

CASES
DECIDED IN THE
APPELLATE CIVIL JURISDICTION.
OF THE
HIGH COURT OF BOMBAY

Regular Appeal No. 9 of 1870.

1871
Jan. 16.

THE COLLECTOR OF RATNAGIRI.....*Appellant.*
VYANKATRAV NARAYAN SURVE.....*Respondent.*

*Grant by Government—Right to resume Grant—Abandonment of Rights
by Managing Khot.*

Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made.

Held that, in the absence of evidence of custom rendering the act of one sharer in a khotship (which act involved the sacrifice of important rights binding upon his co-sharers, a managing *khot* has, without the assent of his co-sharers, no power to give up rights which belong to them as well as himself.

THIS was an appeal from the decision of A. Lyon, Acting Judge of Ratnágiri, in Suit No. 5 of 1869.

The plaintiff, Vyankatráv, brought the suit to recover possession of three hundred poles of teak timber, or the value thereof, with interest, alleging that the wood had been cut down by him in his own private and *khoti* lands in his *khoti* village, and had been attached by order of the Collector, the defendant.

The defendant, *inter alia*, pleaded that only one half of the village belonged to the plaintiff as a *khot*, and that the other half belonged to Government; that the plaintiff himself and a mortgagee of a portion of the khotship had agreed

1871.
Collector of
Ratnagiri
v.
Vyankatrao
N. Surve.

in certain *kabulayats* that they would not cut down any trees without the permission of the Government; and that the right to cut timber granted by Mr. Dunlop, by a proclamation dated the 1st of March 1824, had been rescinded by a subsequent Government proclamation of 1851.

Mr. Dunlop's proclamation was as follows:—

"Proclamation of the Honorable Company Bahadur, by J. A. Dunlop, Esq., Collector and Magistrate, Zilla Southern Konkan.

"It is hereby proclaimed, for the information of all, that it has been the practice hitherto for the Government to claim all Teak, Sisur, and other timber trees within the limits of the zillá, even when growing on private lands, on which account people were discouraged from preserving and rearing these timber trees on their lands. The Government having heard this, and bearing in mind that all people will be much benefited by the rearing and cultivation of Teak, Sisur, and other trees in the country, hereby proclaim, for the information of all, that, exclusive of the Government forest in the Sawera taluká and Málwan taluká, whoever may have Teak and other trees growing on their land outside these limits will be exempted from all claims on the part of Government. Those who are the owners of trees, or who will hereafter raise them on their private land, will be allowed to dispose of them according to their pleasure. No obstruction will be caused on the part of Government.

"Dated 1st March 1824."

The subsequent proclamation ran thus:—

" PROCLAMATION

"Regarding Teak and Sissoo in the Collectorate of Ratnagiri.

"1. Be it known that in 1823 at Mr. Dunlop, ~~was~~ Collector of the Southern Konkan, put forth a Proclamation wherein he conditionally made over, on behalf of Government the royalty rights heretofore exercised in regard to Teak and Sissoo trees growing in certain places.

"2. The object of the said Proclamation, as stated in the first paragraph thereof, was the extension of the growth of useful timber.

"3. As, however, from past experience it is clear that the continuance of the permission to cut Teak and Sissoo on such terms throughout the collectorate will speedily lead to the complete annihilation of such useful timber,

"4. The right Honorable the Governor in Council is pleased to declare that the Proclamation of 1823 is rescinded, and that the Government resumes, in regard to Forest, all the seigniorial rights which it possessed previous to 1823.

"5. At the same time, as it is understood that a few persons, taking advantage of the liberal offer made by Government in 1823, did attend to the Teak and Sissoo timber growing in their own grounds (*Jagih*), Government is prepared to grant full benefit, present and prospective, to such persons, provided they establish, to the satisfaction of the Collector

* Sic.

and Conservator of Forests, within six months from the 1st June next, that the wood in their lands has been attended to and nurtured since 1823 such benefit to be contingent on their continuing their care to the trees now in course of growth.

"6. The forest preserves in the táluká of Suvarndurga and in the Subhá of Málvan to remain, as at present, exclusively Government preserves subject to such future orders as Government may see fit to issue in regard to them."

1871.
Collector of
Ratnágiri
v.
Vyankatráv
K. Surve.

The Acting Judge laid down the following issues :-

Has the plaintiff a right to cut down teak trees in his private and *khoti* lands in the *khoti* village ?

How many trees is he entitled to recover the value of ?

In finding the first issue for the plaintiff, the Judge delivered the following judgment :-

"By *khasgi* land is meant a portion of the *khoti nisbat* land cultivated by the *khot* in person, in contradiction to other land also *khoti nisbat* but sublet to tenants. As regards the right of the *khot* against Government, the interest in regard to each of them is the same. If he has a right to timber in the one case, he has it in the other, as they are both held from Government under the same tenure.

"I consider that he has the right to cut timber in both descriptions of land. The grant of the timber made by Mr. Dunlop's proclamation included a grant to *khots*, as well as to others. Looking to the rules of construing grants from the Crown, and to the strongly expressed object of the Government that the gift was made for the purpose of preserving forests in this country it may be doubtful whether this expression of the object of Government might not amount to a condition ; and that if any grantee should so grossly counteract the wishes of Government as to nearly annihilate the forests in his holding, this might amount to a breach of the condition, authorising the Government to sue to recover the grant. This question, however, does not arise in this case, as it does not appear that the plaintiff has interfered recklessly with the forest in dispute, and, besides, his doing so would not authorise the resumption of the grant at the direction of Government. This could only be done

1871.
Collector of
Ratnágiri
v.
Vyankatrāv
N. Surve.

through the courts of law. It will be seen from the foregoing that I am of opinion, and in this opinion I agree with my learned predecessor, Mr. Izon, that the proclamation of 1851 does not destroy any rights acquired by the previous proclamation. I also consider that the *kabulayats*, both the special ones of the eight-anna sharer and the mortgagee-*khot*, as well as the annual general *kabulayats* have no effect in taking away rights already in existence.

“As the Government are the owners of half the village the plaintiff is entitled only to half the wood cut. I, accordingly, decree for the plaintiff for half the wood claimed, or its value, and costs in proportion.”

The appeal was argued before WESTROPP, C. J., and MELVILL, J.

Dhirajlal Mathuradas, Government Pleader, appeared for the appellant, the Collector.

Shantaram Narayan appeared for the respondent.

The judgment of the court was delivered by

WESTROPP, C. J. :—In this case it is neither denied that the land on which the timber was grown is situated in a district which is affected by Mr. Dunlop's proclamation, nor that the plaintiff, or those through whom he claims, were in possession of the land at the time of that proclamation. It also appears that the land on which the timber was cut was either “*khasgi*” or *khoti nisbat*” land in the possession of the plaintiff or his sub-tenants, and of such land at all events he would be the proprietor, and not a mere farmer of the revenue, if that be the true position of the *khot* in respect of ordinary *khoti* lands—an important point which we do not purpose to decide on this occasion.

The defendant seeks to defeat the operation of Mr. Dunlop's proclamation in this case on two grounds:—1st, that the proclamation was rescinded by Government in a subsequent proclamation of 1851; and, 2ndly, that the *khots* of the village have themselves admitted that they have no proprietary right to the timber.

As to the first of these arguments, it is sufficient for us to say that, if there be not any breach of condition by the donee, the Government cannot, and more than a private person, revoke a gift actually made, without the consent of the donee: 14 Vin. Ab., Grants (H. a 8) 1, 6, 7, 2nd ed., pp. 139, 140; Com. Dig., Grant, . F; 2 Levinz. 142; 7 C. & P. 401, 402; 2 Spence Eq. Jur. 881, 882. If the King be deceived in his grant, It will be void: Com. Dig., Grant (G. 8), I. E. & B. 337, 338. But every grant of the King, of a thing which he may grant, where he is apprised of his interest, and of the cause and circumstances of the grant, will be good: Com. Dig., Grant (G. 4); and will bind his successors: *Ibid.* (G. 3). And he may make a simple grant without consideration: Hobart 230; 5 Bac. Ab., Prerogative, F. 2. (5th ed., p. 608, note [e]); 1 Rep. 53 a, b, note. In Mr. Dunlop's proclamation a hope is expressed: that the gift may have certain good results; but the happening of such results is in no way one of the conditions of the gift.

1871.
Collector of
Ratnágiri
".
Vyankatrāv
N. Survey.

As to the second ground of defence, it has not been contended that the plaintiff has himself entered into any agreement or done any act whereby he has waived the benefit of Mr. Dunlop's proclamation. What is relied on is a special *kabulayat* which was passed in 1855 to Dr. Gibson, the Conservator of Forests, by one of the sharers in the khotship, and by a mortgagee of a portion of it, and in which those persons undertook not to cut any teak or blackwood trees or permit any one else to do so, but to preserve those trees for Government, in consideration of receiving one-third of all cuttings. We have also been referred to a similar proviso contained in the ordinary *kabulayat* subsequently passed to the Collector. But Mr. Dhirajlál admits that he is unable to show that the plaintiff had any notice or knowledge of the proviso in question; nor has he produced any evidence of any custom by which the act of one sharer in a khotship, which involved the sacrifice of important rights, would be binding upon his co-sharers. In the absence of such evidence we cannot hold that a managing *khot* has, without the assent of his co-sharers, power to give up rights

1871.
Collector of
Ratnagiri
v.
Vyankatrāv
N. Surve.

which belong to them as well as to himself. If there be such a custom, it lay upon the Collector to adduce evidence of it; and as he has failed to do so, and has not shown that the plaintiff has cut more timber than he was entitled to cut, we have no choice but to confirm the Judge's decree. The plaintiff has not appealed against Mr. Lyon's order, disallowing one-half of his claim; and it is not, therefore, necessary for us to express any opinion as to the propriety of that portion of Mr. Lyon's decree.

The case has been very imperfectly put forward on behalf of Government in the court below; and our present decision, which is given under peculiar circumstances, must be held to be limited to the particular case before us, and not to prejudice the right of Government, in any similar case which may hereafter arise, to give evidence on the points upon which, in the present case, Government has failed to shed any light.

Jan. 17.

Special Appeal No. 457. of 1870.

MULCHAND GULÁBCHAND... .. *Appellant*
GIRDHAR MÁDHAV *et al.*, sons & heirs of
MÁDHAV GHELLÁ, deceased *Respondents.*

Limitation—Account stated.

Although to make an account a stated account it is not necessary that it should be signed, yet, unless it is signed by the debtor, the intention and effect of Sec. 4 of Act XIV. of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be barred by that Act.

Where there has been a running account between the plaintiff and the defendant, consisting of advances made by the former, and part-payments by the latter, the plaintiff is entitled to recover only in respect of advances made by him within three years preceding the institution of his suit, but he has a right to appropriate any payments made within that time to the reduction of the general balance, even though the recovery of such balance may be barred by time.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge at Ahmedábád in Appeal Suit No. 593 of 1869, confirming the decree of the Subordinate