Vithalrao Chidambarrao Heblikar Vs Baswant Bisto Nadgir

Court: Bombay High Court

Date of Decision: Nov. 9, 1936

Acts Referred: Limitation Act, 1908 â€" Section 10

Citation: AIR 1937 Bom 433 : (1937) 39 BOMLR 576

Hon'ble Judges: Wassoodew, J; Broomfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Wassoodew, J.
This is an appeal from the decision of the Joint First Baswant Class Subordinate Judge of Dharwar who decreed the claim

in the suit brought by the plaintiffs as representatives of the junior branch of the nadgir family of Hebli, a jahagir village in the District of Dharwar,

for possession with mesne profits from the jahagirdars defendants Nos. 1 to 10 of 47 1/4 mars of land and for accounts of the profits after

adjusting the same towards the judi or quit-rent recoverable from the holders.

2. The plaintiffs alleged that their ancestors were the watandar patils, kul-karnis and nadgirs of Hebli and that the lands in dispute were part of the

watan lands consisting of 200 mars granted to them, prior to'' the grant of the jahagir to the defendants, for remuneration by the old rulers subject

to the obligation of service to the village and the payment of the judi fixed on the lands. It was further alleged that the obligation with respect to the

payment of judi was not discharged and that in or about 1832 the lands were handed over in trust to the jahagirdars for reimbursing themselves for

the loss of judi out of the income and for restoring the lands to the watandar nadgirs whenever the latter offered to pay the judi regularly in respect

of the said lands. The plaintiffs have now offered to pay the balance of the judi, if any, recoverable and due upon the lands on condition of the

restoration of the lands by the defendants trustees. That part of the case which relates essentially to the alleged trust is thus adumbrated in the plaint

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About 1832 or later than that the ancestors of plaintiffs became unable to pay the said judi. Therefore they gave possession of the said lands to the

ancestors of defendants Nos. 1 to 10 as deposit or trust for obtaining the said judi on condition that the lands would be given back to these

ancestors of the plaintiffs or to their heirs whenever they would ask for them and would agree to pay the judi. The ancestors of the plaintiffs did not

give up their interest in or right to the lands and the ancestors of the defendants never took those lands as owners either at the time of taking them

or afterwards but had taken the said lands as trustees. Thus according to the trust the said saranjamdars are in the enjoyment of those lands as

kamavishidars and it has been so mentioned in their accounts accordingly. The lands were given in the possession of the said saranjamdars as

trustees and they are in their possession as such.

3. The defendants jahagirdars have set up a grant to their ancestors of the village in 1748 from the then Nabab of Savanur inclusive of the lands in

dispute which are part of the 200 mars of land originally assigned as remuneration to the offices of patils, kulkamis and nadgirs of the said village.

The defendants alleged that those lands together with the offices in question were incorporated in the grant to them by reason of the fact that the

defendants'' ancestors who were previous owners of these lands had failed to pay the judi and raised a rebellion, that their watans therefore came

to an end upon resumption long before 1723, and that having regard to the defendants'' long possession of the lands in dispute in their own right

these lands are now their private hereditable and transferable property. It was also said that the jahagirdars'' right was recognized by Government

after the enquiry under Bombay Act XI of 1852, that the said right was confirmed in the prior suits between the nadgirs and the jahagirdars and

that the Privy Council in Appeal no 149 of 1924, which was decided between the parties during the pendency of the present suit, had set aside the

order of Government directing the levy of contribution from the defendants for payment of remuneration to the watandars, patils and kulkarnis. The

defendants, therefore, maintained that the lands in dispute ceased to partake of the character of watan property and that the previous decision

operated as res judicata. The alleged trust was expressly denied by the defendants and limitation was set up as a bar to the plaintiffs'' claim to

possession.

4. The principal contentions between the parties appear to be crystallized in thirteen issues settled in the trial Court of which the principal ones

were.: whether the plaintiffs proved that the defendants were holding the suit property in trust for the plaintiffs as alleged in the plaint, whether the

prior judgments referred to by the defendants operated as res judicata and whether the claim to possession was in time.

5. The learned trial Judge has held that the suit was not barred by reason of the decisions in the prior suits; and that the defendants were in

possession of the lands as trustees for the plaintiffs. The finding as to fiduciary relationship between the defendants and the plaintiffs and the

creation of an express trust in relation to the lands in dispute is thus expressed by the learned Judge :

I think in this case the lands were given to the jahagirdars for management. The jahagirdars were interested in taking over the management, as judi

was payable to them every year, and it used to fall in arrears. They were to let the lands out, and pay themselves the judi. If there was a deficit,

they were to reimburse themselves from other case due to the nadgirs. It follows that they were to account for the excess, if any, remained with

them if the nadgirs demanded that. To create an express trust, two things must combine. There must be a trustee with an express trust, and an

estate or interest vested in the trustee. In other words, there must be evidence that a trust has been created for some specific purpose, and that

property has become vested in a trustee with the object of carrying that purpose into effect. I think all these ingredients exist in the present case,

and I should think this also a case of trust for specific purpose.

The learned Judge concluded that the trustees having never openly and actively asserted a hostile title to the knowledge of the plaintiffs, the

plaintiffs" claim was not barred by limitation. He was also of the opinion that having entered into possession on certain terms, the jahagirdars were

estopped from denying or setting up an adverse title and that the matter would have been different if the plaintiffs had made an offer to pay the judi

and there was a refusal to accept the same.

6. The facts leading to this litigation are somewhat complicated and as they have been found enumerated in the several judgments which are

reported in the authorized reports (Shrinivas v. Secretary of State (1921) 24 Bom. L.R. 214 and Laxmanrao Madhavrao v. Shriniwas Lingo ILR

(1927) Bom. 830 : 29 Bom. L.R. 1484 it is unnecessary to set them out in detail except the material facts which are necessary for the present

purpose. They Are as follows.

7. The ancestors of defendants Nos. 1 to 10, who represent the junior branch of the jahagirdar family of Hebli, were the grantees of that village

under a sanad of 1748 from the then Nabab of Savanur (exhibit 332). The operative part of that grant is as follows :Ã¯Â¿Â½

We have, conferred upon you the said gallant gentleman (Balvantrao Appaji) the Kasba of Havur Hebli together with the hamlet and Vatanhal and

lands appertaining to Zabt (i.e. attached) Inams of Muccadum and nadgirs and others in the district of Torgal, by way of a perpetual Inam

exclusive of taxes relating to Ijrah Mukhasa and exclusive of Haqdars arid Inamdars and exempting Kulbab Kulkannu.

Contemporaneously with that grant, the grantor wrote a letter to the agents of the State in Hebli in which a clear intention was expressed to confer

an absolute title. That letter reads thus :Ã¯Â¿Â½

We have conferred upon him, his children and grand-children the Kasba of Havar Hebli together with the hamlet and Vatanhal and lands

appertaining to Zabt (i.e. attached) Inams of Muccadum, nadgirs and others by way of a perpetual Inam.

It is not seriously denied before us that the ""lands appertaining to the Zabt Inams of the nadgirs,"" referred to in the above documents, comprised of

the 200 mars which were assigned originally for remuneration to the offices of patils, kulkarnis and nadgirs subject to the payment of a fixed judi to

''Government which was very much less than the full assessment. It appears from the record (exhibits 152, 151 and 150) that prior to the grant that

judi had fallen into arrears, and in 1723 or thereabouts the management of the lands was taken over by the ruling power apparently for the purpose

of realizing the arrears of the judi out of the income. That is what is implied by the term ""Zabt."" That management appears to have continued with

the rulers at the time of the grant to the defendants jahagirdars. According to the extract of the jaminzada (village account) of 1741Ã¯Â¿Â½exhibit 150,

those 200 mars were thus described in the Government record ""200 mars of Inam land in respect of nadgirs paying judi which has been credited

as karnavishi land in Sarkar."" Though the lands were absolutely conveyed to the jahagirdars by the sanad, they were not differently described by

the grantees in their village accounts till the year 1860 and were shown under the heading ""kamavishi judi lands."" It may be noted that in the

accounts of 1843 the following entry appears against the lands in question :Ã¯Â¿Â½

Rs. 890-6-0. In respect of the land measuring 50 mars belonging to judidars, which has been entered as kamavishi the revenue of which has been

received by giving it to the tenants for cultivation and the land measuring 1 mar given to ''Shivangouda Koli for IS hons which could not be paid by

him owing to poverty. The amount of judi in respect of 50 mars of land which remains after deducting the land measuring one mar from the

abovementioned 51 mars of land, comes to Rs, 1,406-4-0, As judidars were unable to pay this amount of Rs. l,406-4-0, they delivered over

(''vopun dile'') the lands. At that time they made a request and got settled that they would pay the amount that falls short of kamavishi lands when

they would take their watan in their possession and'' that some land should;for the present be given to them for maintenance. Therefore that land

was entered as kamavishi land.

8. The description of these lands as ""kamavishi judi"" lands also appears in the other village accounts of the same and subsequent years, the extracts

of which are produced in the case (vide exhibits 297, 299, 300 and 313 of 1843, exhibit 309 of 1854, exhibit 89 of 1857, exhibit 303 of 1858,

exhibit 304 of 1859 and exhibit 90 of 1860)

9. The nadgir plaintiffs have based their case of express trust principally upon the above entries since 1832 in the jahagirdars" accounts, particularly

the description ""kamavishi"" and the words ""vopun dile"" as applied to their --watan lands. These expressions also occur in certain statements of the

jahagirdars in 1832 and are relied upon as affording evidence of the creation of a trust in or about that year by the plaintiffs" ancestors. The

important question is what effect should be given to them.

10. It is urged on their behalf that those words imply the entrusting into the possession of the jahagirdars the lands in question. That act, according

to the plaintiffs, constituted a direct trust for a specific purpose. The plaintiffs: also relied on certain admissions of the inamdars through their agents

to fortify their position. One of such admissions is contained in the statement of one Krishnarao, pleader, in May 1832 (exhibit 298) before the

Mamlatdar who was enquiring into the complaint of the nadgirs that they were not permitted to remove the produce of the watan land. In that

statement it was admitted that the patils were allowed to cultivate the land on payment of judi and to free it from weeds and that on failure to fulfil

those conditions, the land was taken back. The material portion of the statement is as follows :Ã¯Â¿Â½

Recently, when the elder Balwantrao left the Sansthan of Nargund and came-to Hebli and lived there the patils of Kasbe aforesaid requested him

that as the land was full of not they could not carry on household affairs and maintain themselves upon what remained after paying the revenue

equal to the full assessment. Thereupon the amount of judi was fixed at Hons (pagodas). The period of the agreement expired in our time.

Thereafter they (Nadgirs) again got fixed the amount of judi at 750 Nanes (coins) under a Makta (agreement) through two-persons by name

Chaturdas an, d Tinmaji Shesho. Therefore the nadgir"s land was kept amani in the same manner as the lands of all other persons were kept

amani. The amount of balance is due. It is not a resumed land. It is a land. for which old judi had been got fixed under a makta (agreement).

11. The above statement made by the jahagirdars" agent was perhaps made in response to the enquiry by the British officers into the disputes that

were going on between the nadgirs and the jahagirdars which at one time in 1821, upon the suit of the nadgirs, were compulsorily referred to

arbitration under the direction of the said officers (vide exhibit 245). It appears that a portion of the Dharwar District was annexed to the British

territory some time in 1819 and another portion later on in 1830 when Bombay Regulation VII of 1830 was passed. That fact explains the

interference of the British officers. It is doubtful whether any effect was given to the ex parte award, but its significance lies in the fact that the

jahagirdars were then admitted to be in possession in their own right and not as kamavisdars or in any other capacity. There could be no question

of trust at that time having; regard to the pleadings in this suit.

12. The effect of the words used in the above documents such as ""kamavishi"" ""and ""vopun dile"" is, as I have stated, now in dispute. Although no

technical expressions are needed for the creation of an express trust, the Court must be satisfied that the settlor has indicated with reasonable

certainty an intention to create a trust specifying its purpose. The word ""kamavishi"" has been denned by Molesworth as the business of collecting

the revenue. Wilson in his Glossary has attributed the following meanings to the word ""kamavishi"" management of affairs, whether on behalf of an

individual or the estate, stewardship, superintendence; amongst the Marathas it applies especially the business of collecting the revenues, also to the

collections, especially when of a miscellaneous kind : also advantage, gain, profit.

13. As regards the word ""amani"" used in the documents of 1832, Wilson in his Glossary has suggested the following interpretation of that word

:Ã¯Â¿Â½""held in trust or deposit; applies especially to the collection by the officers of Government upon the removal or suspension of an intermediate

claimant or zemindar, the same as the khas collection : it is also applied to Ryotwari settlements, or settlements with each cultivator individually,

where no renter or proprietor has been acknowledged; also to lands in the possession of the Collector''s officers for arrears of revenue, or which,

on any other account, are not held by individual tenants.

14. The use of those words is not helpful in my view to the plaintiffs'' case of trust.

15. The term ""vopun dile"" is certainly not a familiar expression indicating the creation of a trust. According to Molesworth the term ""vopun dile

means "conveyed to the care of or delivered in trust of.'' Assuming that these words are susceptible of the construction that the lands were not

attached by the ruling power prior to the grant to the jahagirdars and suggest a voluntary surrender by the holders, in my opinion they would not

necessarily imply the creation of a trust.

16. It is a just and reasonable inference that the grantor of the jahagir, who was competent to confiscate the lands on failure to pay the judi, had in

the village accounts distinguished the lands attached from the watandars from the other Government or khalsat lands. There is no evidence on the

record that either the grantor or the grantees of the jahagir maintained a separate account of these rents or whether at any time the excess over

judi, if any, was shown to the credit of the watandar nadgirs. Apparently the system in vogue of dealing with the lands in question was adopted by

the grantees. It seems to me obvious that upon discovery of the nature of the village accounts and the statements of the jahagirdars referred to, the

plaintiffs have founded their plea of trust supposed to have been created in 1832. The subsequent conduct of the parties, however, is as much

repugnant to the intention of the nadgir watandars to create a trust as of the jahagirdars to accept the same.

17. The earliest document which militates against the creation of a fiduciary relationship is the representation of the nadgirs to Government in the

year 1843Ã¯Â¿Â½vide exhibit 155. In that petition the nadgirs have complained of the obstruction of the jahagirdars to the cultivation of their lands and

the forcible deprivation of their watans by themÃ¯Â¿Â½a plea which was repeated in the suits instituted by some of the members of the nadgir family in

the years 1858 and 1859 to recover back possession of part of the estate. The attitude of the jahagirdars towards those complaints is thus

expressed in their statement-of February 26, 1844-exhibit 296 :

18. The nadgirs are not holders of sarva inam. They are judidars (persons paying judi). When our ancestors were in the samsthan, they acquired

the said village Vithalrao of jjebli as sarva inam together with kulbab arid kulkanu. Since that time the nadgirs have been carrying on wahivat of the

watan (and enjoying the same) by paying ancient judi from the time of their ancestors. Recently in the time of thirtharup the complainants delivered

over (open devun) the whole of the watan ag they could not manage the watan; and made a request that lands for main- tenance should be given to

them. If the said persons (i.e. nadgirs) are willing to enjoy the watan by paying ancient judi we shall continue watan that belongs to them, whatever

the same (the watan) may be. The complainants gave up the watan formerly of their own free will and now they say that we take the watan by

force arid thus they lower us in the eyes of the people.

19. The implication of the above is obvious. The utmost that can be said in favour of the nadgirs is that their watan lands were not confiscated and

that they voluntarily relinquished possession. Apparently there was a desire on the part of the jahagirdars to rehabilitate the watandars to- their

former position. That seems to be consistent with the view that they were prepared to treat the nadgirs with indulgence in the matter of resumption

of the lands if the arrears of judi were paid. Apparently the nadgirs were not satisfied with those terms and were attempting to regain their watan

through the intervention of the Collector free from any obligation whatsoever.

20. That was the state of things till the year 1852 when Bombay Act XI of 1852 came into force and an Inam Commission was appointed to

enquire into the claims to exemption from the payment of land revenue. That Commission after enquiring into the claims of the jahagirdars found

that theirs was a '' sarva inam,'' i.e. permanent revenue free grant, and that they were holders under the saranjam tenure. That decision appears to

have been approved by Government in or about the year 1856. After that decision there was an enquiry into the kadim inams. It appears from the

letter addressed by the jahagirdars to the Collector in 1862 (exhibit 333) that they repudiated the watandar patils'' claim to the land in the following

words :Ã¯Â¿Â½

From the time the village of Hebli was granted in jahagir up to this day we have been enjoying all the lan''ds. If after the grant of the jahagir we and

our ancestors had attached the lands of the inamdars, it would have been a matter of loss to those persons and they would! have lodged a

complaint immediately.

The claim before the Commission was that the lands were enjoyed as khalsat lands and were not liable to the payment of judi to Government.

Upon the evidence tendered the Commissioner made his recommendations to Government which were ultimately acceptedÃ¯Â¿Â½vide exhibit 161 :

It is to be remarked, however, that the land rolls referred to show that the Heblikar at the date of the acquisition of the village did not receive the

items Nos. 15, 16 and 17, averaging 200 mars as bona fide khalsat but as coomavisee, though, as it appears upon an order ''dated 1792 from

Purushram Ramchandra Patwardhan, a competent authority, to Trimbukrao Anna, the Soobedar of the Dharwar Talooka, that the coomavisee

management at that date still remained as before, and as there is nothing to show that at any subsequent period even up to the present time it had

altered, with the exception of 71 mars and 3 beegas, which at some time unknown had reverted to the nadgeer, it may be allowed that the

coomavisee management of the remaining 1921 mars and 6 beegas has assumed a permanency of tenure which cannot justly be interfered with and

that the gram joshee''s land of 6 mars and the nadgir''s land of mars and 3 beegas be alone made amenable to settlement as held from Government,

when the order for the settlement of alienated villages shall be authorised.

21. It seems to me unnecessary to dilate upon the effect of that decision as it is not the subject-matter of controversy in this appeal. I may,

however, mention that this Court in the judgment recorded in Appeal No. 3 of 1876 (exhibit 243) took the following view of that order :Ã¯Â¿Â½

It is not clear that the Inam Commissioner arrived at the conclusion that the land was absolutely the property of the jahagirdars. But even if such

were his conclusion the plaintiff (nadgir) is not bound by a decision made in an inquiry to which he was not a party and the object of which was

simply to settle the respective rights of the Government and the jahagirdars.

It is indeed difficult to say that the nadgirs did not contest the position taken up by the jahagirdars before the Commission although the evidence of

their actual participation in the enquiry is scanty. It would appear that the nadgirs complained against the conduct of the jahagirdars and perhaps in

response to that complaint their claim was referred for the orders of the Inam Committee in 1848. In that year a list of documents prepared by the

nadgirs in support of their case that the lands were kadeem inam was submitted to the Inam CommitteeÃ¯Â¿Â½vide exhibit 154. It has been said that

that list was prepared upon the general direction of the revenue officers who were collecting evidence. That does not nullify the effect of the

complaint of the nadgirs regarding the jahagirdars'' encroachment on their rights. That complaint is inconsistent with the plea raised in this suit.

22. It is clear from paragraph 7 of Major Etheridge''s letter of 1864 that a recommendation was made for the settlement of 114 mars of land. It is

doubtful whether that recommendation was made by him as Settlement Officer or as President of the tribunal constituted under Act XI of 1852.

There was nothing in my view to prevent that Committee, if the nadgirs had set up their claim to partial exemption from the payment of assessment

for their watan lands, from enquiring into that claim. But in doing so they would have had to consider the rival claim of the jahagirdars. I am not

satisfied that under the Act the adjudication of the rival claims was within the competence of the Committee or that their recommendations in effect

constituted such adjudication. There is much to be said in favour of the view adopted by the High Court in 1876 that the nadgirs are not bound by

the decision of Major Etheridge. It is, however, unnecessary for the present purpose to pursue the point further.

23. The state of affairs in 1864 was that the jahagirdars had succeeded in establishing before Government their right to possess the lands of the

patils as grantees free from the payment of judi or assessment. The accounts subsequent to that period show that the lands were described as

khalsat and the judi on these lands has been appropriated as before by the jahagirdarsÃ¯Â¿Â½see exhibits 160 and 165.

24. It has been pointed out to us that in the statement prepared on behalf of one of the jahagirdars in March, 1924, (exhibit 269) some of these

lands have been shown as kadim kamavishi. Apparently that statement was prepared upon the decision of the High Court to which I shall presently

refer and which was reversed in appeal. The High Court attributed a specific character to the jahagirdars'' possession of the watan lands upon

which the order of Government directing the recovery of contribution towards the remuneration of the patils was maintained. It seems idle to

contend that the Ba want statement of 19124 contains a voluntary admission of the character of the land described therein or that it represents a

system of accounting since 1864 of these watan lands which the jahagirdars had succeeded in claiming as part of their private property.

25. In 1868, certain members of the junior branch of the nadgir family instituted suit No. 83 of 1868 to recover 22 mars out of 100 mars which

was the area allotted to the junior branch of the watan family. That was the first time after the decision of 1864 that the nadgirs had an opportunity

to refute by suit the allegations of the jahagirdars. It is important to note that no express trust was set up then. The High Court, however, upon the

acknowledgments of the jahagirdars which were construed in favour of the nadgirs, decreed the claim on the following groundsÃ¯Â¿Â½vide exhibit 243

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The land was not shown in the accounts as '' khalsat'' but as '' kamavishi''; and this entry under a suspense heading indicates that the land was not

treated as having absolutely lapsed to the jahagirdar, but that a right of redemption by the patels was considered to be still existing. This right may

have been, created by express agreements as alleged by the plaintiff, and as stated in exhibit 72 it was founded upon the custom of the country,

which is always favourable to the preservation of the official emoluments of hereditary district and village officers. But it should be considered that

the admissions and offers in question amount to a distinct recognition of the plaintiff''s right.

The view I take of the effect of the statement of accounts and the admissions of the jahagirdars is that they were desirous and prepared to restore

the lands to the nadgirs upon an appropriate offer by the latter to pay the judi that was in arrears and had no intention to confiscate the watan. The

suggestion that the conduct referred to is expressive of an express trust is ill-founded.

26. I may in this connection also refer to certain litigations between the jahagirdars and the ancestors of the plaintiffs which indicate that it was far

from the minds of the nadgirs to suggest that the jahagirdars were their trusteesÃ¯Â¿Â½exhibit 43. The suit No. 730 of 1858 was filed to recover

possession of mar 1 annas 14 of the watan property and the cause of action was based upon forcible dispossession by the jahagirdars. It appears

that the suit was eventually dismissed upon the refusal to proceed with itÃ¯Â¿Â½vide exhibit 100. In the subsequent suit of 1859 a similar claim for 11

mars was made by the ancestors of the plaintiffs. There is no reference to any trust in favour of the nadgirsÃ¯Â¿Â½vide exhibits 92 and 146. That is a

significant piece of conduct of the plaintiffs which repels the suggestion of trust.

27. After the suit of 1864 which was finally disposed of in 1876 by the High Court in favour of the nadgirs, the jahagirdars were deprived of 22

mars of watan lands. But the latter continued in possession of the remaining area when the Bombay Hereditary Offices Act (III of 1874) came into

force. That gave an opportunity to the nadgirs to petition the Collector to regain possession of their watan lands. In that petition (exhibit 163),

which was submitted in October 1883 by the plaintiffs'' ancestors, the following facts were mentioned among other things :Ã¯Â¿Â½

The said larfds are with the jahagirdars as amanat since the judi in respect of the said lands could not be paid and whenever (at any moment) we

would! pay the judi, the same should be freed (returned) and in accordance therewith it is proved. We are now accordingly ready to pay. But the

jahagirdars deny to hand over possession of the lands, These lands had been given in inam even before the jahagirdars acquired the village and

therefore they had no ownership over the same at all; but they (the said lands) are either of our ownership or that of the British Government. It is

clearly mentioned in Act III of 1874 that we are the owners of patilki and kulkarniki watans. But the jahagirdars have the right only to recover the

judi at Rs. 22-8-0 per mar but they have no right at all to enjoy the watan. But without any reason, the jahagirdars have been wrongfully enjoying

the watan belonging to the ownership of the British Government.

28. That perhaps is the first indication in the nadgirs'' complaint that the jahagirdars were holding the lands upon certain terms and conditions. But

even then there is no clear indication that they were trustees. It is difficult to believe the statement in the petition that there was an agreement to

return the lands on the terms indicated. It is unreasonable to hold, having regard to the prior admissions of the plaintiffs about the restoration of the

lands, that the jahagirdars under that agreement were holding the watan for an indefinite period for the benefit of the plaintiffs under those terms.

29. The history of the conflict between the parties culminating in the present suit will not be complete unless reference is made to the enquiry under

Act III of 1874. It appears that various interlocutory orders were passed upon the representation of the nadgirs and after hearing the jahagirdars.

The final result of that enquiry which was accepted by Government was that the nadgir family were the representative watandars, that the whole of

the watan lands should, therefore, be entered in the watan register as such and that it was not necessary to recover for the watan from the

jahagirdars in possession more than what was required for the emoluments of the officiators under the Act; and accordingly under the directions of

Government contributions were levied from the jahagirdars for the remuneration of the officiating patils and kulkarnis. Upon the enforcement of that

order the jahagirdars instituted suit No. 2 of 1913. The plaintiffs in that suit were certain members of the senior branch of the jahagirdar family and

they claimed a declaration (a) that they and not the nadgirs were the watandar patils and kulkarnis of Hebli village, (b) that the lands measuring 120

mars be entered in the watan register of the village, and (c) that the jahagirdars were not liable to contribute for the remuneration of the officiating

watandars.

30. The first Court decreed the claim. The High Court in appeal dismissed the suit in 1921. It was upori that dismissal that the nadgirs instituted this

suit for the aforesaid reliefs. In the meantime the jahagirdars had filed an appeal to the Privy Council and obtained a decision in their favour to the

effect that they were not liable for the remuneration of patils and kulkarnis and that the contribution with respect to that item should be refunded.

As to the result of that decision, upon the contention of the parties to the dispute, I shall, when dealing with it, show that it impliedly negatives the

nadgirs" contention.

31. I am satisfied upon a careful consideration of the above documents and the conduct of the parties that the jahagirdars did not stand to the

nadgirs in a fiduciary or semi-fiduciary position. The fact that the lands were attached by the rulers for breach of the terms of the tenure did not

constitute the rulers trustees and the continuance of the attachment even upon a voluntary surrender would not necessarily create a trust. The view I

take is that even if the jahagirdars kept the lands in a suspense account with a view to their eventual ""restoration in order to show indulgence to the

defaulters, who had failed to pay the judi in time, the legal position could not be altered in the nature of things. The jahagirdars did not stand in the

position of confidential agents towards the nadgirs so as to invite the application of the rule in Soar v. Ashwell (1893) 2 Q.B. 390 as suggested for

the respondents. I have already stated that no obligation to account was undertaken by the jahagirdars and no accounts were called for or

rendered. The manner, therefore, of describing, the lands in the accounts could not make the person acquiescing in the description a self-

constituted trustee in the absence of satisfactory evidence of an express trust.

32. The underlying assumption in the plaintiffs" case was that their watan grant was recognized by the British Government before 1832, that the

intercession of Government officers is explainable on that hypothesis, and that the jahagirdars in accepting the trust intended to perpetuate their

watan thus ousting; limitation. There is no presumption that upon the assumption of sovereignty by the British Government the pre-British watan

grant was recognized (see Secretary of State for India v. Bai Rajbai (1915) L.R. 42 IndAp 229 : 17 Bom. L.R. 730 and Vajesingji Joravarsingji v.

Secretary of State for India (1924) L.R. 51 IndAp 357 : 26 Bom. L.R. 1143. There is no evidence as to when the nadgirs watan was formally

recognized prior to the inam enquiry. It is argued that, at any rate, the conduct of the jahagirdars implies that they had accepted the position of

trustees. In order that the statute of limitation might be ousted, there must be a direct trust constituted by the act of parties and not a constructive

trust arising by implication of law. The jahagirdars cannot be affected by the plea unless it was found proved that they were persons in whom

confidence had been reposed and who had thereby come into the enjoyment of the property as the result of that confidence and to whom a Court

of Equity would make accountable to the nadgirs as persons entitled to the beneficial enjoyment of the property. I am satisfied beyond doubt that

neither the ruling power prior to the grant nor the jahagirdars subsequent thereto were entrusted with the possession of this property in the manner

suggested. The mere assumption of management by a sovereign power of lands on failure to pay the customary judi is not, I think, tantamount to ''

vesting" in trust of such lands u/s 10 of the Indian Limitation Act. The words"" in trust for a specific purpose"" in that section must obviously receive a

restrictive interpretation. Assuming that the lands were freely surrendered by the nadgirs into the possession of the ancient rulers or the grantees

through them on account of their inability to pay the customary judi, the payment of which was the essential condition of the tenure, that surrender

whether voluntary or not will not necessarily create a trust of the limited character and nature attaching to property within the meaning of Section

10 of the Indian Limitation Act. In that view the suit to recover posses sion of property claimed as the absolute property by the jahagirdars since

1864 or even prior to that date was barred at the date of the suit. It is impossible to agree with the learned trial Judge that the jahagirdars had

made no open hostile assertion of their claim to this property. That assertion is evident from the numerous documents on the record and the attitude

adopted by the parties before and after the enquiry under Act XI of 1852. Therefore the plaintiffs'' claim fails.

33. The above finding is decisive of the case; but as argument has been heard as to the effect of certain decisions upon the questions now raised it

will be useful to express my view thereon.

34. In the earlier suits, viz., suit No. 730 of 1858 and suit No. 1154 of 1859, the dispute was with regard to 1 mar 14 annas and 11 mars

respectively between the plaintiffs'' ancestors and the jahagirdars. Those decisions are not directly relevant to matters in issue in the absence of any

means of ascertaining whether the identical property in dispute in those suits is comprised in the dispute in the present litigation. In one of the later

suits of 1859 the Court held that there was no evidence to identify the lands in dispute as part of the watan property.

35. I have already referred to the suit of 1868 which affected 22 mars which are not the subject-matter of the present litigation. The finding

proceeded on the assumption that in 1868, having regard to the previous acknowledgments and offers, the claim to possession was not barred.

The matter rested entirely on a different footing in the suit instituted in 1924.

36. The suit No. 6 of 1893 was instituted by the nadgirs for a declaration that they were the watandar patils and kulkarnis and were entitled to

perform service. It was dismissed on the ground that a suit for a mere declaration was not maintainable.

37. Suit No. 177 of 1903 which was instituted after the Collector''s order to obtain a decision from the Court regarding the rights of parties to the

watan was not decided on the merits as it was withdrawn. It is to be noted that in 1904 another suit was instituted by the nadgirs (No. 353 of

1904) to recover possession of certain properties and for accounts. The accounts did not relate to the specific properties which are the subject-

matter of the present suit. The decision in the suit cannot possibly operate as res judicata.

38. The one instituted prior to this suit was suit No. 2 of 1913 which ended with the decision of the Privy Council in favour of the jahagirdars in

some respects. The learned Counsel for the latter has relied upon that decision in support of his case. On the nature of the jahagirdars'' possession

it has been urged on behalf of the plaintiffs that the Privy Council decision does not affect the claim of the plaintiffs inasmuch as the only

representative of theirs to that suit, and who was plaintiffs'' father, was respondent No. 3 in the appeal to the Privy Council and he died before the

appeal was heard and decided and no steps were taken to bring his legal representatives on the record. It is important to note that in the suit filed

by the senior jahagirdars, the present defendants Nos. 12 and 13 who were defendants Nos. 1 and 6 in that suit had joined in the prayers of the

plaintiffs for a declaration that the jahagirdars were the watandars, kulkarnis and patils. The junior branch of the nadgirs was represented by

plaintiff No. 1''s father. There is Rule 79 no doubt that he had identified himself with the principal defendant (the Secretary of State) in that suit in

maintaining that the jahagirdars were not the representative watandars and were not entitled to hold the watan lands as the private property.

Ordinarily the junior members of the nadgir family would be bound by that decision. Where persons litigate bona fide in respect of a private right

claimed in common for themselves and others, all persons interested in such right are to be deemed to claim under the per-sons so litigatingÃ¯Â¿Â½see

Expln. VI of Section 11 of the Civil Procedure Code. Before the decision of the Privy Council was reached, and some time before the present suit

was filed, plaintiff No. l''s father died. The only indication of that fact is contained in the rejoinder submitted by the plaintiffs to the defendants''

application, made subsequent to the decision of the Privy Council appeal, to raise an issue as to the effect of that decision upon the contention of

the partiesÃ¯Â¿Â½vide exhibit 203. No further evidence was led as to the fact of the death of the plaintiffs'' father. An issue was framed by the trial

Court in terms of the defendants'' application. It is now urged that upon the death of the third respondent the whole appeal abated and that,

therefore, the only decree binding upon the legal representatives would be the decree of the High Court dismissing the jahagirdars'' suit. It was also

urged that the effect of that dismissal was that the jahagirdars held the lands as watan property in their hands liable to contribution for the

remuneration of the watandars. In consequence it was contended that even if the plaintiffs failed to prove an express trust, the position of the

defendants would be analogous to trustees and not adverse to the plaintiffs. It is difficult to follow that reasoning. Under the heading ""Decree for or

against a dead person"" in the notes to Order XXII, Rule 4, of the Civil Procedure Code, the following statement appears in the Commentary on

the CPC by Sir Dinshah Mulla at p. 868, 10th edn. :Ã¯Â¿Â½

By reason of a statute of 1833 (3 & 4 Will, IV, c. 41, Section 23) a decree passed by the Privy Council against the respondents in ignorance of

the death of one of them is not a nullity, though the legal representative of the deceased was not brought on the record, the decree being an order

of the Sovereign.

That expresses the correct view in regard to the decree passed by the Privy Council. There is, I think, no substance in the contention of the

plaintiffs that the appeal abated so far as the plaintiffs'' father''s interest was concerned. Even if it were so, I do not think the decision of the High

Court which was reversed by the Privy Council could be given the effect suggested on behalf of the plaintiffs. In the view I take of the matter the

decision of the Privy Council creates an effective bar to the plaintiffs'' claim in this suit. It was certainly open to the representatives of the junior

branch to contest the position taken up by the jahagirdars and they appear to have done that. In consequence that decision must operate as res

judicata on the question of the character of the property in dispute in the jahagirdars'' hands.

39. For the above reasons, I would allow this appeal, reverse the decree of the lower Court and dismiss the plaintiffs'' suit with costs throughout.

Broomfield, J.

40. The lands which the nadgir plaintiffs seek to recover in this suit as part of their watan had been for many years under attachment even at the

time of the grant of the village of Hebli to the ancestors of defendants Nos. 1 to 10 in 1748. Between that year and the introduction of the British

rule into this part of the Dharwar District it would seem that the lands were for a time or from time to time restored to the possession of the nadgirs.

There is very little reliable evidence as to this period and what there is, is obscure. But from about 1830 onwards at any rate the jahagirdars have

been continuously in possession and all the attempts of the nadgirs to get back the lands have been unsuccessful.

41. The jahagirdars did not at first repudiate the title of the nadgirs entirely. They showed the lands in their accounts as ""kamavishi,"" and, whatever

the exact meaning of that expression may be, it certainly indicated some distinction between these lands liable to pay judi only and the ""khalsat

lands which belonged to the jahagirdars absolutely (see the discussion of the word ""kamavishi"" in Ramchandrrav Raghunath v. Bhisto Shankar

Nadgir."1) In 1832, when the Company''s Government called upon the jahagirdars to define their position in reply to complaints made by the

nadgirs, they admitted that the lands were not khalsat but kept amani for non-payment of judiÃ¯Â¿Â½exhibit 298. In 1844, while repudiating the

allegation that they had wrongfully dispossessed the nadgirs and stating that the latter had handed over their watan lands of their own free will, they

expressed their willingness to restore the lands if the nadgirs were prepared to fulfil their obligationsÃ¯Â¿Â½exhibit 296. In the accounts of this period

we find a statement (exhibit 299 of the year 1843-44) that the nadgirs had given up the lands (" vopun dile") on the understanding that they would

pay the arrears of judi on resumption of their watan, though in exhibit 300 which relates to the previous year the entry is simply that the lands other

than those kept for maintenance had been given up for cultivation as ryotwari lands, nothing being said about resumption.

42. In the jaminzada of 1856Ã¯Â¿Â½exhibit 309Ã¯Â¿Â½it is stated that the lands handed over by the patils (i.e., the nadgirs) as they could not pay judi,

though entered as kamavishi, were being treated as khalsat, and only the remainder 7 1/4 mars out of 200 mars were enjoyed by the patils on

payment of judi. In the same year we find the nadgirs submitting a memorial to the Governor in Council (exhibit 336) complaining that the

jahagirdars were unlawfully dealing with the watan as if it were their private property and praying that Government should hold an enquiry and

settle the watan on a proper basis. In 1862Ã¯Â¿Â½exhibit 333Ã¯Â¿Â½the jahagirdars put forward the claim that they had been in enjoyment of the watan

lands since the grant of the village to them. It is clear, therefore, that their attitude had changed and from about the middle of the nineteenth century

they repudiated the nadgirs entirely and claimed the suit lands for themselves. It is admittedÃ¯Â¿Â½exhibit 339Ã¯Â¿Â½that from 1840 onwards they had

refused to allow the nadgirs to officiate as revenue patils and kulkarnis.

43. In 1862, Major Etheridge, Alienation Settlement Officer and Inam Commissioner, had decided on the evidence then before him that the suit

lands were kadim, i.e., watan property, of the nadgirs. But in 1864, after further enquiry, he recommended to Government that the kamavishi

management of the jahagirdars had assumed a permanency of tenure which could not justly be interfered with. He suggested that mars and 3

bighas of the nadgirs'' land should alone be made amenable to settlement as held from Government and that the remainder should belong to the

Heblikar, i.e., the jahagirdarÃ¯Â¿Â½exhibit 161. Government accepted this recommendation and the Privy Council have held in (1927) L.R. 54 I.A.

380 (Privy Council) that this amounted to a valid adjudication under Act XI of 1852.

44. From this time forward at any rate the jahagirdars'' possession of the suit lands must be taken to have been in open and complete denial of the

rights of the nadgirs, and throughout the litigation which commenced in 1858 and has continued at intervals ever since their attitude has been quite

uncompromising. See, for instance, exhibit 106 which is the written statement in suit No. 177 of 1903 filed by the father of the present plaintiff No.

1 against the jahagirdars for a declaration of his right to the watan. It was there stated :Ã¯Â¿Â½

The plaintiff is not a patilki and kulkarniki kadim watandar of Hebli as alleged by him and he is not in possession of any watan property as such.

The patilkL and kulkarniki watan lands of Hebli and all the haks appertaining to the patilki and kulkarniki services have been in long and continuous

enjoyment of the defendants'' families along with other jahagir since the time of the grant of the whole jahagir and so the defendants'' families have

been since that time officiating as patils and kulkarnis in their own right through their deputies and karkuns to the knowledge of the plaintiffs'' family

and to the exclusion of their alleged right.

The plaints in the various suits by the nadgirs, whether they alleged forcible dispossession or delivery on some sort of trust, are all clear admissions

that the possession of the jahagirdars was in denial and defiance of their claim. After 1861 or 1865 at the latest the lands ceased to be described

as kamavishi in the village accounts. How the learned trial judge could say that there is no good evidence of any active assertion of a hostile, title to

the knowledge of the nadgirs I am unable to understand. A clearer case of adverse possession it is difficult to imagine.

45. The plaintiffs'' suit must be barred unless they can get out of the law of limitation by praying in aid Section 10 of the Indian Limitation Act, i.e.

unless they can prove that the suit lands were vested in the defendants in trust for a specific purpose. They found their case in this respect on

certain alleged admissions of the jahagirdars and entries in their accounts. I have referred to the principal documents relied on in this connection;

and as my learned brother has discussed the matter in detail, I shall be very brief.

46. The description of the lands in the accounts as kamavishi may be regarded, as long as that description was used, as an acknowledgment that

the rights of the nadgirs were not extinguished. But it cannot by itself connote a trust for a specific purpose, or indeed anything in the nature of a

trust. The same applies to the expressions ""kept amani"" and ""vopun dile."" These expressions might no doubt be used in connection with a trust for a

specific purpose, but they do not necessarily imply anything of the sort. Moreover it would in my opinion be unsafe and unreasonable to stress

these statements unduly against the jahagirdars. It is not shown and cannot be presumed'' that they had any personal knowledge of the

circumstances in which the nadgirs gave up their lands. Apart from that, however, the evidence is much too hazy and uncertain. When the alleged

trust was created, who the parties were, what the terms were, all this is left to mere speculation.

47. The learned trial Judge thinks the case is similar to Vithal v. Prabhu v. Ramchandra S. Kirkire (1870) 7 B.H.C.R. 149. It was held in that case

that where Immovable property was given into the possession of the defendant to sell the crops, to pay the Government dues, and to account for

the profits to the plaintiff on his claiming them, the defendant was not a depository, but a trustee of the property. The learned trial Judge says :Ã¯Â¿Â½

Similarly, I think in this case, the lands were given to the jahagirdars for management. The jahagirdars were interested in taking over the

management as judi was payable to them every year, and it used to fall in arrears. They were to let the lands out, and pay themselves the judi. If

there was a deficit, they were to reimburse themselves from other case due to the nadgirs. It follows that they were to account for the excess, if

any, remained with them if the nadgirs demanded that.

But obviously what made it a trust in Vithal v. Ramchandra was the express provision that the person in possession was to account for the profits

to the owner on his claiming them. In the present case, whatever the value of the evidence may be, it does not even purport to show that the

jahagirdars were under any obligation to account for the management of their lands. Mr. Desai, the learned advocate for the respondents, says that

in Ramchandnav Raghunath v. Bhisto Shankar Nadgir (1876) p.j. 47 this High Court on the same evidence held that there was a trust. But that

was not so. It was held that the jahagirdars had acknowledged the title of the nadgirs and that as the lands were described as kamavishi within

twelve years of the suit, their possession had not been adverse for the statutory period. The fact that the twelve years'' period of limitation was

applied shows that the theory of a trust for a specific purpose was negatived. Sir Charles Sargent was not prepared to find as a fact that there was

any express agreement between the parties at all. He thought it more probable that the nadgirs'' right of redemption ""was founded upon the custom

of the country, which is always favourable to the preservation of the official emoluments of hereditary district and village officers. ""In my opinion the

plaintiffs have completely failed to bring the case within the ambit of Section 10.

48. I should say a word or two on Mr. Desai''s technical argument based cm the recent decision of the Privy Council in Hodge Vs. Marsh, , p.c.

He says that the plaintiffs'' father was the only representative of the interests claimed by the present plaintiffs in the Privy Council appeal in suit No.

2 of 1913 (1927) L.R. 54 I.A. 380 (Privy Council) that he was dead at the time the judgment was delivered and his heirs had not been brought on

the record; that, therefore, the appeal as against him abated; and the result is that the judgment of this Court in that case (Shrinivas v. Secretary of

State (1921) 24 Bom. L.R. 214 still '' stands so far as the present plaintiffs are concerned. He, therefore, relies on that judgment as showing that

the jahagirdars'' possession of the watan lands was not adverse to the nadgirs. This argument assumes that the provisions of the CPC apply to

appeals before the Privy Council. But this is not soÃ¯Â¿Â½see Section 112 of the Code. Section 23 of 2 & 3 Will. IV, c. 41, provides that the decision

of the Judicial Committee shall have full force and effect notwithstanding the death of any of the parties interested therein. (See Broon held J.

Deonandan Prasad Singh v. Janki Singh (1920) 5 P.L.J. 314 Kalyani Pillai v. Thiruvenkadaswami Ayyangaf ILR (1924) Mad. 618 and Sri

Chandra Chur Deo v. Musammat Shyam Kumari ILR (1931) Pat. 445

49. Even if it were the case, however, that the appeal did abate as against the present plaintiffs, the decree of this Court dismissing the jahagirdars''

suitÃ¯Â¿Â½the suit being for a refund of the amount which Government had levied as contribution for the remuneration of the officiating

watandarsÃ¯Â¿Â½cannot in any way assist the plaintiffs" case. It is quite true that Macleod C.J."s judgment in Shrinivas v. Secretary of State shows

that he differed from the trial Court on the question of adverse possession and was of opinion that the jahagirdar plaintiff had not made out his case

in that respect. It is doubtful, however, whether this finding was necessary for the decision of the case, and anyhow it is clear that the issue as to

adverse possession did not arise in the same form. The issue in that case was whether the jahagirdar plaintiff had established his claim to be

watandar by adverse possession. The issue here is whether the nadgirs" claim to recover the watan lands is barred by the jahagirdars" adverse

possession of those lands. That is quite a different matter. There can be no question of res judicata.

50. In the view we take of the case it is not necessary to consider the effect of the Government orders in 1864 as against the nadgirs. However, a

few observations on that part of the case may not be out of place. With all deference to my learned brother I think there is great force in the

argument of the learned Counsel for the appellants that these orders are just as much binding on the nadgirs as on the jahagirdars and a complete

answer to the suit. The trial Court has found that the enquiries made by the Inam Commission related only to the claims made by the jahagirdars

and that the nadgirs were not parties. That no doubt is in accordance with the opinion expressed by this Court both in Ramchandrrav Raghunath v.

Bhisto Shankar Nadgir (1876) P.J. 47 and in Shrinivas v. Secretary of State (1921) 24 Bom. L.R. 214. But en the main question whether Major

Etheridge"s order as confirmed by Government was a valid adjudication under Act XI of 1852, the Privy Council in (1927) L.R. 54 I.A. 380

(Privy Council) has differed from this Court and held that it was so; and, in view of that, I find the greatest difficulty in holding that it was valid only

as between Government and the jahagirdars. The argument is that the Inam Commission was only concerned with claims against Government and

not with disputes between private persons such as those between the nadgirs and the jahagirdars. But as a matter of fact they were both claiming

as against Government. They both held or claimed under pre-British grants, and the plaintiffs" watan no less than the defendants" jahagir required

Government"s recognitionÃ¯Â¿Â½see Secretary of State far India v. Bai Rajbai (1915) L.R. 42 IndAp 229 : 17 Bom. L.R. 730 and Vajesingji

Joravarsingji v. Secretary of State for India (1924) L.R. 51 IndAp 357 : 26 Bom. L.R. 1143. There is nothing on the record of this case to suggest

that both claims would not equally come within the purview of the Inam Commission. The order of 1864 contains a recommendation as regards the

plaintiffs" watan that 7 1/4 mars and 3 bighas should be alone made amenable to settlement as held from Government."" This part of the

recommendation, as well as that relating to the rest of the watan which was held to belong to the jahagirdars, received Government''s approval,

and according to the reasoning of the Privy Council it must also be''regarded as an adjudication under the Act of 1852, at any rate if the nadgirs

were parties to the proceedings. Major Etheridge''s proceedings are no longer available, but it is not unreasonable to assume at this length of time

omnia rite esse acta and that the nadgirs had due notice. Even from the evidence we have, it seems to me sufficiently clear that they were just as

much parties to the enquiry as the jahagirdars. I may refer especially in this connection to exhibits 154, 336 and 333. Exhibit 336 is a petition by

the nadgirs that Government would settle their watan and as it bears the seal of the Inam Commission, it was evidently forwarded to that body for

disposal. It is true that the Privy Council have not stated in so many words that the order of 1864 was binding on the nadgirs, but their rinding that

there was an adjudication under Act XI of 1852 securing the revenue of the suit lands to the jahagirdars can scarcely mean anything else. Of

course a valid adjudication under the Act must bind all the parties to the enquiry. Under Rule 2 of Sch, A the orders of Government are final. See

also Section 1 of the Bombay Hereditary Offices Act.

51. Quite independently of this point, however, I agree with my learned brother that the appeal succeeds and the suit falls to be dismissed.