Special Appeal No. 416 of 1865.

BA'LA'JI J. RAHA'LKAR .....*Appellant.*
NA'RA'YANBHAT son of Anantbhat .....*Respondent.*

Rent-free grant of building-site—Forfeiture—Construction.

A received from B the use of a piece of his ground rent-free, which he thus acknowledged in writing: "Building a house thereon, I shall enjoy so long as I and my kinsmen *live* therein. I shall have no right to *sell* the ground to another." A house was built on the site and inhabited by A and his heirs for several years, until it was destroyed by fire, when the heirs commenced to build a new house upon a portion of the ground, having leased another portion of it for building upon, and having mortgaged the whole of it:—

Held that the heir of B was entitled to recover possession of the ground, as the conditions of the grant had not been observed; and that the word *sell* must be construed as prohibiting alienation of any kind.

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THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of the Konkaṇ, in Appeal Suit No. 619 of 1864, confirming the decree of the Munsíf of Peṇ, in Original Suit No. 416 of 1864.

The respondent Náráyaṇbhaṭ sued the appellant Báláji and his father, as the heirs of Hari Raghunáth, and Gaṇesh Gangádhar Ketkar, as claiming under them, to establish his right to, and recover possession of, a piece ground in Voshí village, Táluká Sánkse, Zillá Koṇkaṇ, which in 1824 was given to Hari Raghunáth under an agreement to build a house on. In 1863 that house was burnt down, and the defendants Nos. 1 and 2, without permission, began to build a new house; and gave a portion of the ground to the defendant No. 3 to build on, and, moreover, mortgaged the whole of it.

Báláji and his father answered, denying knowledge of the agreement said to have been passed by Hari; and stating that they had held the land for sixty years; that they had not let any of it to Gaṇesh, nor mortgaged it, but only begun to build a new house; and that the agreement No. 3 was upon unstamped paper.

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The Munsif of Pen decreed for the plaintiff, finding that the agreement was proved, that it did not require a stamp, and that the possession of the defendants was only that of tenants.

Upon appeal the Acting Assistant Judge recorded as follows:—

"The issues before the Court are:—(1) whether the agreement No. 3 was proved or not; (2) whether the fact of its being on unstamped paper is any objection to its being received in evidence; (3) whether, if the agreement is valid evidence, any cause of action has arisen at present or not. No other issue being sought, I proceed to pass judgment.

"On the first point I find that the agreement No. 3 was proved; and on the second point that it is good evidence, although on unstamped paper. * * * In 1824, as there was, I believe, no stamp law (*vide* preamble of Reg. XVIII. of 1827), there could be no necessity of stamping documents of this kind.

"On the third point—that a cause of action arose, when defendant gave some of the ground to one man and mortgaged it to another—there can, I think, be no doubt whatever. The agreement, it is true, mentions only 'I will not *sell* the ground;' but mortgaging or giving is equally an encroachment on the rights of the owner. I find that a cause of action has arisen.

"I affirm the decree: costs on appellant."

The special appeal came on for hearing this day before COUCH, C.J., and NEWTON, J.

Dhirajlál Mathurádás for the appellant contended that the agreement of Hari had been misconstrued, and a wrong effect given to it, inasmuch as it contained merely a stipulation against *selling* the land; whereas, although there had been no sale, the forfeiture contemplated by it in the event of a sale alone had been enforced. No cause of action had arisen: the mortgaging or leasing the land was not prohibited

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Vishvanáth Náráyan Mandlik for the respondent.—The document, after reciting that the grantee had occupied an old house, and was about to build a new and a larger house upon the grantor's ground, goes on to say: "Thereupon I took from you ground for building by *asking you*. Building a house thereon, I shall enjoy so long as I and my kinsmen *live* therein. I shall have no right to *sell* the ground to another." The right acquired by this document is merely the right of *personal use*. It is a grant to build a house and to live in it; but not to alienate in any way the ground or the building upon it. Mortgaging and leasing are both *sales* in a qualified sense of the term; and as such are in contravention of the conditions of the grant.

Cur. adv. vult.

COUCH, C. J.;—The decision in this case depends upon the construction to be given to exhibit No. 3, which is an express acknowledgment that the grantee had taken ground from the grantor for the purpose of building thereon a house, which the grantee and his kinsmen were to occupy (rent-free) as long as they continued to live in it themselves; and it is specially provided that they "have no right to *sell* the ground to another."

There is no grant of any interest in the land, except of the personal use of it for the particular purpose specified; and we think that it must have been intended by the parties to the grant that it was to expire when the grantee and his kinsmen ceased to occupy the house themselves.

Although the word *sell* only is used, we must construe the document as forbidding alienation of any kind by mortgaging, leasing, or otherwise: for the object of the provision clearly was to prevent the grantees having any right of disposal over the land. They merely get a conditional grant of the use of it. And we think that they have forfeited all right to a continuance of that use by assuming to deal with the land as if they were themselves the owners of it, in violation of the condition of the grant. By letting a portion of the

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ground and by mortgaging the whole of it, defendants Nos. 1 and 2 have put an end to the agreement; nor is this a case in which we can give them any relief, or award them compensation in consequence of the resumption of the land by the heir of the grantor.

The plaintiff only claimed to recover possession of the ground, which has been awarded to him by the courts below; but, to prevent any misconception, we may observe that, according to the custom of the country, the grantee has a right in such a case to remove the materials of the building constructed by him on the land.

Decree affirmed.

Special Appeal No. 48 of 1866.

GANGUBA'I kom SIDHA'PPA' and another...*Appellants.*
RA'MANNA' bin BHIMANNA' .....*Respondent.*

Undivided Hindú family—Alienation.

Held that, on this side of India, a member of an undivided Hindú family cannot, without the consent of his coparceners, make a gift of his share in the undivided property, or dispose of it by will.

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THIS was a special appeal from the decision of W. Sandwith, Joint Judge of the Puná District, in Appeal Suits Nos. 178 and 186 of 1864, amending the decree of the Sadr Amín of Solápur in Original Suit No. 29 of 1864.

Rámanná, in the original suit, claimed to recover possession of a house in Solápur: alleging that it formerly belonged to his father, after whose death it passed to his elder brother, Sidháppá, and that after the death of the latter it was retained by the defendant, Gangubái, his widow.

The defendant, Gangubái, answered, alleging separation—twenty years before—between her deceased husband, his brother the plaintiff, and their father, Bhimanná, and that her husband, to whose share the house had fallen, had given it to her elder daughter, Sáubái.