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on this point was in conflict with her present version, and that the Sessions Judge did not ask her any question on this point, though she was re-called on the 8th January, after the Sub-Inspector was examined and questions on other points, arising out of her statement reduced to writing before the police, were put to her by the Court.

Conviction and sentence confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914. *July* 28.

YELLAVA SAKREPPA BARKI (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIMAPPA GIREPPA DESAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Grant of land—Grant for Barki service—Resumption of grant—Non-production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved.

In the Bombay Presidency where Deshgat Vatan lands are granted for the performance of personal services, no presumption can be made that the grantor has the option to determine the services and to resume the lands. If a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant are unknown, that the proved circumstances justify an inference that he has that right.

SUIT in ejectment.

The plaintiff, an inamdar, owned certain Deshgat Vatan lands. Sometime before 1853, a predecessor of his granted them to defendant's brother for Barki services, which consisted in sweeping the floors and lighting the lamps of the plaintiff's family house.

In 1909, the plaintiff elected to discontinue the services and resume the lands. He sued the defendant in ejectment.

* Second Appeal No. 678 of 1913.

The Subordinate Judge dismissed the suit in absence of evidence to show "that the grant was accompanied by the condition that when the services would no longer be required, defendants' interest in the lands would also cease".

This decree was reversed, on appeal, by the District Judge who held that the plaintiff was entitled to resume the lands on the ground that the Barki services were no longer required.

The defendant appealed to the High Court.

K. H. Kelkar, for the appellant :—We are in possession of the land for a very long time ; and rely on section 83 of the Bombay Land Revenue Code. See *Lakshman* v. *Vithu*[1]. In cases like the present, the plaintiff must prove that he has resumed a right which can be resumed. See *Lakhamgavda* v. *Keshav Annaji*[2]. We have been refused to perform the services.

Campbell, with *A. G. Desai*, for the respondent :—The grant in the present case being of a purely personal nature can be resumed at grantor's choice. See *Radha Pershad Singh* v. *Budhu Dashad*[3], *Sanniyasi* v. *Salur Zamindar*[4], *Mahadevi* v. *Vikrama*[5]. In the case of *Lakhamgavda* v. *Keshav Annaji*[2], the distinction between grants of a public and private nature was probably not pressed on the attention of the Court.

It is incorrect to rely on the principles of a grant in such cases. The defendant is more a tenant than a grantee (section 105 of the Transfer of Property Act), the presumption being that she is an annual tenant (section 106). The defendant has neglected to perform the services and we are entitled to resume.

HEATON, J. :—In this case the plaintiff sued to recover possession of certain lands. It has now been established

(1) (1893) 18 Bom. 221.
(2) (1901) 28 Bom. 305.
(3) (1895) 22 Cal. 938.
(4) (1883) 7 Mad. 268.
(5) (1891) 14 Mad. 365.

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as a fact in the case that the lands belonged to the Deshgat Watan of the plaintiff's family and were granted to the defendant's family for service, and it has further been found by the Court of first appeal that, if I understand the judgment aright, this grant must in all probability have been made sometime subsequent to the year 1853. The first Court came to the conclusion that the plaintiff, the inamdar, had no right to resume the lands in the circumstances appearing in this case and it rejected the claim with costs. On appeal the District Judge came to the conclusion that the plaintiff had the right to dispense with the services and to resume the lands.

The case has been fully argued. The facts such as they are have been found by the Court of first appeal and we have to deal with these facts as the basis of an inference. But, first of all, I will deal with a question which has been a good deal argued in the case and it is this. It is said that where, as here, there is a grant of land for services and where those services are, as here, personal services, then the grantor has, under, what may be called, the common law of the country, the right to dispense with the services and resume the lands. We have no authority to this effect in any Bombay case to which we have been referred, but, as to the law in Bengal, we have the case of *Radha Pershad Singh* v. *Budhu Dashad*[1] and possibly the law is the same also in Madras. But whilst it appears that in Bengal the distinction between a grant for services of a public nature and one for services private or personal to the grantor, is well understood; and though in the case of these private or personal services there is in Bengal presumably a right to dispense with the services and resume the land, it does not follow that it is so in Bombay. In our Presidency the trend of decisions and

(1) (1895) 22 Cal. 938.

what I may describe as the tone of thought in this Court, have always been in the direction of, within reason, protecting the rights of the occupants of lands and not increasing and exaggerating the rights of the inamdar or zamindar or whatever he may be termed I think that the Bombay cases do undoubtedly disclose a reluctance to presume a right to resume lands where resumption involves ejectment. The tendency is to require that it should be an inference from facts proved in the case and not a mere presumption arising out of the circumstance that there is a grant and that the grant is for personal services. Moreover the judgment in the Calcutta case itself shows that even there the Judges considered very carefully the circumstances of that particular case and that the presumption which they mentioned was used not as a conclusive way of deciding the case but rather as an aid to them in dealing with the circumstances which were proved. For the reasons that I have given, I find myself entirely unable to presume that in this Presidency where there is a grant of land even for personal services, it is at the option of the grantor to determine the services and thereupon to resume the land. It seems to me that if a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant, as here, are unknown, that the proved circumstances justify an inference that he has that right. That is the principle which, I think, ought to be applied here. This is the view which the District Judge took, as I understand his judgment, and very properly took. But where he went wrong, and I think he did go wrong, was in coming to the conclusion that the proved circumstances do justify the inference that there is a right to resume.

In dealing with the proved circumstances—and they are very clearly set out in the District Judge's

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judgment—we have to remember that there are two alternative theories. The first is the theory of the plaintiff which, put in common every day language, is this that the grantor in giving the lands to the grantee said "You may hold these lands so long as I require service from you." The other theory—that which is set up by the defendant grantee—is this ; that what the grantor said was "these lands are yours, but so long as I require them of you, you must render me these services." We have to decide, or rather the District Judge had to decide, whether the proved circumstances did definitely favour one theory rather than the other. The circumstances are that there was a grant for service, but in all probability the grant was made subsequent to 1853. There is no written record of the grant ; there is apparently no entry anywhere in the village books which evidences it; the lands have been held continuously since the grant by the grantee or his successors; services of a purely personal, indeed of a domestic, nature have been rendered. Those, I think, are all the circumstances which have been proved. What the Judge asked himself was this : "do they indicate a grant burdened with services or a mere grant in lieu of wages." Even taking that as the question rather than the one which I myself have stated, I should say that the proved circumstances do not in any way whatever suggest that it was a grant in lieu of wages rather than a grant burdened with services. And where that is the state of things, where the circumstances do not in any way in any perceptible degree incline to one theory rather than the other, then I say that there is no evidence of either theory. This is a case therefore which in my judgment the District Judge has decided on no evidence. That being so, as a matter of law we are bound to set aside his decision. It comes to this, therefore. We know that there was a grant for service and we know now in the view of the

law which I have stated that the plaintiff has not a right to resume these lands merely because he chooses to dispense with the services.

There then remains the question : Has the defendant in fact refused to render service. On this point there is no finding by the District Judge, for he deemed it unnecessary to find on it. Therefore under the law as it now stands, because we think it was incumbent on the District Judge to find on this issue, it is for us to look into the evidence and to come to a finding on it for ourselves. We have looked into the evidence and we are satisfied that it cannot be said that it is proved that the defendant in fact refused to render service.

Therefore the plaintiff has failed to make out any just or legal ground for ejecting the defendant from these lands. Consequently the decree of the Court of first appeal must be reversed and that of the Court of first instance restored.

The appellant here should have her costs in the Court of first appeal and in this Court.

SHAH, J. :—I concur.

Appeal allowed.

R. R.

APPELLATE CIVIL.

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

LAXMANDAS HARAKCHAND (ORIGINAL DEFENDANT), APPELLANT, *v.* BABAN WALAD BHIKARI (ORIGINAL PLAINTIFF), RESPONDENT.*

1914. *August 7.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 13, 15D and 16—Monetary dealings, mortgages and promissory notes—Suit for general account and redemption—One general account of mortgage and promissory note transactions—Mortgages found to be satisfied—Surplus profits under mortgage transactions applied in reduction of the claim on promissory notes—Provision of the

* Appeal No. 166 of 1913.