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EMPEROR v. JAFFUR MAHOMED.

In the present case it is a condition precedent to the success of this conviction that somewhere in the Act should be found a declaration that, notwithstanding the provisions of section 7 requiring that the house should have been entered under the special warrant before this particular presumption can arise, the presumption equally arises though the house has not been so entered, provided that the entering police officer be the Commissioner himself. There is no such declaration. On the contrary, as the Act stands, it is fatal to the prosecution; and our duty is to administer the Act as we find it. We must hold that since the imperative provisions of section 7 have not been satisfied, the special rule of evidence authorised by that section does not come into operation.

We, therefore, set aside the convictions and sentences, and direct that the petitioners be acquitted and discharged.

Convictions and sentences set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Rao.

1913.

January 6.

MADHWACHARYA RAMCHANDRACHARYA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHRIDHAR NARASINHA BHAT AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Vritti—Recitation of Purans—Conferring hereditary office and granting lands for performance of office—Grant of lands burdened with the performance of service—Resumability of lands.

Where a hereditary office, e. g., of *vritti* for the reciting of Purans, is created and bestowed hereditarily upon the grantee from generation to generation, and lands are assigned as remuneration therefor, the lands so granted are not resumable.

* First Appeal No. 29 of 1912.

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Where there is an interest in land coupled with a duty, and the grant is not forthcoming, so that its actual terms may be known, it must always be a matter of great difficulty, and no more than a mere conjecture, to decide whether the interest was so coupled with the duty that the latter could confidently be said to have been the sole motive and condition of the former. In such a case the interest in land is resumable on failure or refusal to perform the duty.

In cases of grants burdened with service resumable for failure or refusal to perform that service, the Court would ordinarily require very strong and conclusive evidence before disturbing the practice which has persisted for a long time.

APPEAL from the decision of E. H. Waterfield, acting District Judge of Kanara.

Suit to recover possession of lands, under section 92 of the Civil Procedure Code, 1908.

The plaintiffs who were members of the Gaud Saraswat Vaishnav community of Kadwad, sued as devotees of the Shri Venkatesh Temple at Kadwad, alleging that the lands in dispute were originally the property of the temple and were given to the defendants' ancestors on condition of reciting Purans in the temple; that the defendants accordingly recited Purans down to the year 1898, after which they ceased to do so and claimed the lands as their own; and that therefore the plaintiffs were entitled to recover possession of the lands from the defendants.

The defendants contended *inter alia* that the lands were their absolute property; that they recited the Purans of their own free will and not on account of any obligation; and that they continued to read Purans till the year 1905, when they were prevented from doing so by the priests of the temple.

The District Judge held that the lands in dispute were granted on service tenure to the defendants' family by or on behalf of the temple; that the condition of the grant was that the defendants' family should recite Purans in

the temple during the months of Kartik, Vaisakh and Magh; that the defendants held the lands in trust for rendering the service; and that the defendants having committed breach of the trust were liable to be removed from possession of the lands. The Court, therefore, ordered that the defendants should "hand over possession of the plaint lands at the end of three months to a new trustee to be appointed by the Gaud Saraswat Vaishnav community of Kadwad with the approval of this Court."

The defendants appealed to the High Court.

Coyajee, with *G. S. Mulgaonkar*, for the appellants.

Rangnekar, with *S. V. Palekar*, for the respondents.

BEAMAN, J. :—Adopting the view most favourable to the plaintiffs that the land in suit originally belonged to the temple and was granted by the temple to the ancestors of the defendants hereditarily for the performance of the *vritti* of reciting Purans in the temple, we should still be of opinion that no case has been made out for removing the defendants and restoring the lands to the temple. In fairness to the defendants it ought, however, to be said that in our opinion there is very little evidence, and that not of the best quality, to support either of the propositions assumed in the last preceding observation. The only evidence that the lands ever belonged to the temple consists in a single entry in a revenue record, where it is stated that the land is of the ownership of the God. Beyond that there is absolutely nothing, for I reckon as of no evidentiary value the statements of the witnesses at the present day or the alleged admissions of the father of defendant No. 1 and one admission of defendant No. 1 himself. Nothing is easier than for witnesses to come forward and make a bold statement that such and such land belonged to the temple. It does not appear that any single one

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of these witnesses was asked how he came by that information. And since it is common ground that the grant, if a grant was ever made, was made some time in the very early years of the 19th century, and since then that every act of ownership has been done by the defendants themselves, it is obviously impossible that any living witness could have any first hand knowledge of such a grant having been made, and therefore, of the ownership of the property having inhered in the temple anterior to such grant. Next it is equally uncertain so far as the evidence recorded in this case goes, assuming that the lands in suit were ever granted to the defendants by the plaintiffs, what the terms of that grant were, whether it was in reality the creation of the hereditary office of *vrilli* for the reciting of Purans, then bestowed hereditarily upon the defendants' family from generation to generation, and the lands in suit assigned as remuneration therefor, or whether it was a grant of lands burdened with the service of reciting Purans in the temple. In our opinion the evidence upon which the lower Court has mainly relied is at least as consistent with the grant having been of the former as of the latter description. And if that were so, the law is well established that the lands so granted are not resumable. Further where there is an interest in land coupled with the duty, and the grant is not forthcoming so that its actual terms may be known, it must always be a matter of great difficulty, and no more than a mere conjecture, to decide whether the interest was so coupled with the duty that the latter could confidently be said to have been the sole motive and condition of the former. Where that is so, the law is well established that on failure or refusal to perform the duty the interest in the land is resumable. But there are innumerable cases of an interest in land, so coupled with the duty as not to fulfil the requirements of the last stated definition; and in all those cases it cannot be

said that it is settled that the land can be resumed even upon failure or refusal to perform the duty.

We are, therefore, assuming a great deal when we begin by adopting the view most favourable to the plaintiffs, namely, that this was a grant of land burdened with service, the service being the sole motive and condition of the grant. Even were it so, however, it is clear upon the record that there is no satisfactory evidence either that the defendants are incapable of performing or unwilling to perform the duty, which the plaintiff alleged was the motive and condition of the grant, namely, reciting Purans during three months of the year. The plaintiff has sworn that the defendants were called upon to recite those Purans and refused to do so. On the other hand the defendants have in their written statement expressed their willingness to recite the Purans. And beyond the bare word of the plaintiffs there is only the statement of a single witness which can by means of a little interpretation be made to support him. At first that witness said that after asking the defendant why he was not reciting the Purans and the defendant having replied that he was ill, he afterwards went on to say that he was quite willing to do so if his interrogator so wished. The witness, however, immediately corrected the last statement by saying that he understood by "if he wished" if he were willing to pay him for doing it. However that may be, there is really no evidence worth the name, certainly none upon which we should feel disposed to rely in support of the conclusion arrived at by the learned Judge below, one of the effects of which would be to deprive the defendants of the enjoyment of lands which they have admittedly held uninterruptedly since 1823, and at the same time to deprive them of what it is quite likely they regard as a privilege rather than a duty, namely, reciting Purans during the three months of the year in the temple. In respect of grants burdened with service resumable for

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failure or refusal to perform that service the Court would ordinarily, we think, require very strong and conclusive evidence, where the facts are as found in this case, before disturbing the practice which has persisted for a century. No reflection is made upon the competence of the defendants, and it is the defendants' case that so far from having refused to read the Purans, they have been prevented by the plaintiffs and their adherents from doing so; and speaking for myself, I think, this is much more probably true than that they should have obstinately refused the performance of the duty which is usually regarded as conferring some great honour upon those entrusted with it. It is not an onerous duty, and assuming that lands were held upon condition of performing it, it appears to us that it would be most unjust, upon the bare word of the plaintiff that he called upon the defendants to do this service and that the defendants refused, to take these lands out of the possession of the defendants and to preclude the defendants' family from reciting the Purans, as they have admittedly been doing for nearly a century. We entertain some doubts whether in view of the observations upon the alternative hypothesis, which the Court might well have adopted, we ought not really to dismiss this suit; but taking the evidence as a whole there may be material enough logically to support the opinion of the learned Judge below that the land was given by the temple to the defendants' family on condition that that family should thenceforward and forever hereditarily recite the Purans during the stated months in the temple, and we think that so long as there is a descendant of the defendants' family ready and willing to discharge those duties, he should be allowed to do so and the lands should remain as before in the possession of the defendants and their descendants. We must, therefore, modify the decree of the Court below and substitute for it a decree founded upon the foregoing judgment. Having regard to the fact

that in their written statement the defendants absolutely repudiated any duty coupled with the interest they had in the land, and further to the fact that the plaintiffs theoretically have moved in this matter not in their own but in the interests of the public charity, we think that each party should bear his own costs throughout.

Decree modified.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

NARAYAN ANANDRAM MARWADI (ORIGINAL DEFENDANT 1), APPELLANT, *v.* GOWBAI, WIDOW OF DHONDIBA (ORIGINAL PLAINTIFF), RESPONDENT.*

1912. *December* 18.

Civil Procedure Code (Act V of 1908), section 60—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 22(1)—Decree—Execution—Agriculturist—Exemption from liability to attachment or sale—Absence of proof of exemption—Jurisdiction of the Court to order sale.

Section 60 of the Civil Procedure Code (Act V of 1908) lays down the general rule that property liable to attachment and sale in execution of a decree is lands, houses, etc., belonging to the judgment-debtor. An agriculturist, in order

* Second Appeal No. 545 of 1911, Appeal No. 12 of 1912 under the Letters Patent.

(1) Section 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is as follows :—

22. Immoveable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force, unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists. For the purposes of any such attachment or sale as aforesaid standing crops shall be deemed to be moveable property.

But the Court, on application or of its own motion, may, when passing a decree against an agriculturist or in the course of any proceedings under a decree against an agriculturist passed whether before or after this Act comes into force, direct the Collector to take possession, for any period not exceeding