

*Kamatam* land now in dispute. The appellant appears to have had constructive, if not actual, possession, and is therefore entitled to maintain trespass [200] We are further of opinion that she is, if she chooses so to do, at liberty to sue trespassers for use and occupation, or for damages, instead of proceeding to eject them. We also concur in the finding of the Judge that the claim to mesne profits for the first year is barred, as the right to sue for them accrued three years before the suit. The Judge has not, however, found whether any and what loss has been sustained by the appellant during Faslis 1286 to 1288 (1876-77 to 1878-79). He is, therefore, requested to try, upon the evidence already recorded and upon such further evidence as the parties may adduce, the third issue, *viz.*, what is the amount of damages that can be awarded, and to return his finding, together with the evidence therein, to this Court within four weeks from the date of receiving this order when ten days will be allowed for filing objections.

#### NOTES.

[“ It cannot be disputed that land granted for maintenance is *prima facie* resumable on the death of the grantee :—(1874) 22 W. R., 225; (1899) L. R. 26 I. A., 216; (1900) L. R. 28 I. A., 1; (1881) 4 Mad., 193. though in certain cases the grant may be shown to have been absolute and irrevocable made in full satisfaction of all claims of future maintenance, and conferring on the grantee not only an heritable but an alienable estate :—(1881) 4 Mad., 371; (1862) 9 M. I. A., 55.”—*per* MOOKERJEE, J., in (1905) 2 C. L. J., 20.

See also (1901) 1 C. L. J., 517, where HILL, J., remarked that the proposition in this case that only the income was granted *prima facie* was hardly supported by the case relied on (5 M. I. A., 82).]

[4 Mad. 200.]

#### APPELLATE CIVIL.

*The 26th September, 1881.*

PRESENT :

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Anantha Tirtha Chariar.....(Plaintiff), Appellant

*and*

Nagamuthu Ambalagaren and others.....(First, second and fifth Defendants), Respondents.\*

*Agraharam—Restriction against alienation in grant of land, effect of.*

According to Hindu Law a restriction against alienation in a gift of land to Brahmans is inoperative as being a condition repugnant to the nature of the grant.

Where a grantor creates a secular estate with a religious motive, the grant does not stand on the same footing with a religious endowment, and is not exempt from the rule as to perpetuities.

THE facts and arguments in this case appear in the Judgment of the Court (MUTTUSAMI AYYAR and TARRANT, JJ.), which was delivered by MUTTUSAMI AYYAR, J.

\* Second Appeal No. 165 of 1881 against the decree of F. Brandt, District Judge of Trichinopoly, modifying the revised decree of A. Chendriah, District Munsif of Kulitalai, dated 27th October 1880.

*Bhashyam Ayyangar* for Appellant.

Hon. *T. Rama Rau* for Respondents.

**Judgment:**—Appellant (plaintiff) sued to recover certain land upon a deed of gift executed in his favour by the third and fourth defendants on the 30th August 1866. He alleged that he obtained [201] possession at once and rented it to the first defendant on the 21st August 1872. It was found as a fact that the second and fifth defendants entered into possession in 1874 in collusion with the first defendant. The third and fourth defendants, who are the donors, are the widows of one Ragavendra Chari, a Vaidika\* Brahman, who originally acquired the land from the fifth defendant's father under the documents C and II. Document I, which is referred to in document II and thereby incorporated with it, is an agreement similar to the one executed by Ragavendra Chari in favour of one Ramaiya, the undivided paternal uncle of the fifth defendant and the Shrotriendar of Periya Karuppur in the district of Trichinopoly. From this document it appears that Ramaiya collected a few Vaidika Brahmans and founded in 1815 what is usually termed an Agharam building houses for those Brahmans, and settling upon them an annual allowance of grain for their support.

After reciting the gift of the house and the grant of the annuity, document I goes on to state that "the object of the gift made by you to us this day is that we will not alienate the houses or corn given to us this day by gift, barter, or sale; that we will not be running away to distant countries through avarice, or to the neighbouring places from love of a little gain; that we will be content with what may be obtained by chance; that, as long as you enjoy life and happiness, we will be able to enable you to have your mind clear by the pleasure of constantly hearing the stories of Bhagavata"

In 1825 Ramaiya's undivided brother, the fifth defendant's father, substituted a grant of land for the grain allowance in accordance with the instructions left by his brother, and he also added to the original number of donees. With respect to the land granted by him, it is necessary to observe that he granted not only the *kudivaram* right or the right of proprietorship, but also the *melvaram* right. The terms of this grant are contained in documents C and II. C is a deed of gift from the fifth defendant's father absolute in its terms, and purports to convey the land to each donee with the right to sell, give, or otherwise alienate. Document II, which bears the same date and which is found to [202] have been executed simultaneously with the deed of gift C, contains three restrictions on the interest of each donee in the land, viz., (1) that he shall not sell, mortgage, or otherwise alienate the land; (2) that, in case of emergency, he shall not do so, at all events without the consent of the donor; and (3) that he shall conform to the agreement I. The document then reserves a power to the donor to resume the *melvaram* right in the event of an alienation contrary to the terms of the agreement. Both the Lower Courts have found that the documents C, I, and II are genuine, and the contest in the Lower Appellate Court was as to the effect to be given to the restrictions on alienation. The District Judge held that conditional gifts were sanctioned by Hindu Law, and that there was no reason why the restrictions, subject to which a charitable gift was made, should be set aside and the intention of the donor frustrated. In this view he decreed the claim, save as to "the *melvaram* right." It is argued in second appeal that the restrictions on alienation are inoperative, and reliance is placed on *Bradley v. Peixoto*, one of Tudor's Leading Cases on Real Property, page 968. As incidentally observed in *The Jaghirdar of Viruthalabathe v. Nateri Srinivasa Charlu* (6 M. H. C. R., 356), it appears to us

\* A Brahman conversant with the text of the Vedas.

to be a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant, and, as such, inoperative. We think there can be no doubt on general principles that, when property is transferred absolutely, it must be transferred with all its legal incidents; and that it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant. This being so, the question for decision is whether the gift now before us should be treated as an exception to the general rule, either on the ground that conditional gifts are sanctioned by Hindu Law, or that the transaction is a charitable gift, or that it is in substance the grant of an estate until a particular event. In *Venkatramanna v. Brammanna* [203] Sastrulu (4 M. H. C. R., 345) an agreement entered into on partition that no co-sharer should alienate his share was set aside, and this Court then observed that it is a sound principle, and one from its very nature of general application, that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents, and that it is not aware of anything in the Hindu Law which would permit of a departure from that principle. The parties might, by mutual agreement, impose on themselves an obligation restrictive of their proprietary rights, but they could not, by a collateral agreement, annex a condition to an absolute grant incompatible with its nature. As to the contention that it is a charitable gift, and that it is, on that ground, an exception to the general rule, it must be observed that, though the motive for the grant is no doubt religious, the estate created is in its nature secular, and does not stand on the same footing with a religious endowment, which is ordinarily a grant to an idol and exempt from the rule as to perpetuities. It was held in *Promotho Dossee v. Radhika Persaud Dutt* (14 B. L. R., 175) that where the beneficial interest is given to a donee subject to a religious trust, it will be governed by the ordinary Hindu Law, and any provisions for restraining the alienation will be void, though the alienee will take the property subject to the trust; and in the case before us the alienee is of the class of persons for whom the *Agraharam* was intended. As regards the contention that the grant was subject to residence in the *Agraharam* and to the study of religious books and the giving of religious instruction, we do not decide the question, as it does not arise in this appeal. The appellant is, in his own right, the representative of one of the original donees, and the fifth defendant's case was not that the grant ceased to be in force because appellant violated the condition as to residence, &c., but that the third and fourth defendants had no power to alienate. There can be no reasonable doubt, we think, that the intention was to give the property absolutely subject to the trusts, if any, mentioned in document I, and to the restriction on alienation imposed by document II. It is admitted by the fifth defendant that the *kudivaram* right has been given away absolutely, and we do not see how this is to be reconciled with the contention that no absolute gift was intended.

[204] For these reasons we decree the appeal and modify the decree of the Lower Appellate Court by awarding to the plaintiff the *melvaram* claimed in his plaint, in other respects confirming the decree of the Lower Appellate Court. In the circumstances of the case we direct that each party do bear his or their costs throughout.

#### NOTES.

[Conditions restraining alienation void:—(1886) 8 All., 452; (1897) 17 A. W. N., 104; (1883) 7 Bom. 538 (arrangement to keep a certain property joint for ever).]