[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

1877. March 5.

KEVAL KUBER AND ANOTHER (PLAINTIFFS, APPELLANTS) *v.* THE TA'LUKDA'RI SETTLEMENT OFFICER AND GAGUBHAI ABHESANGJI TA'LUKDA'R (DEFENDANTS, RESPONDENTS).*

Talukdári Act, Bombay Act VI. of 1862—Rent-free land—Right to levy assessment—Limitation.

The Talukdári Settlement Officer having assessed rent-free land, on the ground that it had been granted for service, and that service was no longer required,

Held that this was not a sufficient defence to an action by the holder of the land, it not being shown that by the terms of the grant (assuming that there had been a grant of an estate burdened with service) the estate was determined by the remission of the service.

Held further that if the grant was the grant of an office remunerated by the use of land, the right to assess was barred, by the possession of a person, not claiming under the grantee, for a longer period than twelve years after the right to resume accrued, under Act IX. of 1871, Section 29 and Art. 130, Schedule II.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the district of Ahmedabad, confirming the decree of J. W. Walker, Assistant Judge.

The facts of the case are as follows :—

The plaintiffs in 1874 sued to recover the amount of rent imposed in 1871-72 by the Tálukdári Settlement Officer, proceeding under Bombay Act VI. of 1862, upon a piece of land. They alleged in the plaint that the land belonged to Galá Tejá and Parshotam Tejá, by whom it was mortgaged to the plaintiff's father, Kuber, in 1859-60; a further charge was placed upon it in 1861-62; and, finally, in 1865-66 it was sold to the plaintiffs. The plaintiffs also prayed for cancelment of the Tálukdári Settlement Officer's order imposing rent.

The Tálukdári Settlement Officer was at first the only defendant in the cause; and he answered that the plaintiffs were not the owners of the land; that the land belonged to the Tálukdár of Gángad, whose estate was now in his charge; that it was granted to one Jiva Karshan, at a date unknown, in return for services as a cook; that Jiva performed service and cultivated the land till

* Special Appeal No. 68 of 1876.

1834; that Jiva died in 1853 and was succeeded by Morar Ganesh. That the services of cook were no longer required by the Tálukdár; and, therefore, under Bombay Act VI. of 1862, the Tálukdári Settlement Officer had every right summarily to impose the rent he had fixed.

The Tálukdar of Gángad, Gagubhai Abhesangji, was subsequently added as a defendant to the suit, and he made a similar defence.

The Assistant Judge of Ahmedabad, who tried the suit, rejected the plaintiffs' claim, for the reasons, among others, that the Tálukdári Settlement Officer was perfectly justified in deciding summarily that the land was not alienated and liable to pay rent in lieu of service, and that, even if this was not so, the plaintiffs had failed to prove their title.

Gokuldás Káhándás Párekh for the plaintiffs, the special appellants :—Bombay Act VI. of 1862 gave no power to the Tálukdár to put a stop to the service at pleasure and recover the land or levy assessment upon it. The Tálukdár himself could not do so. The land was not service land. It was granted for past service. There is no evidence that the grantee or those who came after him, including the plaintiffs, who came in as purchasers, as we allege, or as mortgagees, as the Courts below hold it established, ever performed service. Their possession of the land is adverse and extends over fifty years. The Tálukdár, or the Tálukdári Settlement Officer, cannot stop service if it was performed at pleasure. The suit is, at all events, barred by lapse of more than twelve years from the death of Jiva, the cook to whom the land was granted, for the office of cook was not hereditary, nor is it proved that those who held the land after Jiva were his heirs.

Honourable Rao Saheb V. N. Mandlik, Acting Government Pleader, for the Tálukdári Settlement Officer :—The land is service land held rent-free. Mere lapse of time and non-performance of service do not bar a Tálukdár's right to demand service from the holder of service lands. The case might be different if the holder had, on demand, refused to render it. The mere fact that the Tálukdár did not require service, cannot of itself bar his right. Section 3 of the Tálukdári Act authorizes the Settlement Officer to remove the holder from possession.

1877.

KEVAL KUBER v. THE TA'LUKDA'RI SETTLEMENT OFFICER

Nagindas Tulsidás, for the Tálukdár, adopted the argument of the Government Pleader.

MELVILL, J. :—The land in dispute has admittedly been rent-free for fifty years. This is sufficient to throw upon the person demanding rent the burden of proving that rent is due.

The case made by the defendant (the Tálukdári Settlement Office,) is that the land is service land, and that, as service is no longer required, rent must be paid. It appears to us that this is not a sufficient defence to the action.

In *Baboo Koolodeep Narain Singh* v. *Mahadeo Singh*(1) Peacock, C.J., says :—"I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held whenever he pleases, and take back the estate. It is not because the services are released or dispensed with, or become unnecessary, that the estate can be resumed. If a grantor release the services, or a portion of the services, upon which lands are holden, the tenant may hold the land free of the services; but the landlord cannot put an end to the tenure, and resume the land. Many services upon which very valuable estates are held are of little value now. The estates may be very valuable, and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates are liable to be resumed. It might as well be contended that if lands are granted at a small quit-rent, the landlord might relinquish or dispense with the payment of the rent, and take back the lands. It is said in the plaintiff's written statement that the sannad was granted upon condition of rendering services. But, even if it were so, the person to whom the condition is to be performed, cannot, by dispensing with the performance of the condition, put an end to the grant. If lands were granted upon condition of paying a certain rent, the grantor or his representatives would have no right to say, when the lands are very valuable, 'I will dispense with the performance of the condition, I will exempt you from the payment of the rent, and I will take back the estate.' If he could not do so in the case of rent, why should he be able to do so in the case of services?"

(1) 6 Calc. W. R. 199 Civ. Rul., see p. 203.

1877.

KEVAL KUBER v. THE TALUKDA'RI SETTLEMENT OFFICER.

In *Forbes* v. *Meer Mahomed Tuquee* (1) their lordships of the Privy Council say that they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the above passage.

In the same case their lordships adopt a distinction between the grant of an estate burdened with a certain service, and the grant of an office, the performance of whose duties is remunerated by the use of certain lands.

Of the former description of grant they say: "Their lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that the service ceasing, the tenure should determine."

In the present case, if the grant was of the former description, there is no evidence whatever that it was of such a nature, or so expressed, as to make the continuance of the tenure dependent on the continuance of service. The grant may have been made as a reward for past as well as an inducement to future services. No *sanad* is forthcoming, so that of the terms of the grant we know nothing.

If the grant were of the other description, (and looking to the nature of the service—that of cook to the Durbar—it probably was so,) the use of the land was merely a remuneration of the service, and *primâ facie* the grantor would be entitled to resume the land if the service ceased. But it appears to us that the right to do so has become barred by lapse of time. The original grantee, according to defendant's statement, was Jiva Keshav. Jiva seems to have had nothing to do with the land after 1834, and it was dealt with as their own by the persons through whom the plaintiffs claim. Still it may be admitted that, as the District Judge says, the Tálukdár had no occasion, so long as Jiva lived, and the service was performed, to trouble himself as to the manner in which the land was dealt with. But Jiva died in 1853, and then,

(1) 13 Moore Ind. Ap. 438; see p. 463.

1877.

KEVAL KUBER v. THE TA'LUKDA'RI SETTLEMENT OFFICER.

at all events, if not before, the right of resumption accrued. Even in this country the office of cook can hardly be considered hereditary. Jiva's successor in the office, Morar Ganesh, is not shown to have been his heir. There must have been a fresh appointment; and if the use of the land were intended to be the remuneration of the new cook, a resumption and re-grant were necessary. Nothing of the kind is shown to have been done. It is true that, ten years after Jiva's death, the land was entered in the name of Morar Ganesh. But Morar Gunesh never had possession of the land. The plaintiffs and those through whom they claim (or their mortgagees) have had undisturbed possession for some forty years; and, at all events since Jiva's death, that possession must be regarded as adverse to the Talukdár. His right to resume or to assess the land is, consequently, barred by Act IX. of 1871, Section 29, and Article 130, Schedule II.

For these reasons we reverse the decree of the Courts below, and allow the claim, with costs on defendants throughout.

Decree reversed.

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

RAGHOJI' BHIKA'JI AND OTHERS (DEFENDANTS, APPELLANTS) v. ABDUL KARIM (PLAINTIFF, RESPONDENT).*

Limitation—Promise—Acknowledgment—Recovery of barred debt—Act XIV. of 1859, *Section* 4—*Act IX. of* 1871, *Section* 20—*Act IX. of* 1872, *Section* 25, *Clause* 3.

The "promise" referred to in Section 20 of Act IX. of 1871 is a promise introduced, by way of exception, in a suit founded on the original cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. Accordingly a suit is not barred which is brought on a bond executed, in consideration of a barred debt, after the expiration of the period prescribed for its recovery.

THIS was a special appeal from the decision of W. Wedderburn, Judge of the District of Ratnágiri, amending the decree of the 1st Class Subordinate Judge of Ratnágiri.

The plaintiff, on the 18th of August 1875, sued the defendants to recover from them two instalments on a bond for Rs. 1,400,

* Special Appeal No. 303 of 1876.