appealable under section 26, and the question as to the propriety of the order requiring security may then arise for the consideration of the District Court, but at present there is no reason for our interference.

I, therefore, concur in discharging the rule with costs.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

THE MUNICIPALITY OF THE CITY OF POONA (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VA'MAN RA'JA'RA'M GHOLAP (ORIGINAL DEFENDANT), RESPONDENT.*

1894 *September* 12.

Easement—Right of way—Purchase of land adjoining purchaser's land—Way of access—Way of necessity—Sale-deed—Construction—Circumstances existing at the time of the sale.

A person purchasing a plot adjoining his own land, and having access to the plot through his land, cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that if the plot had been sold to a third person, he would have acquired a way of necessity, does not affect the question.

Where a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties.

Where the words used in a Maráthi deed of sale were "*sarva hakk wa sambandh*" (*i. e.*, all rights and accompaniments),

Held that the words in themselves, apart from the circumstances at the time of the sale, did not include a right of way over the vendor's property as conveyed along with the portion of the land sold; but if there was an old path leading across the vendor's adjoining ground to the plot sold, and the purposes for which the plot was sold, and the conduct of the parties were such as to justify an inference that by the use of these words it was the intention of the parties to convey the right to use the path, it would be open to the Judge to find as a fact that such was the intention.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, affirming the decree of Ráo Bahádur Chunilál M., First Class Subordinate Judge.

A plot of open land at Poona, known as Anjir Bágh, belonged originally to one Khásgiwála. Part of it, which adjoined the defendant's dwelling-house, was sold by him to the defendant for

* Second Appeal, No. 504 of 1892.

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building purposes in 1872. The remaining part was sold by him to one Paránjpe, who sold it to the Municipality of Poona.

On the eastern boundary of the land so purchased, the Municipality afterwards put up a railing which blocked up a right of way across the land which the defendant claimed as a way of access to the land purchased by him. In the month of January, 1890, the defendant removed a part of the railing. The Municipality thereupon brought this suit against him to recover Rs. 5 as the price of the railing removed, and for an injunction restraining him from removing the new railing which it proposed to erect.

The Subordinate Judge found that there was a right of way through the ground in dispute as alleged by the defendant, and dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree. The following is an extract from the Judge's judgment:—

"The defendant's deed (Exhibit 102) states that the land, including all its belongings and appurtenances except treasure-trove, were sold to defendant. The words are: '*tya sambandhi bhumistha dravya kherij sarva hakk wa sambandha suddhá tumhás áj mitis rupaye 99 yás kharedi deun rupaye ghetle áhet*,' (that is, in connection with it [land] all the rights including appurtenances, excepting treasure-trove, have been sold to you this day for rupees ninety-nine and the rupees have been taken).

"I think the previous statement made by Khásgiwála and the terms of the deed of sale executed between himself and defendant when they were on good terms has a most important bearing on the case. I come now to consider the direct testimony of some of the witnesses cited in defendant's behalf. Narsopant (Exhibit No. 53) states that he was secretary to the Municipality from 1875 to 1887 and is now a municipal commissioner. He says he has seen defendant using the road in dispute since 1875, that defendant's door has been in existence since then and that defendant used to get water from the well situated in the garden (Anjir Bágh) and there was a *belka* or piece of forked timber at the mouth of the passage across the path which was used by the people in the garden as a passage. In his opinion the Anjir Bágh was purchased subject to defendant's right of way, and his right of way has never been obstructed. The present municipal secretary, Mahádeo Keshav Kumtekar, also deposes (Exhibit No. 44) that he was appointed secretary in 1887, and defendant has since then been using the land in dispute as a passage. Now, looking to this evidence, it appears to me highly probable that the right of way, though not mentioned in express terms in defendant's deed, was intended to be conveyed in the comprehensive expressions used with regard to the land in that document. The right of ingress to and egress from a piece of land separated from a larger piece passes by implication of law to the purchaser as an easement of necessity in the

absence of any stipulation to the contrary. It is a mere accident that the piece purchased by the defendant was contiguous to his dwelling-house. If he had disposed of it to a stranger, the stranger must have claimed a right of way to and from the land; and there is no reason why defendant should be put in a worse position than an outsider would have been. Looking at all the evidence in the case, I have no difficulty in agreeing with the view taken by the learned Subordinate Judge."

Inverarity (with *Mahádeo B. Chavbal*) for the appellants (plaintiffs) :—The defendant had no right of way at the place from which he removed the railing. The present suit was filed in the year 1890, and according to the Limitation Act (XV of 1877) the defendant ought to have adduced evidence of user for twenty years before suit, *i.e.*, since 1870. He has not done so. The evidence at the most shows that the defendant's user commenced in the year 1872. The right of way claimed by the defendant is not an easement of necessity. See section 5 of the Easement's Act (V of 1882). A right of way is not an apparent or continuous easement. Even if the right of way existed, the defendant had no right to remove the railing.

Lang (Advocate General), with *Muhádeo C. Apte* for the respondent (defendant) :—Both the Courts have found that the passage to our house lies over the land in dispute. It is a way of necessity. A way of necessity passes by implication. Further, there is a wall between the land which we have purchased and our house. As the wall was already in existence when we purchased the land, we are not bound to make a door in the wall or to pull it down in order to have access to the land from our house. Further, we say that the right of way passed to us under the words of the conveyance—Gale on Easements, pp. 66, 108; *Wheeldon* v. *Burrows*[1]. A vendor cannot derogate from his own grant. The Municipality having purchased the land from our vendor stands in his shoes. The point as to whether we were justified in removing the railing, was taken for the first time at the hearing of the second appeal. It was not urged before.

Inverarity, in reply :—The lower Courts have not found that there is no other access to the defendant's house. There is a door in the defendant's wall which leads to the land. The mere circumstance that the defendant's land adjoins our land, cannot

(1) 12 Ch. D., 31.

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give him the right of way over our land—Goddard on Easements, pp. 134, 324 and 328; section 13 of the Easement's Act (V of 1882). *Wheeldon* v. *Burrows*(1) was relied on, but it is not applicable. It does not relate to a right of way.

FULTON, J.:—The facts which have led to this suit are summarised by the District Judge as follows:—The ground in dispute, which is now the property of the Municipality, and the site belonging to the defendant, on which a house has been erected by him, belonged originally to one Khásgiwálla, who sold a small site to the defendant by deed of sale dated 3rd April, 1872. The remainder, known as the Anjir Bágh, was subsequently disposed of to one Paránjape, through whom it came into the possession of the Municipality.

The defendant now claims a right of way over the land purchased by the Municipality, but has not very clearly stated the grounds on which he claims. In his written statement he merely alleged that there had been a right of way through the ground in suit since the time when the plaintiff acquired it. The learned Advocate General, who appeared for him, based his claim on two grounds: (1) that he had acquired a way of necessity on the purchase of the site which he bought from Khásgiwálla, and (2) that he had obtained a right of way under the terms of the deed of sale.

In regard to the supposed acquisition of a way of necessity, we do not think that any question arises. The plot of ground bought by the defendant was contiguous to his own property through which access to it could be gained. The District Judge pointed out that, if the site had been sold to a third party, the purchaser would have acquired a way of necessity, but this does not seem to affect the question. If a stranger had bought, he would have got what is called a landlocked tenement, to which he could only obtain access over the land of his vendor or by trespassing on other people's property. But the defendant having bought could approach his new acquisition through his own premises, and it cannot, therefore, be said that in order to enjoy it, it was necessary for him to pass over his vendor's land. The Advocate General contended that it was separated from his house

(1) 12 Ch. D., 31.

by a wall, and that he was not bound to pull that down or to make a door in it. No authority, however, was quoted to support this argument. As a fact, however, a door actually then existed, or was made shortly afterwards, so that if ever there was any necessity for passing over Khásgiwálla's land in order to reach the site bought by the defendant, it ceased as soon as the door was opened. Mr. Goddard in summing up the English authorities on ways of necessity states that a man cannot acquire a way of necessity if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbour's soil, p. 328. The case of *Holmes* v. *Goring*[1] shows that a way of necessity does not last longer than the necessity. Whether in this country a Court might recognize a way of necessity in case of extreme inconvenience of approach by another possible way, need not be considered, for neither Court has found that the passage through the door to the land purchased was inconvenient.

Turning next to the argument that a right of way was conveyed by the terms of the grant, we find it difficult, having regard to the facts found by the District Judge, to hold that by themselves they justify such a construction. Various English decisions may be referred to—such as *Barkshire* v. *Grubb*[2], *Kay* v. *Oxley* [3] and *Brown* v. *Alabaster*[4], in which certain general words have been held to convey certain rights of way, but so far as they turn on the use of particular words they are of little assistance towards the construction of a Maráthi document in which other words are employed. They show, however, that when a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties. This principle will, we think, hold good in this country as well as in England. In each case the real test appears to be the intentions of the parties so far as they can be gathered from the language used with reference to the existing circumstances. The law on the subject seems summarised by Blackburn, J., in his judgment in

(1) 2 Bing., 76.
(2) 18 Ch. D., 616.
(3) L. R., 10 Q. B., 360.
(4) 37 Ch. D., 490.

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Kay v. *Oxley*[1], where in the last sentence he says: "I think in considering the words we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance." In the present case the general words used were "*sarva hakk wa sambandha*" which, in themselves, apart from the circumstances at the time of the sale, do not specify a right of way over the vendor's property as conveyed along with the portion of land sold. But if it were found that there was an old path leading across C to B (the plot sold), and that the purposes for which the plot was sold and the conduct of the parties were such as to justify the inference that by the use of the words "*hakk wa sambandha*", "rights and accompaniments," it was the intention to convey the right to use the path, it would, we think, be open to the District Judge to find as a fact that such was the intention. At present, however, we are unable to accept as sufficient his opinion that the right of way was intended to be conveyed, because he has not found what were the circumstances existing at the time of the sale, and his opinion appears to have been formed partly in the belief that the fact that the plot purchased by the defendant was contiguous to his dwelling-house did not affect the question. Before, therefore, deciding this appeal, we must request the District Judge to find on the following issue:—

"Whether, having regard to the circumstances existing at the time of the sale, the purpose for which the ground was sold, and the conduct of the parties, a right of way across the vendor's remaining property was conveyed by the deed of sale, and, if so, whether it passed through the place where the defendant pulled down the railings?"

The Subordinate Judge in his judgment expressed an opinion that, irrespective of the land purchased, the defendant had a right of way to his old house, but this was not the case put forward by him, and as pointed out by Mr. Inverarity, seems unsupported by evidence, as there is nothing to show that previous to 1872 he was in the habit of crossing the Anjir Bágh when going to and from his house. Moreover, no argument was addressed to us in support of this view, which need not further be considered.

(1) L. R., 10 Q. B., 360.

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It was argued that, even if the defendant had a right of way, he was not justified in pulling down 20 feet of railings. The point was not taken in the memorandum of second appeal, nor apparently argued in the District Court, and at most would only raise a question of damages. As, however, the plaintiff only claimed nominal damages of Rs. 5, we must conclude that it was not thought worth while to raise the question in the District Court, and we cannot, therefore, entertain it in second appeal. The real question at issue is as to the defendant's right of way. If it is decided in his favour, the decrees of the Courts below are substantially correct.

The District Judge should now with reference to the above remarks record his finding on the issue referred, and return his proceedings within two months. The Court may admit further evidence if it thinks proper.

Issues sent down.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

KALU VALAD VISHNA (ORIGINAL DEFENDANT), APPELLANT, *v.* BARSU VALAD ZENDU (ORIGINAL PLAINTIFF), RESPONDENT.*

1894. *September* 13.

Hindu law—Joint family—Joint family property—Gift—Gift of undivided share by adults of family—Minor co-sharer not a party to gift—Ejectment—Defendant trespasser— Onus of proof—Plaintiff to prove his superior title.

According to Hindu law, under ordinary circumstances a gift by a co-parcener of his undivided share in the immoveable property is invalid, and a minor's share cannot be given away by a manager except in case of necessity or for certain specified purposes.

Certain land which was joint family property was given by the adult members of the family to the plaintiff as the worshipper of a deity. A minor co-parcener did not join in the gift. The plaintiff sued the occupier for possession.

Held that the plaintiff could not recover. The gift not being made from necessity, or for the performance of any pious duties obligatory on the minor or the family, was invalid, and could not be given effect to even with respect to the shares of the donors.

In an ejectment suit, the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title.

THIS was a second appeal from the decision of Ráo Bahádur N. N. Nanavati, First Class Subordinate Judge of Dhulia with

* Second Appeal, No. 188 of 1893.