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thodi v. *Appu*[1]; *Pittapur Raja* v. *Suriya Rau*[2]; *Ramhurry Mondul* v. *Mothoor Mohun Mondul*[3].

One rough test to determine whether the cause of action is the same or distinct, is to see if the same evidence supports both claims—*Soorasoondree Dabea* v. *Golam Ali*[4]. It is clear that, judged by this test also, the present suit is not barred by reason of the previous litigation.

For the several reasons set forth above, we hold that the District Judge was in error in dismissing the claim. We reverse his decree and remand the case back to him for disposal on the merits.

Decree reversed and case remanded.

(1) (1892) 15 Mad., 296.
(2) (1885) 8 Mad., 520.
(3) (1873) 20 Cal., W. R., 450.
(4) (1873) 19 Cal., W. R., 141.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 23.

KOMARGOWDA (ORIGINAL PLAINTIFF), APPELLANT, v. BHIMAJI KESHAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Service lands—Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—Resumption.

Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.

SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

Plaintiff was the desái of the Narendra Mahál.

In 1893 he brought this suit to recover possession of certain lands forming part of his *deshgat inám* lands. He alleged that his ancestors had assigned these lands to the ancestors of defendant No. 1 as remuneration for services to be rendered in connection with the office of *mutalik* or deputy of the desái; that up

* Second Appeal, No. 391 of 1898.

to 1882 these services had been rendered from time to time by the defendant's family, but that latterly defendant No. 1 had refused to perform any services, and was, moreover, unfit to perform them. He claimed that he was, therefore, entitled to resume the lands. Defendant No. 1 pleaded (*inter alia*) that his ancestors had held the lands uninterruptedly for nearly 200 years; that the suit was time-barred; that he was unaware that any services were attached to the land; that the plaintiff had never demanded performance of service; and that he was willing to perform any services which the Court might direct.

The Subordinate Judge held that the lands in suit formed part of plaintiff's *deshgati* vatan that they had been held and enjoyed by the first defendant's family as remuneration for services rendered by them as *mutaliks* of the desái, and that such services had been duly performed up to 1882-83. The suit was, therefore, not barred by limitation.

He passed a decree in plaintiff's favour, awarding possession of the lands.

On appeal, the Assistant Judge agreed with the Subordinate Judge in holding that the lands in dispute originally belonged to the plaintiff's family; that they had been assigned to the family of defendant No. 1 for services to be rendered as *mutaliks* of the desái; and that they had always been treated as forming part of the plaintiff's *deshgat inám* lands. He found, however, that defendant No. 1 had held the lands without rendering any service for over thirty years, and was of opinion that his possession had become adverse, and that the plaintiff's claim was, therefore, time-barred. He accordingly reversed the decree of the Subordinate Judge and dismissed the suit.

Against this decision, plaintiff preferred a second appeal to the High Court.

Invcrarity (with him *Manekshah Jehangirshah*) for appellant.

Branson (with him *N. G. Chandavarkar*) for respondents.

PARSONS, J.:—The current findings of the lower Courts are that—

1, the lands in suits originally formed part of the plaintiff's *deshgat inám* lands;

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2, they were assigned by the ancestors of the plaintiff to the ancestors of the first defendant for services to be rendered by the latter to the former.

The lower appellate Court, however, differing from the Court of first instance, found that the suit to recover possession of the lands was time-barred. In coming to this conclusion, the Assistant Judge has held that the mere non-render of any service made the possession of the defendant adverse. This is clearly incorrect. The lands were held for service, and the fact that no service was performed would not of itself make the holding adverse. In this respect, render of service is on the same footing as payment of rent, and the principle laid down in the cases of *Dadoba* v. *Krishna*[1] and *Budesab* v. *Hanmanta*[2] would be applicable. To make the possession of such lands adverse, there must be a refusal to perform service, or a claim to hold the lands free of service. The Subordinate Judge has shown conclusively that the defendant continued to serve as pátil on behalf of the plaintiff up to 1882-83, and that no refusal to serve was made till after that time, and his decision on the point of limitation is undoubtedly correct.

In this connection, I notice the Exhibit 256, which is a document passed by the first defendant to the plaintiff on the 24th July, 1880. In it the defendant states that the lands in dispute and others formed a part of the *chavrat* lands of the plaintiff's *deshgati vatan* of Narendra Mahál and were continued to him (first defendant) as remuneration for doing *mutaliki* service, and that he was liable accordingly to perform the service directed by the plaintiff by paying Rs. 100 as judi per annum for those lands, and he further states that not having performed the said service or paid the judi so long regularly and from time to time, and having humbly represented to the plaintiff that he would not thenceforth commit such default or act in such a way, and the plaintiff having agreed to appoint him to the office of pátil of Narendra on condition of his regularly paying the judi of the lands in question as before, he proceeds to execute this karár-patra with his free will and consent with an agreement to per-

(1) (1879) 7 Bom., 34 at p. 39. (2) (1896) 21 Bom., 509 at p. 516.

form thenceforth the aforesaid duties with ability and pay the judi regularly as stated above. This was admitted in evidence by the Subordinate Judge, but rejected by the Assistant Judge on the ground that it was not registered. I do not think that it is a document that required registration. It is merely a statement of past facts with a promise for the future to act in accordance therewith. No interest in immoveable property is declared, and no new rights or obligations are created by it. The document was admissible in evidence. The Assistant Judge says of this document that, if admissible, it makes it quite clear that service was actually performed. It shows further, I think, that service was admitted and promised to be performed, and that there was no adverse possession.

It only remains to notice the fourth issue, which related to the particular relief, out of those claimed, to which the plaintiff might be entitled. This was fully dealt with and found upon by the Subordinate Judge who awarded possession, but was only discussed by the Assistant Judge on account of his finding on the point of limitation. I am unable, therefore, to accept the opinion of the latter on the point. I think there should be a fresh finding thereon by the lower appellate Court after a full consideration of the evidence of the plaintiff himself (as to demand of service) and of the conduct of the defendant which will be found fully set out by the Subordinate Judge at page 11 of the paper book. We, therefore, ask the Judge of the lower appellate Court to record a fresh finding on his fourth issue and certify it to this Court within two months.

RANADE, J.:—The appellant, desái of Narendra Mahál in Dhárwár, brought this suit for the resumption of certain lands granted as remuneration for service as *mulalik* desái by appellant's ancestors to the ancestors of respondent No. 1. The resumption was sought on the ground that respondent No. 1 had become unfit for such service, and refused to render service though asked to do so in 1882. There was also an alternative claim for rent and judi and local cess for three years. Respondent No. 1 claimed to be in possession of the lands for over 150 years, and stated that he was not aware that any service had to be rendered for the same. He denied that any service had been

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demanded of him, and said that he was ready to render service if it was proved that he was bound to do so. He finally denied any liability to pay rent or judi or local cess.

The second respondent and other defendants claimed title under respondent No. 1. The Court of first instance decreed the appellant-plaintiff's claim, holding that the lands were held by respondent No. 1 on service tenure, and that as respondent had refused to render such service, appellant had a right to resume possession of the lands. In appeal, the Assistant Judge found that the lands in dispute belonged to the desái; that they were assigned by his ancestors to respondent No. 1's ancestors in connection with, and as remuneration for, the office of *mutalik* desái; that respondent's ancestors rendered *mutalik* service thirty years ago, and respondent No. 1 himself officiated as pátil ten years before the suit. He, however, held that this last duty was not performed as *mutalik*, and that as respondent No. 1 had enjoyed the lands without rendering any service for thirty years, respondent's possession was adverse to the appellant, and barred the claim. Finally, the Assistant Judge held that there was no evidence of demand and refusal. The claim was accordingly dismissed.

The principal point for consideration is the question of limitation. There can be no doubt that the Assistant Judge was in error in holding that the mere non-rendering of service for thirty years under the circumstances stated by him constituted adverse possession of the lands so as to bar appellant's claim. It has been repeatedly held that mere non-payment of rent by a tenant to his landlord does not constitute his possession adverse to the landlord. When the relationship of landlord and tenant has been established, mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased. There must be affirmative proof to that effect—*Rungo Lall* v. *Abdool Guffoor*[1] and *Poresh Narain* v. *Kassi Chunder*[2]. In the first case, rent had not been paid for over fifteen years, and a rent suit had been actually withdrawn. The same position was laid down by this Court in *Gangabai* v. *Kalapa*[3], where

(1) (1878) 4 Cal., 314. (2) (1878) 4 Cal., 661.

(3) (1885) 9 Bom., 419.

the landlord had been inámdár of the land, and the inám had been resumed in 1858, and the tenants, who claimed to hold the lands under a permanent lease from the inámdár, continued in possession after the resumption for over twenty years. The Madras High Court has followed the same ruling in *Rungo Lall* v. *Abdool Guffoor*[1] in *Tiruchurna* v. *Sanguvien*[2]. The mere fact that the lands in dispute are held on service tenure makes no change in the relationship of landlord and tenant: section 105 of the Transfer of Property Act expressly classes service with money or grain rents. The rulings in regard to rents apply with equal effect to service tenure lands. In *Easwara Doss* v. *Pungavanachari*[3], the zamindár's right to resume lands held on service tenure was upheld. The portion of the judgment, which relates to the point of limitation, bears intimately upon the point now under consideration. The Assistant Judge has not found that there has been, over and above the omission to render service, any active assertion of an adverse right on the part of the respondent. On the contrary, he has expressly found that service was regularly rendered thirty years ago, and some service was rendered within ten years previous to the suit. So far from asserting any adverse right, the respondent has expressed his readiness to serve, if it is proved that he is bound to do so. The document, Exhibit 256, excluded for want of registration, may be referred to show that the service as pátil was a part of the *mutaliki* duties. Under these circumstances, we must hold that the respondent's possession has not been adverse, and that the claim is not barred by limitation.

The statement in the judgment of the Assistant Judge, that there was nothing to show any demand and refusal in this case, was challenged by Mr. Inverarity, counsel for the appellant. The lower appellate Court laid down no issue on this point, and the Court of first instance has expressly found that there was a wilful default on the part of the respondent in the matter of service. In deciding questions about the resumptions of lands held on service tenure, the general principles to be observed have

(1) (1878) 4 Cal., 314. (2) (1881) 3 Mad., 118.

(3) (1890) 13 Mad., 361.

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been laid down in *Forbes* v. *Meer Mahomed Tuquee*[1], followed in *Silaramarazu* v. *Ramachendrarazu*[2]. It is desirable that a clear finding should be recorded on the point before the right to claim resumption is enforced. The appellant asserts that he made a demand and that respondent refused to render service. The respondent directly challenges this position. We must, therefore, send down an issue and require the Assistant Judge to find whether there has been such a demand and refusal as to entitle the appellant to claim resumption of the possession of the lands in dispute.

(1) (1870) 13 M. I. A., 438. (2) (1881) 3 Mad., 367.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 30.

YAMUNABAI (ORIGINAL DEFENDANT), APPELLANT, *v.* MANUBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Maintenance—Maintenance of daughter-in-law—Claim of daughter-in-law against self-acquired property of her father-in-law in hands of his heirs.

The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father.

APPEAL from an order passed by Ráo Bahádur V. M. Bodas, First Class Subordinate Judge of Sholápur, with appellate power.

Suit against a mother-in-law for maintenance. The plaintiff's husband Tatia was the son of the defendant and her husband Bala. Tatia had lived in union with his father Bala, but had died before him. Bala subsequently died, leaving no surviving issue, and his property went to his widow, the defendant. The plaintiff now sued the defendant for maintenance.

The Subordinate Judge found that the property left by Bala was his self-acquired property and that the plaintiff had, therefore, no right to maintenance out of it. He dismissed the suit without finding on the other issues in the case.

* Appeal No. 24 of 1898 from order.