Appellate Jurisdiction(a)

Special Appeal No. 315 *of* 1872.

KACHUR SUBRAYA.....*Special Appellant.*

BENGAL SANTAPPAIYA.....*Special Respondent.*

Plaintiff's father and defendant entered into an agreement in 1850, by which the former delivered over certain lands to the latter in consideration of his promises to perform certain services. Plaintiff brought this suit for restoration of the land, alleging that defendant had failed to perform the services. Defendant denied failure to perform and pleaded that the contract was not revocable.

Held, in Special Appeal, reversing the decisions of the Lower Courts, that the question was whether there was in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side was the pre-supposition of the continuous existence of the gift on the other, or whether there was a mere gift with a charge upon it, the primary intent being to give. That this was a question of construction, and that, in the present case, taking the agreement and counterpart together, there was clearly a covenant for the hereditary enjoyment of the land, to be exchanged for an hereditary performance of the services.

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THIS was a Special Appeal against the decision of T. Subbanachary, the Acting Principal Sadr Amín of Mangalore, in Regular Appeal No. 217 of 1871, confirming the Decree of the Court of the District Munsif of Barkúr; in Original Suit No. 157 of 1869.

Plaintiff's father (deceased) and the defendant entered into an agreement in 1850, by which the former delivered over certain lands and promised others to the latter in consideration of his promise to put up his dwelling near a temple of the former, and perform certain services, such as keeping accounts, etc. In this suit plaintiff alleged that as the defendant had failed to perform the services from 1864, he (plaintiff) was entitled to restitution of the land. Defendant, on the other hand, contended that he had not failed to perform the services referred to; and that the contract was not revocable.

The following is a translation of the agreement and counterpart in question [*Documents A and No.* 1].

Document A.

Swatantra Mukhtyari (deed transferring right) executed on Friday the 5th Magabahula of Saumya, corresponding to the 1st February 1850, by Kachúr Tammaiya Senabhoy, residing at Barkúr Taluq, in favor of Bengal Saulappen residing at Bramhavar.

(a) Present: Holloway and Innes, JJ.

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Whereas I have to conduct, singlehanded, the management of my whole affairs, namely those of the land allotted to the service of the deity at Barkúr, called Gopaladévaru, and worshipped by me, and those of my own land, etc.—whereas it has been determined that you should be made to dwell near the (*temple of the*) said deity, and you should yourself or by employing such person on your behalf as will suit me, continue to render such assistance as you can in the writing business, etc., necessary for the management of my affairs aforesaid; and whereas I made a verbal promise, willingly and gratuitously to give you, on that account, a land yielding a net produce of Hoons 12, a year. I have, towards the above extent of land, conveyed to you, this day, all my rights over a moiety [*Here enter the particulars thereof*], bearing a beriz of Hoons 13-4-4, and an old beriz of Hoons—inclusive of vantage, and a sist of Hoons 11-3-2 out of the land No. 1 registered in the name of Maribhatta, connected with me, bearing a sist of Hoons 22-6-4, an additional tax of Hoons 5-0-13, and Hosagame tax of Hoons 0-3-3, *i. e.*, Hoons 28-0-4 in all, for which the Tharar beriz fixed is Hoons 26-8-8, together with all the appurtenances and privileges thereunto belonging. Until I shall give over to you such portion of land as would make up the above extent yielding a net produce of Hoons 12, I shall pay you, in cash, the balance left, to the exclusion of the net produce derivable from the land specified above. You should get registered in your name the aforesaid land bearing the Tharar beriz of Hoons 13-4-4: pay from the present year the said beriz to the Sarkár, and enjoy from generation to generation the abovementioned land and all its appurtenances, such as garden, etc., by exercising all rights of ownership over the same and acting up to the terms of the counter-deed passed by you this day. You are not to sell the said land. As I have given the said land to you gratuitously, myself and my descendants are only to have the assistance rendered as above agreed upon, but not to claim the restoration of the land. Thus the Sarvasivatantra Mukhtyari deed has been executed by me of my own accord.

(Signed) TAMMAIYA SENABHOY.

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Document No. 1.

The counterpart of the Swatantra Mukhtyari deed, executed to Tamma Samaboga of Kachúr attached to Barkúr Taluq, by Banagalli Santhappa on the 1st February 1850 is as follows—

As, in order to conduct the whole management of the land which you have allotted to the use of the Sri Gopálakristna Dévaru at Barkúr, which is worshipped by you, and of your own private lands, you are a Vabistakari (single man), it has been determined that I should keep my residence near the said Gopálakristna Dévaru and assist you in the writing business, etc., connected with your management, either personally, or by employing on my own responsibility a man who would suit your convenience. For this purpose as you have promised to give me gratis a land yielding annually a profit of Kunterayi Hoons 12, and of which, as you have put me in possession of a land assessed at Hoons 13-4-0 and executed a Survasivathantra Mookhtyari (*deed transferring all rights*) for the same, and as you have further agreed to pay me in cash to make up the difference of the profit of 12 Hoons, which may be left after deducting the profit which shall be derived from the land now given me this day belonging to the Wurg No. 1 in the village of Hosala and assessed at Hoons 13-4-0, until you give me the remaining land to make up the deficiency of the profit of 12 Hoons, I from generation to generation, either personally or by employing on my own responsibility a man who would suit your convenience, will assist you and your generations in the writing business, etc. as aforesaid, according to your pleasure, and I will keep my permanent residence near the said Pagoda, and enjoy the land which has been given me and which will be given in future, from generation to generation. Moreover, there is no reason either for you or for your generations to say that this land which you have given me gratis and the land which you will give me hereafter, should be returned. I, and also my generations will give the assistance that could be done by us as aforesaid and enjoy (*the land*). Except this, we have no right to sell the land. Thus this counter-part has been executed.

(Signed) SANTHAPPA.

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The District Munsif, in his judgment, said:—"Though at the time when the land alluded to by the plaintiff was given by his father to the defendant under the said karárs, it was settled that the defendant should perform the writing business and do other assistance for the management of affairs by him (plaintiff's father), yet it is clear that the land was given gratuitously. It is not stipulated therein that in the event of the defendant failing to do the assistance resolved to be done by him, the land, or the net produce thereof should be given up. Besides this, the plaintiff's father inserted a stipulation therein in strict terms to the effect that because the land had been given gratuitously, himself or his descendants should not claim the same back; and the fact that the plaintiff has no right either to claim, in opposition to the said stipulation, the land or the produce thereof, or to bring a suit claiming therein the same, is undoubted.

It is not clear from the said karárs to what extent the writing business and other assistance must be done by the defendant for the management of the affairs by the plaintiff's father or the plaintiff, as shown in the said karárs. Such an assistance cannot be expected except on amicable terms among the parties with each other, and the Court cannot compel them on that account. Hence the Court, finding that the plaintiff's claim cannot stand good, dismisses the suit with costs."

Upon appeal (by the plaintiff) the Principal Sadr Amín said—"The questions for consideration in this case are; (1), whether the contract is revocable; and (2), whether there was any breach of it on part of the defendant.

With regard to the 1st point, I entirely concur with the Munsif in holding the gift of the land to the defendant to be absolute and irrevocable. The donor has clearly expressed that the land was given to the donee absolutely, to be enjoyed from generation to generation; and again explained his intention in the latter part of the deed, where he stated that the gift is irrevocable, though he can require the donee to perform the services. I am, therefore, of opinion that the plain-

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tiff has no right to claim restoration of the land, as sued for. Hence I think it unnecessary to decide the second question."

The plaintiff preferred a Special Appeal upon the following grounds among others :—

I.—The Lower Courts have misconstrued the agreement in question.

II.—The defendant not having acted up to the terms of the said agreement, the plaintiff is entitled to the lands in dispute under the agreement in question.

III.—Even if the document in question should be supposed to contain no *express* provision for the restoration of the lands in the event of the services not being properly performed, such provision must necessarily be *implied* from the nature of the contract.

IV.—A suit for damages by the plaintiff, even if it should be successful, would not afford adequate relief to the plaintiff.

Sanjiva Rau, for the special appellant, the plaintiff.

The Court delivered the following judgments :—

HOLLOWAY, J. :—The question is whether there is in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side is the pre-supposition of the continuous existence of the gift on the other, or whether there is a mere gift with a charge upon it, the primary intent being to give.

The English lawyer would say—Are the covenants upon the one side the entire and indivisible consideration for those on the other? This is a question of construction, and, taking the two documents together, it seems clear to me that there is a covenant for the hereditary enjoyment of the land to be exchanged for an hereditary performance of the services. To fasten, as the Principal Sadr Amín does, upon some words at the end of the one document without so interpreting it with the remainder, is to violate a plain rule of construction. The words are—"As I have given the said land to you gratuitously, "myself and my descendants are only to have the assist-

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"ance rendered as above agreed upon, but not to claim the "restoration of the land. Thus the Sarwaswatantra Mukhtyari "deed has been executed by me of my own accord." When read with the rest of the documents on both sides, they merely mean—'this shall be no gift defeasible by me or my heirs, but the land is yours on the terms above agreed upon.' The two documents shew those terms.—'I want assistance in my business. You have agreed to render it or cause it to be rendered from generation to generation. In return you shall enjoy the land but without the power of alienation'—A stipulation strongly enforcing the construction to which the words themselves lead, that the continuous enjoyment was on the pre-supposition of the continuous performance. There may, of course, be cases in which the non-fulfilment may be merely ground for the demand of the sum which ought to be applied. The legatum sub modo is an example. Where the legatee refuses to perform the modus, he is liable to the restoration of the sum which requires to be applied to the purpose. Where, however, even here, the duty is not the expenditure of money and the performance refused, entire restitution can be required, and simply because there is no room for a measure of the non-performance (compare Puchta Pand., Sec. 533; Arndts Pand., 533 with Scheurl Nebenbestimmungen, 255.)

The intent apparent upon the two documents taken together is that the continuous enjoyment of the land shall be exchanged for the continuous performance of the services. I would, therefore, reverse the decree of the Principal Sadr Amín and of the Munsif, and direct the latter to try the case in the regular manner, as the judgment upon the preliminary point is erroneous. The question to be tried is "whether "there have been on the defendant's part neglect and refusal "to perform or get performed the services mentioned in the "agreement."

The costs of this appeal should be provided for in the judgment.

INNES, J.:—I have already expressed my opinion in accordance with this construction of the documents and agree to the disposal of the case in the manner proposed.