point is one which was taken for the first time in second appeal; it was not argued in the trial Court or in the Court of first appeal. It is one which invites, and for its satisfactory elucidation in my opinion requires, an investigation of the facts from an altogether new point of view. We cannot make such an investigation here nor ought we to remand the case. I am, therefore, not satisfied that the transfer by the lessor to the plaintiff was illegal in so far as it comprised a transfer of a right to sue. Indeed, though my learned brother takes the contrary view I am rather disposed to think that the transfer in this case is one which is exactly covered by the words of section 109 of the Transfer of Property Act.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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March 12.

CHANDRAPPA ALIAS APPASAHEB BASAWANTRAO DESAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BHIMA BIN DASSAPPA MANIKERI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Grant of land—Deshgat Vatan—Grant for peons' services—Resumption of grant—Grant burdened with service, prima facie *irresumable—Grant of office to which lands are annexed by way of remuneration,* prima facie *resumable —Burden of proof.*

In the Bombay Presidency where ancient grants of lands are sought to be resumed, all grants of the kind for the purpose of applying the law of resumption fall into two main categories: (1) grants of lands burdened with service, and (2) grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume lands. Grants under

* Second Appeal No. 40 of 1917.

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the second category are always resumable, unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability.

SECOND appeal against the decision of C. C. Boyd, District Judge of Belgaum, confirming the decree passed by P. Shrinivasrao, Subordinate Judge at Bail-Hongal.

Suit to recover possession.

The lands in suit were the Deshgat Vatan property of the plaintiffs. The plaintiffs alleged that the lands were granted by the plaintiffs' ancestors to the defendants' ancestors in lieu of remuneration for their services as peons and the lands were resumable whenever plaintiffs chose to dispense with the services. In 1906, the plaintiffs gave a notice to the defendants to quit the lands as their services were no longer required. The defendants having failed to comply with the notice, the plaintiffs sued to recover possession of the lands as owners.

The defendants answered that the grant was not a grant in lieu of wages for services to be performed, but a grant, burdened with service; that they were ready and willing to perform the services; and that the plaintiffs had no right to resume the lands.

The Subordinate Judge dismissed the suit holding that the grant was one burdened with service and that the plaintiffs had not proved the right to resume. He observed as follows:—

"All that the plaintiffs' evidence in the case goes to show is nothing further than that there was a grant made more than 160 years back, that the grantees or their heirs have been holding the lands continuously ever since the grant, and that they have performed services of a purely personal nature till recently It has to be seen now whether these circumstances do indicate a grant burdened with services or merely grant in lieu of wages for same. It seems to me that they are at least as consistent with the grant having been of the former as of the latter class. There is nothing to show decisively that the

grant originally intended to come under the latter class only. And where that is the state of things I fail to see how plaintiff can fairly be said to be entitled to resume the lands comprised in the grant merely because he chooses to dispense with the services connected with it. I may, I think with advantage, quote the observations of Mr. Justice Heaton in a similar case which seems to be applicable to the present case with equal force. 'Where the circumstances do not, in any way in any perceptible degree, incline to one theory rather than the other, then I say there is no evidence of either theory.' (Sir Heaton J. in *Yellavva* v. *Bhimappa*, 17 Bom. L. R., 132). This is the most recent case on the point and the present case can be said to be somewhat stronger than the one above noted. In that case the evidence was quite positive in showing that the grant was made some time subsequent in the year 1853. But in this case the grant is considerably more ancient and acted upon for a much longer period of time. The circumstances about the commencement of or motive for the grant are more or less enshrouded in mystery. No one can possibly say at this distance of time with any degree of exactness when or why the grant came to be made. In fact the origin of it can be said to have been hopelessly lost in antiquity, and not capable of being traced satisfactorily. Under these circumstances I think section 83 of the Land Revenue Code can well be resorted to and the holding of defendants taken to be co-extensive in point of duration with that of the landlords' own Jahagir (vide *Lakshman* v. *Vithu*, I. L. R. 18 Bom. 221).

"The plaintiffs' pleader argues that the grant in the present case may be considered to fall under the third class of the three classes of grants described at page 309 of the I. L. R. 28 Bom. (*Lakhamgavda* v. *Keshav Annaji*), i.e., a grant of an office services attached to which are remunerated by an interest in land. But as I already pointed out I do not think plaintiff has succeeded in furnishing any materials for construing the grant in that way. I am disposed to hold that it falls under the first class of such cases. And even if it can be said to fall under the second class, it is evident that plaintiff could make out no case of resumption by voluntarily putting an end to the services (vide the ruling in I. L. R. 28 Bom., 309). It seems to me that it would be too wide a proposition to say that where service enters into the motive or consideration of a grant, the grant will become void if the service ceases, or is not required (vide *Forbes* v. *Meer Mahomad Tuquee*, 13 M. I. A. 438 and *Bhimaji* v. *Giriapa*, I. L. R. 14 Bom. 89)."

On appeal, the District Judge, confirmed the decree.

The plaintiffs appealed to the High Court.

Nilkanth Atmaram, for the appellants.

J. G. Rele, for respondents Nos. 1 and 3,

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BEAMAN, J. :—This is one of a fairly common and always interesting class of cases. Where ancient grants in this country are brought into controversy at the suit of the grantor seeking to resume, the law has in this Presidency at any rate been clear, simple and invariable ever since I have had any practical knowledge of it. All grants of that kind for the purpose of applying this law fall into two main categories : grants of lands burdened with service, and grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume the lands. Grants under the second category are always resumable, unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability. The first category has been sub-divided, though I think quite unnecessarily, for the purpose of discussing the broad principles of law in the case of *Lakhamgavda* v. *Keshav Annaji*[1], into (*a*) grants burdened with service ; (*b*) grants for services rendered in the past and to be rendered in the future, or, as we find in the older cases, *pro servitiis impensis et impendendis*. For the purpose of ascertaining the grantor's right to resume, this sub-division seems to me to have no relevance and to be of no assistance. Thus in every case of the kind it is always a question of fact and nothing more to determine whether the grant in suit falls within the first or the second category. If it be found to fall within the first category, it is always *prima facie* irresumable. If it be found to fall within the second category, it is always *prima facie*

[1] (1901) 28 Bom. 305.

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resumable. And in every case the burden of proof must necessarily be upon the grantor seeking to resume to show that either the grant was of a kind falling under the second category, or, if a grant of the kind falling under the first category, that it was specially conditioned. Once these principles are clearly understood, I cannot see how there can ever be any difficulty in deciding cases of the kind we are dealing with beyond of course the always extreme difficulty of ascertaining what the actual facts were in the case of very ancient grants, where the actual deed, if ever there was a deed, has long since been lost.

Here, I gather that the learned Judge of first appeal really meant to find that this grant was a grant of land burdened with services. He has referred to a very recent decision in the case of *Yellava Sakreppa* v. *Bhimappa Gireppa*[1], which, again, has been followed and approved in the case of *Baslingappa* v. *Chandrappa*[2], as though this decision introduced some new element into the law. I do not think that it either did or was intended to. The reason why, as I understand it, the discussion was longer than is common in such cases to-day, was to rule out the rather vicious distinction drawn in a Calcutta case between "public" and "private" services. That distinction never has been recognised as far as I know in this High Court ; and a very little reflection will show that in dealing with these ancient grants it would be virtually impossible to maintain such distinctions between the kind of services with which the lands were at the time the grant was made intended to be burdened. Nor in principle can the kinds of service so distinguished be of any value as affecting the application of the perfectly well-settled law. The most that could be said in favour of even noticing

(1) (1914) 39 Bom. 68.

(2) (1916) 18 Bom. L. R. 695

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terms of this kind is that although the grants might have been in the first instance burdened with services and so irresumable, special conditions might be sought to be proved, and then it might become a question whether the grantor would be permitted under those conditions to dispense with services in the performance of which the public indirectly had an interest. I think, however, that going into nice refinements of that kind only complicates this simple branch of the law quite unnecessarily and with very little likelihood of helping us in its practical administration.

Now, looking to the nature of this grant which is admittedly nearer two centuries than one century old, I see no reason whatever to doubt but that on the facts before them the Courts below have come to the right conclusion. It is in the first instance extremely improbable that an Inamdar or a Durbar would create and grant a State office of peon, annexing thereto State lands by way of salary. On the other hand, it is extremely probable that the grantors here did in those remote days grant certain lands so that the grantees and their descendants should, when called upon, render to the grantors the services of peons. However that may be, the only facts found here, and the only facts which could be found, are that the grantees have been in continuous possession rent-free for about one hundred and sixty years; and there is absolutely nothing known of the actual terms, if any terms there were, of the original grant. In my opinion, therefore, only one inference was possible and that is, the inference which the Courts below have drawn, viz., that this was a grant of lands burdened with services. As such the lands were irresumable.

In my opinion the decision of the Courts below is right and this appeal (and the other sixteen companion appeals) ought to be dismissed with all costs.

HEATON, J. :—In this case the first Court found what were the proved circumstances concerning the relations between the plaintiff, the Inamdar, and the defendant, who was grantee under him, and from those circumstances, undoubtedly correctly, inferred that the grant was not resumable. The same conclusion was reached by the Court of first appeal. In that Court, I gather from the judgment that the circumstances were not disputed and the only matter which the Court had to decide was whether, that being so, the lower Court was wrong in holding that the grant could not be resumed. The first appellate Court decided, I think rightly, that the trial Court was not wrong. That is enough for the purpose of deciding this appeal. But some allusion has been made to a judgment of my own in the case of *Yellava Sakreppa* v. *Bhimappa Gireppa*[1]. It has been suggested in argument that this judgment is misunderstood, but I do not myself find any particular reason for supposing that it is. The only general importance of that judgment lay in the fact that we were declining to follow a decision which had been come to by the High Court of Calcutta. In every other particular it is merely a decision on the particular circumstances of that case ; and though the decision may have been of the highest importance to the parties, it was not, excepting in the one matter I have mentioned, of any general importance.

I agree that this appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

[1] (1914) 39 Bom. 68.