1895

QUEEN-EMPRESS v. GASPER.

The opinion of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

It does not appear that the Code contains any provision for the trial of claims which may be preferred to property which is distrained under section 386, and any orders which this Court might issue could only be by way of advice. We are of opinion that when the Magistrate had issued his warrant under that section in the form given in the schedule, he had done all that was required of him by the Code, and that he is nowhere required by law to try any claim that may be preferred to the ownership of the property distrained. We express no opinion as to how such claims can be determined.

S. C. B.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

1895
June 19.

RADHA PERSHAD SINGH (PLAINTIFF No. 1) *v.* BUDHU DASHAD AND ANOTHER (DEFENDANTS) AND ANOTHER (PLAINTIFF No. 2.)*

Service tenure—Jagir granted to Gorait or village watchman—Resumption by Zemindar—Notice.

A service tenure created for the performance of services, private or personal, to the zemindar may be resumed by the zemindar when the services are no longer required or when the grantee of the tenure refuses to perform the services. The distinction between a grant of an estate burdened with a certain service, and an office the performance of whose duties is remunerated by the use of certain lands, pointed out.

Sanniyasi v. *Salur Zemindar* (1) ; *Hurrogobind Raha* v. *Ramrutno Dey* (2) ; *Sreesh Chunder Rae* v. *Madhub Mochee* (3) ; *Nilmony Singh Deo* v. *Government* (4) ; *Unide Rajaha Raje Bammarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (5) ; *Forbes* v. *Meer Kahomed Takee* (6) ;

* Appeal from Appellate Decree No. 933 of 1893, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Shahabad, dated the 16th of February 1893, affirming the decree of Babu Srigopal Chatterjee, Munsif of Buxar, dated the 30th of January 1892.

(1) I. L. R., 7 Mad., 268.
(2) I. L. R., 4 Calc., 67.
(3) S. D. A., 1857, p. 1772.
(4) 18 W. R., 321.
(5) 7 Moo. I. A., 128.
(6) 13 Moo. I. A., 438 (464.)

Lilanand Singh v. *Munorunjun Singh* (1) ; and *Mahadevi* v. *Vikrama* (2) referred to.

In a suit for resumption of jagir lands granted by the zemindar to a *gorait* (village watchman), the lower Courts found that the grant was made in favor of the defendant's ancestor more than twelve years before suit, and descended from father to son who was allowed to retain possession without rendering services to the zemindar, and that the zemindar could not prove the terms of the grant. *Held*, that the facts found did not legitimately lead to the inference drawn therefrom that the tenure was of a permanent character ; but that the defendants could not be ejected without notice.

PLAINTIFF No. 1 as zemindar sued for the recovery of possession of certain lands in his zemindari from one Budhu Dashad and one Tufani Dashad, son of Kangali Dashad. The plaint alleged that the lands were granted to Kangali for the performance of the services of a *gorait* (village watchman), and that on the death of Kangali, the defendants, having failed to perform the services, were discharged, and the lands brought under *sir* possession and settled with plaintiff No. 2 ; but that the defendants succeeded in getting a declaration of possession in their favor from the Criminal Court and dispossessed plaintiff No. 2.

The defendant Budhu denied the allegation of a grant to Kangali and set up a grant from the Mahomedan Government to his ancestors.

The Court of first instance found that Budhu, and his father before him, had held the lands for more than thirty years ; that while on the one hand plaintiff No. 1 could not show that either he or his predecessors ever exercised ownership over the lands, the defendant Budhu on the other hand failed to prove his alleged grant ; and the Court held that plaintiff No. 1 had no right summarily to dismiss Budhu at his will.

The Subordinate Judge, on appeal, found that the service tenure was created for private works of the zemindars and was not a public grant. He said : " The tenure being proved to have been created in favour of the respondent's ancestor long upwards of twelve years ago and descended from father to son who was allowed to retain possession even without rendering

(1) 13 B. L. R., 124 ; L. R., I. A., Sup. Vol., 181.
(2) I. L. R., 14 Mad., 365.

1895

RADHA PERSHAD SINGH v. BUDHU DASHAD.

services to the appellant, I should, in the absence of satisfactory evidence as to the terms of such grant to the contrary, hold that it was of a permanent as well as hereditary character and cannot be resumed by the appellant at his will, particularly when the holder is capable and willing to render those services to him for which the land was originally given." The appeal was dismissed.

The plaintiff No. 1 preferred a second appeal to the High Court.

Babu *Hem Chundra Banerjee*, Babu *Raghunandan Prosad* and Babu *Jogendra Chandra Ghose* for the appellant.

Mr. *C. Gregory* for the respondents.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows :—

This was a suit by the Maharajah of Doomraon for recovery of possession of certain lands. The lands form part of his zemindari, and the action was based upon the allegation that the lands had been granted to one Kangali Dashad, father and ancestor of the defendants, as a jagir in lieu of services as a *gorait*; that he died in the year 1294 (F. S.), and the defendants having failed to perform the service, their services were dispensed with in 1296 ; that the lands were then settled with one Raja Koeri, the plaintiff No. 2 ; that he raised crops thereupon, but was dispossessed by the defendants in July 1890 (1297). The suit was defended by the defendant No. 1, Budhu Dashad, upon the ground that the land had not been granted in lieu of service to Kangali, the father of defendant No. 2, but that since before the accession of the British Government, his ancestors and he had been holding the same as *gorait's* jagir under a *sanad* (not produced) granted by a Mahomedan Emperor ; that no service had ever been rendered to the plaintiff, the Maharajah of Doomraon, or to his ancestor, in lieu of holding possession of the lands in question, though he had been performing certain quasi-public service ; and that in fact the land did not belong to the Maharajah's zemindari. He also pleaded that the claim was barred by limitation.

As regards these two last pleas, it is sufficient to say that they were negatived by the Courts below ; and no question has been raised before us with reference thereto.

1895

RADHA PERSHAD SINGH v. BUDHU DASHAD.

Both the Courts below have dismissed the suit. The lower Appellate Court, with reference to the question of the incidents of the defendants' tenure, has found that it was not a "public grant," but a service tenure created in favour of the contending defendants' ancestor "long upwards of twelve years ago" for the performance of private work of the zemindar, but that he (the zemindar) did not avail of the contending defendants' services "of late," and yet the latter continued to be in possession; and that the tenure descended from father to son. Upon these facts the Subordinate Judge holds, and as he says "in the absence of satisfactory evidence as to the terms of the grant or contrary," that it was of a permanent and hereditary character and cannot be resumed by the zemindar at his will, more particularly when the tenure-holder is "capable and willing" to render services.

The distinction between a grant for services of a public nature, and one for services, private or personal, to the grantor, is well understood. In the former case the zemindar is not entitled to resume, while in the latter case he may do so, when the services are not required or when the grantee refuses to perform the services. [See *Sanniyasi* v. *Salur Zemindar* (1); *Hurrogobind Raha* v. *Ramrutno Dey* (2); *Sreesh Chunder Rae* v. *Madhub Mochee* (3); *Nilmoney Singh Deo* v. *Government* (4); *Unide Rajaha Raje Bammarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (5).] A distinction also exists between the grant of an estate burdened with a certain service, and that of an office, the performance of whose duties is remunerated by the use of certain lands. In the former case it would seem that the zemindar is not ordinarily entitled to resume, even if the service is not required, if the grantee is willing and able to perform the services, while in the other case he may do so when the office is terminated. [See *Forbes* v. *Meer Mahomed Tukee* (6); see also *Lilanand Singh* v. *Munorunjun Singh* (7).]

(1) I. L. R., 7 Mad., 268.
(2) I. L. R., 4 Calc., 67.
(3) S. D. A., 1857, p. 1772.
(4) 18 W. R., 321.
(5) 7 Moo. I. A., 128.
(6) 13 Moo. I. A., 438 (464.)
(7) 13 B. L. R., 124; L. R., I. A. Sup. Vol. 181.

1895

RADHA PERSHAD SINGH v. BUDHU DASHAD.

The Subordinate Judge has found that the service tenure held by the defendant was created for the purpose of doing the private work of the zemindar, and that the grant was not for performance of any public service. And there is nothing to shew that the grant was a grant of an estate burdened with the performance of certain services.

The question then arises whether the circumstances relied upon by the Subordinate Judge justify the inference (for it is only an inference as we understand his judgment) that the grant was of a permanent character. It seems to us that neither the fact that the land has been allowed to devolve from father to son, nor the fact that the tenure was created very many years ago, nor the circumstance that of late the zemindar did not avail himself of the services but still allowed the defendant to hold on, or all these facts taken together, could legitimately lead to the inference that the grant, which was purely in lieu of personal services to be rendered to the zemindar, was of a permanent character, such that the zemindar is not entitled to resume, though the grantee may refuse to perform the services, or the services may be no longer required.

The service grant having been created by the zemindar for personal services to be rendered, he has, we think, a *primâ facie* right to resume the grant when such services are dispensed with [see *Sanniyasi* v. *Salur Zemindar* (1); *Mahadeni* v. *Vikrama* (2)]. The defendant has not produced his *sanad*, nor has he proved that the grant was a grant of an estate burdened with certain services, but he is content with relying upon the circumstances referred to in the judgment of the Subordinate Judge, which in our opinion do not justify the inference that the grant was of a permanent and heritable character.

But then it seems to us that the plaintiff is not entitled to resume the grant before he gives to the grantee notice dispensing with his services. The allegation in the plaint is that the defendants were discharged from the office of *gorait*; but it would appear upon the evidence adduced by the plaintiff that the services of defendant No. 2 were dispensed with because he expressed his

(1) I. L. R., 7 Mad., 268. (2) I. L. R., 14 Mad., 365.

1895

RADHA PERSHAD SINGH v. BUDHU DASHAD.

inability to perform the services as *gorait*, and that the defendant No. 1, the real holder of the service tenure, had no notice of the determination of the service, or of the action on the part of the zemindar in settling the lands with plaintiff No. 2.

It seems to us, therefore, that the plaintiff cannot recover possession in this action, for he can only do so by determining the service tenure held by the defendant No. 1. Upon the judgments of the Courts below, and upon the case of the plaintiff himself, that tenure has not yet been determined ; the plaintiff has not given to the contending defendant any notice to quit, nor is there any allegation, much less evidence on his part, that the defendant has declined to perform the services for which the tenure was created ; though no doubt the defendant by his written statement has clearly indicated that he is not willing to render any services to the plaintiff. In this view of the matter, we are of opinion that the claim for ejectment fails. We, however, think that, as the question of the character of the tenure held by the defendant No. 1 was raised in issue between the parties and dealt with by the Courts below, it may be declared, as has already been expressed, that the tenure in question is a service tenure created in lieu of private services to be rendered to the zemindar, and that the tenure is not of a permanent character.

Each party will bear his own costs throughout this litigation.

S. C. C. *Appeals dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Hill.

M. M. WATKINS AND OTHERS *v.* N. FOX AND OTHERS.*

1895 *May* 20.

Limitation Act (XV of 1877), Art. 84—Taxed costs of an attorney, Suit for—Suit or particular business, Meaning of.

Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself.

Where a firm of attorneys brought a suit against their clients to recover the costs of an application to the High Court :

Held, that limitation began to run from the date of the judgment in the

* Suit No. 195 of 1891.