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31 C. 305=31 I. A. 24=8 C. W. N. 225.

any power which they might jointly have exercised had no manager been appointed. The restraint upon them is co-extensive with the power conferred on the manager; it does not extend to the exercise of individual rights. In the view which their Lordships take, the acquisition of Rahimulla's share in the property by the appellant made the appellant a co-owner of the property under the manager, and as such co-owner he is entitled to the benefit of the decree for redemption, which has been passed in the suit, with such alteration of the date for redemption as the High Court may find proper.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *Watkins & Lempriere.*

Solicitors for the respondents: *T. L. Wilson & Co.*

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31 C. 314.

[314] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

JAGAMBA GOSWAMINI *v.* RAM CHANDRA GOSWAMI.*

[1st December, 1903.]

Limitation—Debutter property, transfer of—Adverse possession—Limitation Act (XV of 1877), ss. 2, 10, 28—Implied Trust—Act IX of 1871, ss. 10, 29—Act XIV of 1859—Regulation III of 1793—Revival of right to sue barred under old law.

A *debutter* property was endowed in 1771 A. D. by a Hindu Raja for the worship of a deity and other religious purposes. A former *shebait* transferred the property in 1820 A. D. by a deed of gift to the defendant's predecessor. The plaintiff, the present *shebait*, sued to recover possession of the property on the ground that the said transfer did not confer any title on the defendant. The defendant pleaded limitation:—

Held, that a person in the position of the defendant is one "in whom property has become vested in trust for any specific purpose," within the meaning of s. 10 of the Limitation Act of 1877.

Sethu v. *Subramanya* (1) followed. *Kherodemoney Dosse* v. *Doorgamoney Dossee* (2) referred to.

Held, further, that notwithstanding s. 10 of the present Limitation Act, XV of 1877, which is similar to s. 10 of Act IX of 1871, the suit was barred by limitation, the right to sue having been barred under the old law, which contained no provision similar to s. 10, long before Act IX of 1871 came into operation.

Gunga Gobind Mundul v. *Collector of 24-Pergunnahs* (3), *Luchmee Buksh Roy v. Runjeet Ram Panday* (4), and *Fatimatulnissa Begum* v. *Sundar Das* (5) followed.

[Foll. 123 P. W. R. 1908=127 P. R. 1908; 2. C. L. J. 546; 13 A. L. J. 612=29. I. C. 292; 23 M. L. T. 187=34 M. L. J. 344=44 I. C. 630=1918 M. W. N. 179; Ref. 42. Cal. 536; 3 Pat. L. J. 327=47 I. C. 290; 16. C. L. J. 349=16 I. C. 927=17 C. W. N. 873; 20. C. L. J. 312; 24. I C. 899.]

SECOND APPEAL by the defendants, Jagamba Debi Goswamini and another.

* Appeal from Appellate Decree, No. 2763 of 1902, against the decree of W. Maude Officiating Judicial Commissioner of Chota Nagpore, dated Nov. 4, 1902, affirming the decree of Jadupati Banerjee, Subordinate Judge of Manbhum, dated June 28, 1901.

(1) (1887) I. L. R. 11 Mad. 274.
(2) (1878) I. L. R. 4 Cal. 455.
(3) (1867) 11 Moo. I. A. 345, 361.
(4) (1873) 13 B. L. R. (P.C.) 177; 20 W. R. 375.
(5) (1900) I. L. R. 27 Cal. 1004; L. R. 27. I. A. 103.

[316] The plaintiff Ram Chandra Acharya Goswami, as *shebait* and *mohunt* of Keshab Rai Jeo Thakur, brought the suit for recovery of right of management and possession of mouza Sonaijuri on the allegation that the said mouza was part of landed property endowed by a former Raja of Chaklai Panchkote as *debutter* property for the performance of *sheba*, &c., of the deity Keshab Rai Jeo Thakur, of Beragadi. It was alleged that when the plaintiff as *shebait* and *mohunt*, attempted to make a settlement of the disputed mouza on behalf of the deity in 1894, the defendant No. 1 prevented him from doing so, and set up a claim to the mouza, alleging that it was held by her under a gift made to her father-in-law, the late Raghab Acharya, by Luchman Acharya, a former *shebait* and *mohunt*, in 1227 B.S. (1820 A.D.) The plaintiff accordingly sued for possession by ejectment of the defendants and for a declaration that they had no right to the property.

The defendants Nos. 1 and 2 filed a written statement, denying that the property in suit was *debutter* or that its profits were ever used for the worship of the deity, and alleging that it was the rent-free *brahmottar* grant of the father-in-law of the defendant No. 1. The plea of limitation, as well as other formal objections, were also taken.

The Subordinate Judge decreed the suit giving the defendants, however, option to take a settlement of the mouza within three months at a reasonable and fair rent, a decision which was confirmed on appeal by the Judicial Commissioner. Upon the question of title, the Judicial Commissioner found that the original grant was in fact a *debutter* grant pure and simple, that the treatment of any portions of the property as *brahmottar* was a later innovation introduced by the *shebaits* and their connections for their own purposes of gain, and that the property in dispute was included within the said original grant. In coming to this conclusion, the Judicial Commissioner relied, amongst others, upon a copy of a list of villages dated 1178 B.S., purporting to have been granted by the former Raja and described as the *Raj guru debutter* of Keshab Rai Jeo. The defendants objected to the admissibility of this document. The Judicial Commissioner held that the Raja being dead, the statement in the document was [316] admissible as being made against his interests, and that the list was not a copy of a copy. On the question of limitation, he held that although the defendants admittedly got possession by virtue of a *sanad* dated the 28th April 1820, under section 10 of the Limitation Act, the suit was not barred by limitation.

Dr. *Ashutosh Mookerjee*, Babu *Biraj Mohan Mazumdar* and Babu *Indra Bhushan Mazumdar* for the appellants.

Babu *Sarada Charan Mitra* and Babu *Nolini Ranjan Chatterjee* for the respondent.

RAMPINI AND PRATT, JJ. This is an appeal against a decision of the Officiating Judicial Commissioner of Chota Nagpur. The suit out of which the appeal arises is one brought to establish the right of the plaintiff, as *shebait*, to recover possession of certain land alienated by one of his predecessors in favour of the predecessor of the defendants so long ago as the 17th Bysack 1227, or 28th April 1820, that is upwards of 80 years ago. The plaintiff contends that the land is *debutter* and that his predecessor had no right to make a gift of it as *brahmottar* land in favour of the defendants' predecessor.

The lower Courts have found the land to be *debutter*. They have accordingly given the plaintiff a decree.

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The defendants now appeal and on their behalf it is contended (i) that the suit is barred by limitation, and (ii) that the lower Courts were wrong in admitting in evidence a document described in the Lower Appellate Court's judgment as the list of 1178. We need say no more with regard to this second plea than that for the reasons given at length by the Officiating Judicial Commissioner we consider that the document was properly admitted in evidence.

The appellant's first plea, however, in our opinion must prevail. The argument of the learned pleader for the appellant on this point is a twofold one. He says, firstly, the provisions of section 10 of the Limitation Act (XV of 1877) on which the Lower Appellate Court relies, do not apply, because the words " person in whom property has become vested in trust for any specific purpose " mean a person in whose favour according to English law an express [317] trust, as distinguished from an implied trust, has been created. Some support for the argument is to be found in a judgment of Chief Justice Garth in *Kherodemoney Dossee* v. *Doorgamoney Dossee* (1), but we on the whole agree with the opinion of the Madras High Court in *Sethu* v. *Subramanya* (2), that a person in the position of the defendant is " a person in whom property has become vested in trust for any specific purpose," within the meaning of the section. The pleader for the appellant, in the second place, contends that, as the gift of the property in favour of the predecessor of the defendants was made in 1820, and the grantee or his successors have been in possession of the lands as *brahmottar* ever since, the suit was barred by limitation long before Act IX of 1871 (the provisions of section 10 of which are practically similar to those of section 10 of the present Act) came into operation, and hence the right to sue once barred cannot be revived either by Act IX of 1871 or Act XV of 1877.

We are of opinion that this argument must prevail. It is true that there is no section in Act IX of 1871, or any previous Act, similar to section 2 of Act XV of 1877, which, however, would not seem to apply to section 10, owing to the words " Notwithstanding anything hereinbefore contained," which occur in the beginning of the latter section. But neither in the two statutes previously in force, which deal with the subject of limitation, *viz.*, Regulation III of 1793, and Act XIV of 1859, is there any provision similar to section 10 of Acts IX of 1871 and XV of 1877. It has been pointed out to us that in neither of the former two enactments is there any provision similar to sections 29 and 28 of the two latter Acts. In answer to this it is sufficient to point out that it has been ruled by the Privy Council in the cases of *Gunga Gobind Mundul* v. *Collector of 24-Pergunnahs* (3), *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (4), and *Fatimatulnissa Begum* v. *Sundar Das* (5), that even before the passing of Acts IX of 1871 and XV of 1877, a right not sued for within the period of limitation prescribed for the suit is extinguished and cannot be revived [318] by the passing of any subsequent Act (See also Mitra on Limitation and Prescription, 3rd Edition, p. 13). Hence it is clear that as the defendants' predecessor or predecessors was or were in adverse possession of the land sued for in this suit since 1820 and have from that date been holding it as *brahmottar* land, the plaintiff, notwith-

(1) (1878) I. L. R. 4 Cal. 455.
(2) (1887) I. L. R. 11 Mad. 274.
(3) (1867) 11 Moo. I. A. 345, 361.
(4) (1873) 13 B. L. R. (P. C.) 177 ; 20 W. R. 375.
(5) (1900) I. L. R. 27 Cal. 1004; L. R. 27 I. A. 103.

standing the provisions of section 10 of the Limitation Act of 1877, cannot now recover it.

We therefore decree this appeal with costs.

Appeal allowed.

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[319] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pargiter.

FATIMA BIBEE *v.* AHMAD BAKSH.*

[4th, 5th, 6th, 7th, and 14th August 1903.]

Mahomedan Law—Gift—Marz-ul-maut, death-illness, what constitutes—Gift to minor son—Possession, delivery of—Hibanama—Transfer of Property Act (IV of 1882), ss. 123, 129.

According to the Mahomedan Law, three things are necessary to constitute *Marz-ul-maut* or death-illness, *viz.*, (i) illness, (ii) expectation of fatal issue, and (iii) certain physical incapacities, which indicate the degree of the illness. The second condition cannot be presumed to exist from the existence of the first and the third, as the incapacities indicated, with perhaps the single exception of the case in which a man cannot stand up to say his prayers, are no infallible signs of death-illness.

When a malady is of long continuance and there is no immediate apprehension of death, it is not a death illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, is not invalid. Ordinarily a malady should be considered to be of long continuance, if it has lasted a year, but the limit of one year does not constitute a hard and fast rule. If, however, the illness increases to such an extent as to give rise to an apprehension of death in the mind of the donor, the increase is death-illness.

Muhammad Gulshere Khan v. *Mariam Begam* (1) and *Hassarat Bibi* v. *Golam Jaffar* (2) followed; *Labbi Beebee* v. *Bibbun Beebee* (3) referred to.

No actual delivery of possession is necessary when a parent makes a gift to a son, who is a minor.

Ameeroonnissa Khatoon v. *Abadoonnissa Khatoon* (4) followed.

[Affirmed on appeal 35 Cal. 271 P. C.=35 I. A. 67=12 C. W. N. 214=7 C. L. J. 122=10 Bom. L. R. 51=18 M. L. J. 6. Ref. 6 A. L. J. 503=1 I. C. 408; 28 I. C. 903; 20 Bom. 537; 31 Bom. 264; 35 Cal. 1 P. C. 37 Cal. 271; Dist. 12 A. L. J. 132=22 I. C. 807. Rel. on 36 All. 289.]

APPEAL by the defendants, Fatima Bibee and others.

One Dader Baksh was the Sub-Deputy Collector of Khurda. He suffered from diabetes for years, and then got albuminuria from which he suffered for more than a year before his death. He came home to Cuttack on sick leave in the beginning of May [320] 1897. From the 12th to the 19th of May, he was under the treatment of one Dr. Keshab Chandra for fever and other complaints. On the 20th May, he was placed under Dr. Meadows, the Civil Surgeon, for treatment. On the 21st May, he and his wife, Salimut-un-nessa, the *pro forma* defendant No. 7, jointly executed a *hibanama* or deed of gift of their properties specified therein, in favour of their son, Ahmad Baksh, the plaintiff, who was a minor. It was set out in the deed that the offer and acceptance duly took place between the grantors and the grantee's

* Appeal from Original Decree, No. 305 of 1900, against the decree of Behary Lal Mullick, Subordinate Judge of Cuttack, dated Aug. 20, 1900.

(1) (1881) I. L. R. 3 All. 731.
(2) (1898) 3 C. W. N. 57.
(3) (1874) 6 All. H. C. 159.
(4) (1875) 15 B. L. R. 67; L. R. 2 I. A. 87.