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excommunication has been resorted to in order to compel obedience to the wishes of the *bháubands* for a share in the temple lands.

If the appellants as plaintiffs had a right to require the Courts to make an inquiry into the factum and regularity and *bona fides* of the excommunication proceedings, it is clear they have a stronger right as defendants to insist upon such inquiry before an injunction is given against them.

We must, therefore, remand the case for a finding upon the issue about the regularity and *bona fides* of the excommunication.

Case remanded.

N. B.—Upon remand the District Judge found that the sentence of excommunication was not passed on justifiable grounds after a fair and proper inquiry.

On this finding the High Court reversed the decree of the lower Court and dismissed the suit.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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February 28

RAJARAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS, *v* GANESH (ORIGINAL PLAINTIFF AND DEFENDANT NO. 4), RESPONDENTS.*

Gift—Revocation of gift—Vritti—Gift of vritti—Validity of such gift—Compulsory alienation of vritti invalid—Private alienation not absolutely prohibited.

When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete, and he cannot revoke it by a subsequent will.

A *vritti* cannot be sold in execution of a decree. Such a compulsory alienation is not only opposed to the Hindu law and public policy, but is also against the provisions of section 266 of the Code of Civil Procedure (Act XIV of 1882). But private alienations are not absolutely prohibited. No general rule can be pleaded in such matters. The rules of succession depend upon each particular foundation or office, and in respect of it, custom and practice must govern and prevail over the text law which prohibits both partition and alienation.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, Additional First Class Subordinate Judge at Násik.

*Second Appeal, No. 948 of 1897.

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One Bhikambhat was the original owner of the property in dispute, which consisted of (1) a house at Trimbak, (2) one-fourth share in an inám village, (3) a right of service in the temple of Shri Trimbakeshvar, and (4) one-half share in the *upadhikpana vritti*[1] on the *Kushavarth Tirth*, which is a sacred place at the source of the Godávari.

Bhikambhat made a gift of the whole of the property in dispute to the plaintiff by a *bakshis-patra* (deed of gift) dated 16th November, 1888.

At the date of the gift the house and the inám village were in the possession of a mortgagee to whom Bhikambhat had mortgaged them. Bhikambhat, however, handed over to the plaintiff such documents of title as he had with him relating to the property, and he also applied to the Revenue authorities to transfer his share in the inám village to the plaintiff's name.

As to the *vritti*, plaintiff entered upon the duties of his office immediately after the execution of the deed of gift.

On the 5th January, 1891, Bhikambhat adopted defendant No. 1 and made a will by which he revoked the deed of gift to the plaintiff and bequeathed the whole of his property to his adopted son (defendant No. 1). Bhikambhat died shortly afterwards.

In 1894 plaintiff filed the present suit to establish his title to the property under the deed of gift executed by the deceased in his favour.

The defendants pleaded (*inter alia*) that the deed of gift was invalid on the ground that it was not accompanied with possession, and as to the *vritti* and the right of service in the temple contending that Bhikambhat was not competent to alienate them to a complete outsider and stranger to the family.

Both the lower Courts held the gift valid and awarded the plaintiff's claim.

Defendants thereupon preferred a second appeal to the High Court.

(1) The *vritti* is a priestly office in virtue of which certain religious services are performed on behalf of pilgrims to the *tirth*, who pay fees to the holders of the *vritti* for the performance of those services. See (1886) 10 Bom., 395.

Daji Abaji Khare, for appellants:—The deed of gift is invalid because it was not accompanied by delivery of possession. Part of the property in dispute was not in the possession of the donor at the time of the gift. It was then, and is still, in the possession of the mortgagee. As regards the *vritti* and the right of service in the temple, the donor continued in possession after the execution of the deed, since we find that the donee signed the receipts for the payments made to him in the donor's name. The gift was, therefore, incomplete and it was afterwards revoked by the donor by his will. But assuming that the gift was complete, still it is open to the objection that the *vritti* as well as the right of service in a temple are inalienable under the Hindu law. A religious office cannot be made the object of sale, mortgage or gift, and the emoluments of the office are absolutely *extra commercium*—*Rajah Vurmah Valia* v. *Ravi Vurmam*[1]; *Narasimma* v. *Anantha*[2]. *A vritti* is a right of personal service and as such cannot be attached or sold in execution of a decree—*Ganesh* v. *Shankar*[3]. In the present case the *vritti* was transferred to a perfect stranger. Such an alienation outside the family is bad—*Kuppa* v. *Dorasami*[4]; *Durga Bibi* v. *Chanchal Ram*[5].

N. G. Chandavarkar, for respondents:—It is found as a fact by both the lower Courts that the gift was carried out by the donors taking all the steps necessary to give effect to it. This finding is conclusive on this Court in second appeal. As to the alienability of a *vritti*, it is too broad a proposition to assert that a *vritti* is absolutely inalienable. No such rule is deducible from the decided cases. On the contrary the Courts have upheld the alienation of a priestly office to a member of the founder's family standing in the line of succession—*Sitarambhat* v. *Sitaram*[6]; *Srinivasa* v. *Rengasami*[7]; *Mancharam* v. *Pranshankar*[8]. Even an alienation to a stranger has been allowed where such alienation is in the interest of the endowment—*Khetter Chunder Ghose* v. *Hari Das*[9]. No doubt it has been held that a *vritti*

(1) (1877) 1 Mad., 235.
(2) (1881) 4 Mad., 391.
(3) (1886) 10 Bom., 395.
(4) (1882) 6 Mad., 76.
(5) (1881) 4 All., 81.
(6) (1869) 6 Bom. H. C. Rep., 250 (A.C.J.)
(7) (1879) 2 Mad., 304.
(8) (1882) 6 Bom., 298.
(9) (1890) 17 Cal., 557.

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cannot be sold in execution of a decree. But the grounds on which such an alienation is forbidden, do not apply in the case of a private alienation. If a *vritti* were subject to attachment and sale, the auction-purchaser might be a Mahomedan or a Christian, and he would be both unwilling and incompetent to perform the services to an idol. But these objections do not apply to the alienation in the present case. In *Sadashiv* v. *Jayantibai* (1), this Court has allowed the sale of a *vritti* even in execution of a decree. It is not, therefore, correct to say that a *vritti* cannot be alienated under any circumstances. It is for the Court to determine in each case whether the alienation is one that can be upheld.

RANADE, J.:—The appellants' pleader in this case raised only two contentions in his argument before us,—first, that the gift in this case was invalid, because it was not carried out by transfer of possession, and was subsequently revoked by the donor, and secondly, that the alienation of the *vritti* was invalid as being the alienation of an hereditary priestly office outside the family to a stranger.

As regards the first contention, both the Courts below have found in respondent's favour, that the possession was transferred to the respondent by the donor taking all the steps necessary and in his power to effect it. This is a question of fact, and we must accept the concurrent finding of both the lower Courts as binding on us in second appeal. The donor transferred the documents relating to the *vritti* to the respondent, and he also applied to the Revenue authorities to transfer his interest in the inám village to respondent. The donor was not in possession of the inám village and the house, which he had mortgaged to his creditors, and transfer of actual possession was in the nature of things impossible till the debt was paid off. The duty of service in the temple was performed by the respondent, who signed the receipts in the donor's name. We must, therefore, overrule this objection. If the gift was carried out by the donor's taking all the steps in his power to give effect to it, it was complete, and the donor had no power to revoke it by a subsequent will, as was sought to be done in the present case.

(1) (1883) 8 Bom., 185.

The other ground of invalidity presents more difficulty. It appears that the objection that a *vritti* was inalienable was raised in the Court of first instance, and decided against the appellants before us. In the District Court, the point was again raised, but the judgment of the lower appellate Court shows that it was not pressed there. This of course does not deprive the appellants of their right to raise the question in second appeal—*Kuppa* v. *Dorasami*[1].

It appears from the authorities cited, and from others which will be noticed further on, that a distinction has been made by the Courts between *vrittis* such as those in dispute in this case, and defined in *Ganesh* v. *Shankar*[2], and the right of hereditary service in temples, private and public, and between alienation to strangers and to members of the family, and, lastly, between compulsory and private alienation. Compulsory alienation by way of sale in execution of decrees has been disallowed in all cases as being not only opposed to Hindu law and public policy but against the provisions of section 266 as being rights of personal service—*Ganesh* v. *Shankar*; *Govind* v. *Ramkrishna*[3]; *Kalee Churn* v. *Bungshee Mohun Doss*[4]; *Durga Bibi* v. *Chanchal Ram*[5]; *Dubo Misser* v. *Srinibas Misser*[6]. Such compulsory sales might transfer such properties to persons disqualified to perform the duties of the office. In the case of private alienations, this objection does not hold equally good, and private alienations are not absolutely prohibited. Alienations to strangers are indeed not favoured, as will be seen from the rulings in *Rajah Vurmah Valia* v. *Ravi Vurmah*[7], *Narasimma* v. *Anantha*[8], *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*[9], *Keyake-Ilata Kotel Kanni* v. *Yadattil Vellayangot*[10], *Rajah of Cherakal Kovilagom* v. *Mootha Rajah*[11], *Venkatarayar* v. *Srinivasa Ayyangar*[12].

Most of these decisions relate to temple offices in Madras Presidency where the sentiment against alienation is very

(1) (1882) 6 Mad., 76.
(2) (1886) 10 Bom., 395.
(3) (1887) 12 Bom., 366.
(4) (1871) 15 Cal. W. R., 339.
(5) (1881) 4 All., 81.
(6) (1870) 5 Beng. L. R., 617.
(7) (1876) 4 I. A., 76.
(8) (1881) 4 Mad., 391.
(9) (1877) 1 Mad., 235.
(10) (1868) 3 Mad. H. C. Rep., 380.
(11) (1873) 7 Mad. H. C. Rep., 210.
(12) (1872) 7 Mad. H. C. Rep., 32.

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strong. In other parts of India, the restrictions are less strictly enforced, especially when the alienee is a nearly related member of the family. In this Presidency it was ruled in *Sitarambhat* v. *Sitaram Ganesh*[1] where the dispute related to a temple office, that alienation to grand-children by way of relinquishment on the part of the grandfather was not illegal. The principle was re-affirmed in *Mancharam* v. *Pranshankar*[2], where the dispute related to a *joshi vritti*, and it was held that alienation to a member in the line of succession or to a possible heir, bandhu or sapinda, would not be illegal unless there was any express direction of the founder, or rule or usage to the contrary. In *Khetter Chunder Ghose* v. *Hari Das Bundopadhya*[3] the alienation by the entire family of the sebaits of private idol with its endowed land to a stranger was upheld as being in the interest of the idol, and calculated to carry out the objects of the original founder. A similar transfer in respect of a public temple was held to be legal—*Konwar Doorganath Roy* v. *Ram Chunder Sen*[4]. Where the alienation is made by one out of several joint owners for his own benefit, the transfer was held to be illegal —*Kupa* v. *Dorasami*; *Narasimma* v. *Anantha*. In *Ukoor Doss* v. *Chunder Sekhur Doss*[5] such a transfer was held to be invalid beyond the life-time of the alienor. In *Kuppa* v. *Dorasami*, transfer to a person not in the line of heirs was disallowed. In *Durga Bibi* v. *Chanchal Ram*, alienation outside the family was held to be illegal. In *Sadashiv* v. *Jayantibai*[6], on the other hand, the execution of a decree directing the sale of a *vritti* was upheld.

It will be thus seen that in the case of private alienations the prohibition is not of general application. As observed by their Lordships of the Privy Council, no general custom can be pleaded in such matters. The rules of succession depend upon the nature of each particular foundation or office, and in respect of it custom and practice must govern and prevail over the text law which admittedly prohibits both partition and alienation—*Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*[7]; *Greedharee*

(1) (1869) 6 Bom. H. C. Rep., 250.
(2) (1882) 6 Bom., 298.
(3) (1899) 17 Cal., 557.
(4) (1876) 2 Cal., 341.
(5) (1865) 3 Cal. W. R., 152.
(6) (1883) 8 Bom., 185.
(7) (1874) 1 I. A., 209.

Doss v. *Nundo Kissore Doss Mohunt*[1], *Rajah Vurma Valia* v. *Ravi Vurma Mutha*; *Genda Puri* v. *Chhatar Puri*[2]; *Durga Bibi* v. *Chanchal Ram*; *Ramlingam Pillai* v. *Vythilingam Pillai*[3]; *Manchharam* v. *Pranshankar*. By force of custom, however, a limited right of partition and alienation might be established, and the custom must be ascertained by evidence in each class of cases.

As this point has not been formally inquired into, it becomes necessary to send down the following issues and obtain a finding on the same :—

(1) Whether a custom and practice of the alienation or gift of the *vritti* in dispute and of the service in the temple was established either generally or as limited to particular classes of heirs or relations ?

(2) Whether the appellant's gift falls within or is governed by such custom and limitations ?

The finding and evidence taken, if any, should be certified to this Court within two months.

(1) (1867) 11 Moore's I. A., 405. (2) (1886) 13 I. A., 160.
(3) (1893) 16 Mad., 490.

FULL BENCH.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Candy and Mr. Justice Fulton.

BHAVRAO AND OTHERS (ORIGINAL DEFENDANTS NOS. 17, 19 AND 20), APPELLANTS, *v.* RAKHMIN AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1898. *March* 1.

Partition—Alienation by co-parceners—Possession by alienee—Adverse possession—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 127 and 144.

Where co-parceners have alienated their shares in the joint property by sale and mortgage, and the alienees have been in possession for more than twelve years, a claim for partition is, as against such alienees, barred by limitation under article 144 of the Limitation Act (XV of 1877).

Pandurang v. *Bhaskar*[1] distinguished.

*Joint Second Appeals, Nos. 989 and 990 of 1896.
(1) (1874) 11 Bom. H. C. Rep., 72.