1873. *March* 13. *R. A. No.* 80 *of* 1872.

An attempt was made to show that in the place from which this case comes the rule of the special Bengal treatises and not that of the general law prevails. This argument was never put forward in the Lower Court, and so far as I can see from the authorities within my reach it is wholly unfounded.

There was no argument as to the mesne profits, the amount of which was, I believe, admitted, and the decree will be, reversing that of the Court below, for the return of the Zemindary to the adopted son with mesne profits from the date of suit.

KINDERSLEY, J. :—I agree to this judgment but would disallow interest on the jewels and money.

Appellate Jurisdiction. (a)

Regular Appeals, Nos. 95 *and* 123 *of* 1872.

NALLATHAMBI BATTAR. *Appellant in No.* 95.

NELLAKUMARA PILLAI. { *Respondent in No.* 95 *and Appellant in No.* 123.

NALLATHAMBI BATTAR and another..... } *Respondents in No.* 123.

The suit was brought by the trustees of certain pagodas for the recovery of six villages from the defendant, on behalf of the pagodas, and to declare a copper sannad, purporting to be an ancient grant on which defendant based his title, a forgery. The District Judge considered that the evidence sufficiently established that the title to the villages was in the temples and not in the defendant, but he was also of opinion that as defendant had been lawfully placed in management by the Board of Revenue in 1858 he was entitled to hold the villages for life. He therefore declared plaintiff's reversionary title as trustee of the temples on the death of the defendant.

Defendant appealed from this decision as to the title and plaintiff appealed as to the part of the decree which refused him immediate possession of the property. *Held* by INNES, J. that the title to manage must reside in the pagoda if it did not reside in the defendant, that the evidence abundantly negatived the title of the defendant, and that plaintiff was entitled to possess and manage the property as trustee of the temples. Upon the question whether plaintiff was precluded from recovering during the life-time of defendant, by reason of the order of

(a) Present :—Innes and Kindersley, JJ.

1858, placing defendant in possession: *Held* that the Government could not create a valid title to more than they themselves possessed; that they had simply taken over the possession and management of the endowment and afterwards given it over to defendant; that by so doing they relieved themselves of the trust they had undertaken under Regulation VII of 1817, but did not thereby appoint defendant a manager under Regulation VII of 1817. *Held* also that the Judgment in Suit No. 17 of 1819 in which the cousin of a former manager sued him for a partition of certain villages, some of which were included in this suit and in which it was decided that the manager was manager and not owner, was a decision upon a question of public right and was receivable against the defendant.

KINDERSLEY, J. agreed generally, but doubted whether the judgment in O. S. No. 17 of 1819 was upon a matter of such general interest as to be good evidence against a stranger.

1873. *November* 10. *R. A. Nos.* 95 *&* 123 *of* 1872.

THESE were Regular Appeals against the decision of F. C. Carr, the Acting Civil Judge of Tinnevelly, in Original Suit No. 38 of 1870.

Rámu Rau, for the appellant in No. 95 and for the 1st respondent in No. 123.

Sloan and Johnstone, for the respondent in No. 95 and for the appellant in No. 123.

Nallathamby Mudaliar, for the respondent in No. 95.

The Government Pleader, for the 2nd respondent in No. 123.

The Court delivered the following judgments:—

INNES, J.:—This was a suit brought by the trustee of the pagodas of Nallayappen and Kanthimathi Ammal for the recovery of six villages from the defendant on behalf of the pagodas and to declare the copper sannad purporting to be an ancient grant on which defendant based his title to be a recent forgery. There was also a prayer for mesne profits. The District Judge considered that the evidence sufficiently established that the title to the villages was in the temple and not in the defendant, but he was also of opinion that as defendant had been lawfully placed in management by the Board of Revenue he was entitled to hold the villages for life. He therefore declared plaintiff's reversionary title as trustee of the temples on the death of the defendant. In regard to the copper sannad he considered it unnecessary to determine whether or not it is a genuine

1873. November 10. R. A. Nos. 95 & 123 of 1872.

instrument, as he was of opinion that there was nothing to show that it had ever been acted upon.

Defendant appealed from this decision as to the title, and plaintiff appealed as to the part of the decree which refused him immediate possession of the property.

It is conceded that the grant of the villages carried with it the obligation to perform certain ceremonial services in these temples. In other words it is conceded that the temples have at least a charge upon the produce of the villages for this purpose. What the plaintiff contends is that the villages appertain exclusively to the two temples, while defendant claims them subject to the aforesaid charge as an hereditary grant made to one of his ancestors and rightfully devolved on him which, though taken possession of by the Government in 1858, was restored to him in 1859. The only substantial question is whether plaintiff as warden of the temples can claim actual possession and management of the villages as the property of the temple. Taking the appeal of defendant first, we may start with the admission that the person managing in 1838 was Vendramuthu Kumarasami.

Exhibit O is the judgment in Original Suit No. 17 of 1819 in which the cousins of Vendramuthu Kumarasami Pandaram sued him for partition of eight villages of which six are those claimed in the present suit. In that case Vendramuthu Kumarasami Pandaram set up that the villages were the property of the Nallayapper pagoda, and that he was manager and not owner. It followed, if this were so, that the cousins could have no right to enforce partition. The decision was that he was not the owner. To arrive at that decision it was necessary to determine, and the Judge did determine, that the property was that of the Nallayapper pagoda, and that the defendant was merely a manager for the pagoda. The present 1st defendant was not a party to this suit, but the decision is a decision upon a public right, which is as reputation receivable in evidence against defendant, though not conclusive as evidence. In 1838 the villages were attached by the Collector as the property of the pagodas

1873. *November* 10. *R. A. Nos.* 95 *&* 123 *of* 1872.

and so held. The same person was then in management. The evidence that he was then managing as agent of 1st defendant fails entirely as the Judge has shown; and the presumption arises that he was managing on behalf of the temples, as he himself then asserted. Here then we have *primâ facie* evidence of a right of possession and management residing in the temples so far back as 1819 and up to 1838.

Then how does defendant meet this? He relies on his Sásanam (the copper grant); on his evidence to his lineal descent from the original grantor; on certain decisions of the Courts; on the recognition of his title by Government in 1858; on long possession; and certain other evidence.

The Sásanam and defendant's title as derived from it were, it is true, recognised by the Board of Revenue and the Government in 1858, but this recognition rested, as has been clearly shewn in the judgment under appeal, upon no apparent foundation. As to the judgments from 1813 to 1866 on which defendant relies, the learned Judge of the Court of First Instance has very carefully gone through them, and it is clear that the question of title as between the temples and defendant has not by any of those judgments passed into *res judicata*.

It appears to me from the evidence and the circumstances of the case that the title to manage must reside in the pagoda if it does not reside in the defendant; that the evidence abundantly negatives the title of the defendant; that there is besides evidence that the possession in 1819 and up to 1838 by Vendramuthu Kumarasami was possession on behalf of the temple; and that that possession continued from 1838 till the surrender of the villages to defendant, as they were held in the interval by the Collector on behalf of the pagoda. It is difficult to understand why the managers of the temple did not come forward earlier. Prior to 1843, we have it in evidence that there were no Dharmakurtas which would explain why there was no remonstrance on the part of the temple in 1838, but the acquiescence in 1859 in the delivery of the property to defendant leads to a suspicion that those concerned abetted defendant in 1858-59

1873. *November* 10. *R. A. Nos.* 95 & 123 *of* 1872.

when he asserted his title, possibly with a view to obtain a share in the sums accrued in the hands of Government during the management.

But I think, for the reasons first given, that plaintiff is the person entitled to possess and manage the property as trustee of the temples, and I would affirm the judgment on this question.

No question arises of a bar by lapse of time, for, as the District Judge says in para. 25 of his judgment, the cause of action arose in January 1859 and the suit was filed within twelve years, viz., 9th December 1870.

We now come to the appeal of plaintiff, and it is necessary to determine whether plaintiff is precluded from recovering during the life-time of defendant by reason of the order of Government in 1858, placing defendant in possession.

The District Judge considers that defendant was lawfully appointed a manager and that he cannot be ejected in his life-time, but he has given plaintiff a decree declaratory of his reversionary title on behalf of the temple. The Board of Revenue had in 1838 taken the endowment into direct management and in placing defendant in possession in 1859, they simply made over the trust to the person whom they supposed to be entitled to hereditary management. But if they *had* treated him as the person absolutely entitled this circumstance would not debar a rightful competitor from contesting the title. The Government, assuming to act within the law, could not create a valid title to more than they themselves possessed. They could not lawfully have resumed nor had they affected to resume this ancient endowment. They had simply taken over the possession and management of it, and this was all that they gave over to defendant.

By doing so they relieved themselves of the trust they had undertaken under Regulation VII of 1817, but I do not conceive that by relinquishing the possession to 1st defendant they thereby appointed him a manager under Regulation VII of 1817 as supposed by the Judge. Under the Regulation a manager can only be appointed when no private person is found competent and entitled to manage

1873. *November* 10. *R. A. Nos.* 95 *&* 123 *of* 1872.

the trust. But defendant was evidently in the view of the Government both competent and entitled, and possession was given to him not as manager appointed by Government but as the person supposed to be hereditarily entitled to manage. But if we assume for argument's sake that he was appointed manager under the provisions of Section 12 of the Regulation, that is still no bar (see Section 14) to a contest of the title with a view to the recovery of the property. The words are:—"if the suit be brought against a competitor or other private person for recovery thereof;" and if a person appointed manager sets up a title to the property he takes immediately the position of a competitor and becomes liable to restore the property if another is found to have a better title.

I think that plaintiff is entitled to be at once placed in possession and management of the property to the exclusion of defendants; I would modify the decree accordingly and order an account of mesne profits from the commencement of Fusly 1279 (1869-70) to date of decree.

KINDERSLEY, J.—I agree generally in the judgment of Mr. Justice Innes. My only doubt is whether the judgment in Original Suit No. 17 of 1819 was upon a matter of such general interest as to be good evidence against a stranger. That suit was brought by a coparcener to recover his share in what he alleged to be the family property in eight villages of which six are now in question. The answer was in effect that the property was not family property but was held in trust for the performance of certain services at the pagoda. It was decided that the property was not a family inheritance, but was held by the 1st defendant in that suit, Vendramuthu Kumarasami, in trust as an endowment of the Nallayappen pagoda. The decision appears to have been upon a family question of small interest to the villagers, and I have been unable to divest my mind of a doubt whether, with reference to the object matter of the suit, or to the incidental decision in favor of the pagoda, the judgment can be held to be upon a question of such general interest as to be good evidence against Nullathambi Battar, who was no party to it.

1873. *November* 10. *R. A. Nos.* 95 & 123 *of* 1872.

But this question has very little bearing on the determination of these appeals. It has clearly not been proved that Vendramuthu Kumarasami held the villages merely as the agent of Nallathambi Battar; and all the proceedings of his time tend to show that Vendramuthu Kumarasami held the villages ostensibly as a trustee and not as an agent.

It is quite clear from Exhibit V 3 that the Government of Madras on the 9th December 1858 ordered the villages to be restored to Nallathambi Battar, not as a trustee or manager appointed under Regulation VII of 1817, but as the person whom the Government understood to be rightfully entitled to possession as the heir of the original grantor. The Government and the Board of Revenue acted under the impression that Nallathambi Battar's title had been admitted both by the Civil Courts and by the Revenue Authorities. But it now appears that that impression was erroneous. Nallathambi Battar having come into possession only in 1858, and having entirely failed to establish his title, I think the natural presumption must prevail that the endowment belongs to the temple in which the service was to be performed. And Nallathambi Battar never having been appointed a trustee or manager under Regulation VII of 1817, I agree that he has not even a life interest. The plaintiff as the trustee of the Pagoda is therefore to be placed in immediate possession of the endowment, an account being taken as directed by Mr. Justice Innes.

I think that all the costs should be borne by Nallathambi Battar throughout.

Appellate Jurisdiction. (a)

Regular Appeal No. 131 *of* 1872.

GOPALASAWMY MUDELLY.....*Appellant.*

MUKKEE GOPALIER and 41 others ...*Respondents.*

Suits for the recovery of rent cannot be maintained in the Civil Courts by the landholders described in Section 3 of Madras Act VIII of 1865 unless puttahs and muchilkas have been exchanged between the landholder and the tenant as required by Section 7 of the Act, or some one of the other conditions of the Section has been complied with.

(a) Present: Morgan, C. J., Holloway, Innes, and Kindersley, JJ.