or others deriving right from him, such possession shall be received as proof of a sufficient right of property in the same.