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Court discharging the surety is altogether premature and should be set aside. The surety must pay the costs of these proceedings.

HEATON, J. :—I agree with the order proposed. The result stated is necessarily arrived at whether we take the view that there has been want of jurisdiction or a serious irregularity in the exercise of jurisdiction. It seems to me that there are reasons of considerable cogency which point to a want of jurisdiction, but as the result remains unaffected, whether it is attributed to that ground or to a serious irregularity in the exercise of jurisdiction, it does not seem to me very profitable to discuss which of the views is the one which ought to prevail in this case.

Order set aside.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

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December 22.

GURURAO SHRINIVAS HEBLIKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Saranjam—Grant of royal share of revenue—Resumption of Saranjam—Lands can be still held on payment of assessment—Suit to recover possession of land—Revenue Jurisdiction Act (X of 1876), section 4—Pensions Act (XXIII of 1871), section 4.

It is well established that in the case of Saranjam or Jaghir (the terms being convertible) the grant is ordinarily of the royal share of the revenue and not of the soil, and that the burden of proving that in any particular case it is a grant of the soil lies upon the party alleging it.

Krishnarav Ganesh v. *Rangrav*[1], *Ramchandra* v. *Venkatrao*[2] and *Ramkrishnarao* v. *Nanarao*[3], followed.

* First Appeal No. 169 of 1913.

(1) (1867) 4 Bom. H. C. R. (A. C. J.) 1. (2) (1882) 6 Bom. 598 at p. 606.

(3) (1903) 5 Bom. L. R. 983.

The right to the possession of the land in the case of the Saranjam grant of the royal share of the land revenue does not form part of the Saranjam and is independent of it.

The Government can, therefore, resume what they granted as Saranjam, viz., the royal share of the land revenue; and the right to the occupation of the land subject of course to the payment of the full assessment can and does survive the resumption of the Saranjam.

Neither section 4 of the Revenue Jurisdiction Act (X of 1876) nor section 4 of the Pensions Act (XXIII of 1871) bars a suit to recover possession of lands, the Saranjam rights in which have been resumed by Government.

FIRST appeal from the decision of E. H. Leggatt, District Judge of Dharwar.

Suit to recover possession of lands which formed a 1/16 part of the Hebli estate.

The Hebli estate was granted to an ancestor of the plaintiff by the Nawab of Savanur in 1748. When the British Government conquered the country from the Peshwas the grant was continued to the same family. The original grantee was Balvantrao. At the time when the British Government continued the grant, the family was represented by Lakshmanrao (a grandson of Balvantrao), and Ramchandrao (another son of Balvantrao). Ramchandrao had two sons: Krishnarao and Raghunathrao. Krishnarao had two sons: Pandurangrao and Ramchandrarao (who was adopted by Raghunathrao).

When Pandurangrao died in 1899, his share in the estate was resumed by the Bombay Government and regranted to Narsingrao, a son of Ramchandrarao, although Pandurangrao had left four sons. In 1904, the Secretary of State for India in Council held that the share of Pandurangrao should be regranted to Vithalrao, a grandson of Pandurangrao. The whole of his share was accordingly given into the possession of Vithalrao; in doing so, Gururao (plaintiff), one of the grandsons of Pandurangrao, was dispossessed. He, therefore, sued to recover possession of his share, which

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was 1/16th, in the estate, which he alleged was Sarva Inam.

The defendant No. 1, the Secretary of State for India, contended *inter alia* that the Hebli estate was granted as Saranjam or on political tenure; that Government had the right to resume and regrant the estate; and that the suit was barred by section 4 of the Revenue Jurisdiction Act, 1876. Vithalrao (defendant No. 2) raised similar defences.

The lower Court held that the Hebli estate was granted not as Sarva Inam but as Saranjam; that Government had the right to resume and regrant the estate; and that the suit was barred by the Revenue Jurisdiction Act, 1876.

The plaintiff appealed to the High Court.

K. H. Kelkar, for the appellant:—It is held by this Court repeatedly that grants by the Crown although in terms the grant of land are really alienations of the royal share of the revenue: see *Krishnarav Ganesh* v. *Rangrav*[1]; *Ramchandra* v. *Venkatrao*[2]; *Vaman Janardan Joshi* v. *The Collector of Thana*[3] and *Rajya* v. *Balkrishna Gangadhar*[4]. The theory on which this doctrine is based is to be found in the case of *Vyakunta Bapuji* v. *The Government of Bombay*[5].

The theory of the grant of the royal share of the revenue really emanates from this juristic conception of the relation between the Crown and the subject. All unoccupied land was *res nullius* and could be occupied by anybody. The moment it was occupied the occupancy was created and the right of the Crown to levy the assessment arose.

(1) (1867) 4 Bom. H. C. R. (A. C. J.) 1.
(2) (1882) 6 Bom. 598.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 191.
(4) (1905) 29 Bom. 415.
(5) (1875) 12 Bom. H. C. R. Appx. 1.

If land revenue was granted land revenue alone can be resumed. The possession may be an effect of the grant but is not a part of the grant. The distinction is not fanciful: see *Balvant Ramchandra* v. *Secretary of State*[1] and *Appaji* v. *The Secretary of State for India*[2]. When the grant is made the village is usually revenue paying. There must be occupants in the village. Otherwise no revenue can be collected. At this distance of time it is impossible to show exactly when our actual possession commenced. There is nothing in the law to prevent the Saranjamdar from becoming an occupant himself.

The Elphinstone Code enacted the fundamental law of land revenue: Regulation XVII of 1827. The Company and their successors never claimed anything more than assessment. The history of the Land Revenue law regarding the different parts of the Presidency will be found lucidly presented in Col. Etheridge's Narrative of the Inam Commission: see Government of Bombay Publication, New Series, No. 132. When we come to Act XI of 1852 we find that the Act contemplates the promulgation of rules for the regulation of Saranjams.

The scheme of the Act (XI of 1852) shows that the word "resumption" used in the Act bore a technical meaning. And although there are words in the Act which may contemplate "eviction" also, the Government of the day allayed all excitement by issuing a special resolution disclaiming any right to dispossess. Even under the Regulations right to possession was a right which was to be judicially decided by civil Courts. This right is not taken away by Act XI of 1852. And indeed any enactment which purports to take away this elementary right would be *ultra vires* of the Indian Legislature: see *Secretary of State for India* v. *Moment*[3].

(1) (1905) 29 Bom. 480. (2) (1904) 28 Bom. 435.

(3) (1912) L. R. 40 I. A. 48.

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The case-law on the meaning of resumption is conclusive in our favour: see *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* [1] and *Hari Sadashiv* v. *Shaik Ajmudin* [2]. These are the only cases in which this point was specifically raised and they are both in our favour. In *Shekh Sultan Sani's case* [3] this question was not raised: see Mr. Doyne's argument on behalf of the appellant. It was a treaty Saranjam and the grantee was put in possession by the Government after the conquest. There is no adjudication guaranteeing possession as we have in this case. *Ramchandra's case* [4] is considered by Sir Charles Sargent in *Ganpatrav Trimbak's case* [1] and is also discussed in *Balvant Ramchandra's case* [5] by Batty J.

The suit is not barred by Act X of 1876 because we submit that in this case land revenue is held as Saranjam and not land. This prohibitory enactment and the Pensions Act both deal with land revenue and disputes between the Government and the subject, relating to the collection or distribution of that revenue. Both have nothing to do with possession of land. That is a distinct right which has not been taken away by any Legislature. As regards the Regulations, Regulation XVII of 1827 expressly reserves questions of possession for the civil Courts: see Chapter VIII. We further contend that Act X of 1876, if it affects questions of possession also, is to that extent *ultra vires* of the Indian Legislature. A suit could have lain against the East India Company: see Chap. VIII of Regulation XVII of 1827; 21 and 22 Vic. Ch. 106, sections 64, 65; 24 and 25 Vic. Ch. 67, section 22; *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India* [6] and *Secretary of State for India* v. *Moment* [7].

(1) (1885) 10 Bom. 112.
(2) (1886) 11 Bom. 235.
(3) (1892) 17 Bom. 431.
(4) (1882) 6 Bom. 598 at p. 608.
(5) (1905) 29 Bom. 480.
(6) (1861) 5 Bom. H. C. R. Appx. 1.
(7) (1912) L. R. 40 I. A. 48.

Coyajee with *S. S. Patkar*, Government Pleader, for the respondents:—What is the meaning of 'in any event plaintiff is entitled to the right of occupancy?' Was the Government bound on Pandurang's death to levy an assessment on the land and split the estate into (1) a right to levy assessment and (2) a right to occupy it? If this latter right were recognised then it would amount to treating the Saranjam lands as private heritable property. Pandurang's estate terminated with his death and the whole intact estate is given by the Government to defendant No. 2. So there is no eviction in such a case. The points, therefore, that arise for determination are :—

(1) What is the nature of the Hebli estate of which the plaint property forms an integral part?

(2) Is the resumption in question valid?

(3) If so, what is the effect of resumption?

(4) Whether the claim is excluded from the cognizance of the civil Court in virtue of the provisions of the Revenue Jurisdiction Act?

As for this fourth point the case of *Secretary of State for India* v. *Moment* [1] is no authority for saying that the Revenue Jurisdiction Act is no bar to the present suit. The question is whether the plaintiff could have sued the East India Company before 1858. If he could not have done so before 1858 then he cannot do so now. Before 1858, no suit could have been brought in respect of the Saranjam property. Regulations XVII and XXIX of 1827 which governed the Saranjam and the Inam estates were extended to the Southern Maratha Country by Regulation VII of 1830. Under those regulations the civil Courts had no jurisdiction to entertain claims in respect of Saranjam estates. Therefore, the provisions of the Revenue Jurisdiction Act were not *ultra vires*. If so, section 4 is a bar to the

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present suit. In this case the property is Saranjam Therefore it clearly comes under section 4 of the Act.

There is a substantial distinction between an Inam and a Saranjam : see *Ramkrishnarao* v. *Nanarao*[1]. It clearly lays down what the distinguishing features of a Saranjam estate are. It is (1) resumable, (2) held for life, (3) inalienable, and (4) impartible. It thus differs from an Inam. All the powers of disposal of a Saranjam estate are vested in the Government: see *Ramchandra* v. *Venkatrao*[2]. A Saranjamdar cannot acquire occupancy rights in a Saranjam estate. The case of *Balvant Ramchandra* v. *Secretary of State*[3], relied on by the appellant's pleader, was a case of an Inam and there too it was held that an Inamdar by his grant obtains the right to hold unoccupied land.

As to the nature of the Hebli estate, there is no dispute that the appellant claimed to hold it as Sarva Inam, that claim was disallowed both by the Inam Commissioner and the lower Court. There is no doubt that it is Saranjam property. An examination of the legislative enactments governing Saranjams and Inams reveals a distinction between an Inam and a Saranjam. The earliest regulation bearing on this point is Regulation XVII of 1827. This Regulation confirmed or left untouched the Inamdar's pre-existing right to remain in occupation but a Saranjamdar having no such right, that was dealt with in a different way. This is apparent from sections 38 and 40 of Regulation XVII of 1827 and the notices required to be given thereunder. It will be noticeable that section 38, which deals with Jaghirs (or Saranjams), speaks of the holder of the grant as the 'incumbent' or the person enjoying the exemption, while in section 40 the corresponding person in the case of Inam holdings is called the 'occupant' or holder

(1) (1903) 5 Bom. L. R. 983. (2) (1882) 6 Bom. 598 at p. 608.
(3) (1905) 29 Bom. 480.

of the land. This difference could not be meaningless. It lends strong support to the contention that the Legislature intended to recognize an already existing occupancy right vested in the Inamdar but did not recognize any such right in the Saranjamdar who was merely an 'incumbent.'

The counsel after referring to the cases of *Ramchandra* v. *Venkatrao*[1]; *Balvant Ramchandra* v. *Secretary of State*[2] and *Rajya* v. *Balkrishna Gangadhar*[3] said that it was obvious from these authorities that a grant whether in Inam or Saranjam carried with it the right to hold or make the best use of the unoccupied land as Saranjamdar or Inamdar and this right was resumable by the Sovereign power with the Inam or Saranjam grant. In the case of the Saranjamdar his grant was resumable at pleasure and the right to hold the land is merely co-extensive with the grant. It would, therefore, come to an end when the grant comes to an end.

The Saranjam rules framed in 1898 by Government Resolution No. 2942, Political Department, dated 17th May 1898 (see Bombay Government Gazette for 1898, Part I at pp. 424 and 425) support the case of the Secretary of State. Rule 5 lays down that Saranjam shall be held as a life-estate and it shall be formally resumed on the death of the holder and shall be made over to the next holder as a fresh grant. Rule No. 6 prohibits sub-division.

As regards the case of *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*[4], Government was not a party to that case and moreover Sir Charles Sargent C. J. says in the course of the judgment that no legislative enactment was cited in support of there being any difference between the tenures (Inam and Saranjam)

(1) (1882) 6 Bom. 598.
(2) (1905) 29 Bom. 480.
(3) (1905) 29 Bom. 415.
(4) (1885) 10 Bom 112.

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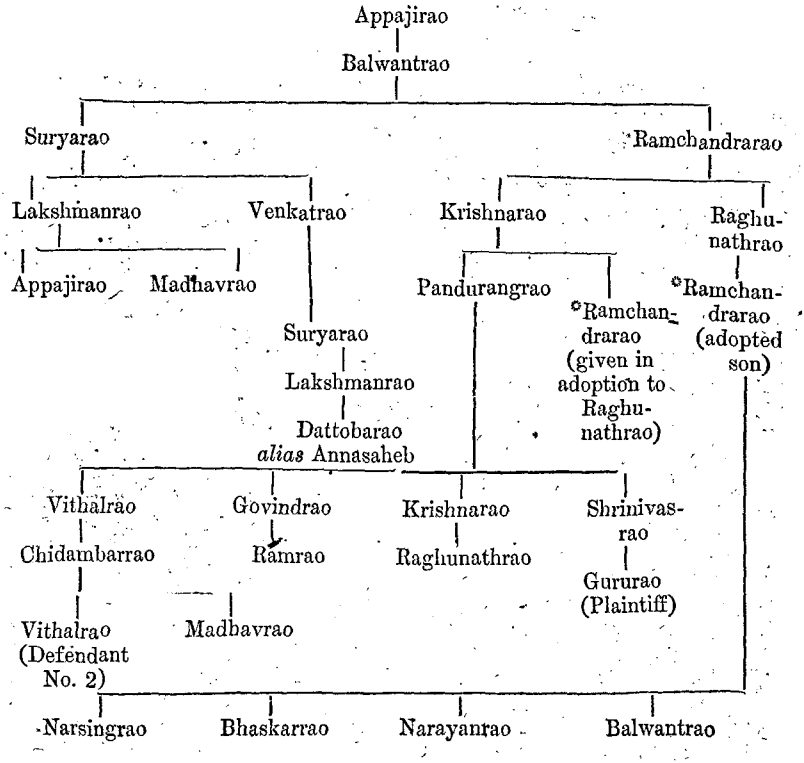
as regards the effect of resumption by Government. In that case there was no reference to Regulation XVII of 1827 and the Saranjam rules; and it is, therefore, obvious that this aspect of the case was not present before their Lordships' mind. Moreover the observations in that case are merely *obiter dicta*.

Lastly, if this is a grant of the land revenue as contended by the appellant, then no suit would lie without a Collector's certificate under the Pensions Act and the absence of it would be fatal to this suit.

C. A. V.

SHAH, J. :—It will be convenient at the outset to set forth the genealogical table of the family of the original grantee of the Hebli estate.



The original grant of the Kasba Hebli was made to Balwantrao by the Peshwa. At the introduction of the British Government, the estate was held by Lakshmanrao bin Suryarao, and his uncle Ramchandrarao. Lakshmanrao died in A. D. 1836 and was succeeded by his son Appajirao. Ramchandrarao was succeeded in A. D. 1818 by his son Krishnarao and Raghunathrao. The latter adopted Ramchandrarao, and this adoption was recognised by the British Government in 1839. Krishnarao died in 1842, and was succeeded by his son Pandurangrao. Pandurangrao died in 1899. It is the estate held by Pandurangrao or rather a part of it with which we are concerned in this litigation.

The share of the Hebli estate held by Pandurangrao was resumed by the Bombay Government and regranted to Narsingrao Ramchandra in 1901. The Secretary of State for India in Council, however, ultimately directed in 1904 that Pandurangrao's estate should be resumed and regranted to Vithalrao, the great-grand-son of Pandurangrao. As a result of this grant to Vithalrao the present plaintiff was dispossessed of the lands in suit.

The plaintiff Gururao filed the present suit in 1911 in the District Court of Dharwar to recover possession of the property mentioned in the Schedule referred to in the plaint with mesne profits. He based his claim mainly upon two grounds; firstly, that the grant to Pandurangrao was a Sarva Inam and not a Saranjam and that therefore it was not resumable by Government, but heritable and partible property; and secondly, that even assuming the grant to Pandurangrao to be a Saranjam, the Government could resume what they granted, viz., the royal share of the revenue and not the lands, and that the Government could assess the lands and recover the royal share of the revenue but could not dispossess the plaintiff. The property described in

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the Schedule attached to the plaint is claimed as forming one-sixteenth share of the whole estate, i.e., one-fourth of Pandurangrao's one-fourth share in the estate. The suit is filed against the Secretary of State for India in Council, who is defendant No. 1, and Vithalrao, the new grantee, who is defendant No. 2.

The defences raised by defendant No. 1, briefly stated, are that the suit is barred by section 4, clause (*a*) of the Revenue Jurisdiction Act (X of 1876), that the grant is not a Sarva Inam but a Saranjam, that the plaintiff is not entitled to recover separate possession of the property, as the Saranjam is impartible except to such extent as may be recognised by the Government, and that the Government could take possession of the lands in effecting resumption. Defendant No. 2 made no separate defence but adopted the contentions of the defendant No. 1.

On the plaint and the written statement, which have been stated in detail in the judgment of the lower Court, several issues were raised.

The lower Court in effect found that the grant to Pandurangrao, which was declared by the Government in 1863 to be Saranjam and not Sarva Inam, must be treated as Saranjam and that the Court had no jurisdiction to question the declaration made by the Government. It further found that though the grant was of land revenue the right to hold the land went with and therefore formed part of the grant, and that the lands were resumable as the grant was. It also found that the lands being held as part of the Saranjam, the suit was barred by the Revenue Jurisdiction Act.

It is not now necessary to notice the findings on other issues.

The result was that the plaintiff's suit was dismissed with costs.

The plaintiff has appealed from the decree of the District Court, and has practically confined his appeal to the prayer for possession subject to his paying the royal share of the revenue and mesne profits.

It is not contended before us that the original grant was not Saranjam, but Sarva Inam. It is difficult to see how such a contention could be raised now. When the descendants of Balwantrao including Pandurangrao made their claim to the estate as Sarva Inam before the Inam Commissioner in 1858 under Act XI of 1852, the Inam Commissioner decided that the claimant's title to hold Kasba Hebli in Sarva Inam was invalid, but that its enjoyment was not to be interfered with in consequence of his decision: see Exhibit 34, para 31. The Government declared in November 1858 that Hebli should be continued to the family, which held it as hereditary in the fullest sense of the word (Exhibit 41); and they further held in 1863 that it was to be regarded as a Saranjam and not as Sarva Inam (Exhibit 37). Under the provisions of Act XI of 1852 it was for the Inam Commissioner and Government to decide whether the grant was a Saranjam or a Sarva Inam, and their decision must be accepted as decisive of the point raised by the plaintiff in the suit, but not pressed in appeal, as to whether Hebli is held by the family as a Sarva Inam or a Saranjam.

It may be mentioned here that Ramrao, grandson of Pandurangrao by his second son Govindrao, had filed Suit No. 3 of 1907 against the present defendants on the ground that the property held by Pandurangrao was Sarva Inam and that the regrant to Vithalrao was illegal. But that suit was held by the High Court to be barred by section 4, sub-section (*a*) of the Revenue Jurisdiction Act and the decision of the Inam Commissioner was held to be final; and it was further held that the title to and continuance of the estate held as

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Saranjam must be determined under schedule B, Rule X of Act XI of 1852 under such rules as Government may find it necessary to issue from time to time. The main point argued in the present case was suggested for the first time in appeal in that case. The High Court, however, held that it was a question which ought not to be decided in that suit and abstained from expressing any opinion on it: see *Ramrav Govindrao* v. *Secretary of State*.[1]

The principal point, however, argued and insisted upon by Mr. Kelkar in support of this appeal is that the Saranjam is merely a grant of the royal share of the land revenue without any relation to the possession of the land, that the grantee may have possession of the lands before the grant or may take possession of any vacant or unoccupied land after the grant, and that the right to the possession and enjoyment of the lands is outside the grant and does not form any part of the grant. It is further argued that the Government can resume only what they have granted, that is, the royal share of the revenue, and that as a result of the resumption the lands which were not liable to assessment may be liable to be assessed. But the possession and revenue of the lands subject to the payment of assessment form part of Pandurangrao's ordinary heritable estate, in respect of which the plaintiff's rights cannot be affected by the resumption of the Saranjam. The rule as to resumption in the case of Inam lands where the grant is of the royal share of the revenue only has been relied upon as affording a ground for putting the same meaning upon resumption when applied to the case of a Saranjam. By way of reply it is argued on behalf of the respondents that though the grant may be of the royal share of the revenue, the right to hold the land is the result of the grant and forms part of it, and

[1] (1909) 34 Bom. 232.

is, therefore, resumable. It is further argued on behalf of the defendant No. 1 that there could be no occupancy rights in a village held as Saranjam, where there is a succession of life-estates, and that the word resumption in case of a Saranjam cannot have the same meaning as in the case of an Inam.

In addition to the answer on the merits, it is contended that the suit is barred by the Revenue Jurisdiction Act and the Pensions Act.

I shall first deal with the merits of the plaintiff's claim, as it seems to me that if he can succeed on the merits, the Revenue Jurisdiction Act and the Pensions Act will not afford any answer to his claim.

Now it is well established that in the case of Saranjam or Jaghir (the terms being convertible) the grant is ordinarily of the royal share of the revenue and not of the soil, and that the burden of proving that in any particular case it is a grant of the soil lies upon the party alleging it: see *Krishnarav Ganesh* v. *Rangrav*[1]; *Ramchandra* v. *Venkatrao*[2] and *Ramkrishnarao* v. *Nanarao*[3]. Mr. Coyaji for the respondents does not contest this position, and is unable to refer to any document or terms of the grant which would show that the grant was of the soil and not merely of the royal share of the land revenue.

In this case the history of the Saranjam, to which I shall refer more particularly later, shows that the grant was made to the family before the British Government acquired the territories, and that during the last century before Pandurangrao's death on all occasions of fresh successions the grant was continued by the British Government on payment of the usual Nazrana. On not a single occasion does the grant appear to have

(1) (1867) 4 Bom. H. C. R. (A. C. J.) 1. (2) (1882) 6 Bom. 598 at p. 606.
(3) (1903) 5 Bom. L. R. 983.

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been made in terms which would indicate a grant of the soil or which would indicate that the grant had any relation to the occupation of the lands. The grantees were in prior occupation of the lands and they were continued in possession of the lands without any liability to pay the royal share of the revenue.

It is also a settled rule in this Presidency that in the case of an Inam, where the grant is merely of the royal share of the revenue and not of the soil, resumption means only the discontinuance of exemption from payment of land revenue, and that interference with actual occupation is not allowable. The Government Resolution of 1854 is clear on the point: see Exhibit 260. This Court has consistently taken the same view as to Inams: see *Vishnu Trimbak* v. *Tatia Pant*[1] and *Balvant Ramchandra* v. *Secretary of State*[2].

Before dealing with the question as to how far the same meaning should be put upon the word resumption in the case of a Jaghir or Saranjam when the grant is not of the soil, but of the royal share of the land revenue, it will be convenient to deal with the view taken by the lower Court on the evidence and the history of this particular Saranjam.

The learned District Judge has stated his conclusion in para. 18 of his judgment as follows:—"Obviously what is to be resumed is that which is given and in the case of a Saranjam grant of land revenue it is a grant of the land revenue coupled with the right to make the best possible use of unoccupied land, and presumably the whole of this can be resumed." Further on in para. 20 of the judgment after adverting to the circumstances of the present grant and the incidents of the tenure he expresses the opinion that the grant was not

(1) (1863) 1 Bom. H. C. R. 22. (2) (1905) 29 Bom. 480 at p. 498.

merely a grant of the royal share of the revenue but included the right to hold the land and that the lands are, therefore, resumable with the Saranjam.

Now first as to the circumstances of this grant. The history of this grant is set forth in the report of the Assistant Inam Commissioner and the decision of the Inam Commissioner (Exhibit 34, particularly paragraphs 27 and 28). The learned District Judge has placed reliance upon the fact that in 1761-62 the Peshwa had taken back the Jaghir with the possession of the lands from Balwantrao, had made a grant of this Saranjam to Yogeeram and Bhaskarrao and had given it back to Balwantrao in 1872. We do dot know the circumstances under which this temporary change of the grant was made, nor do we know what exactly happened at the time. I consider it wholly unsafe to draw from this circumstance the inference that the original grant by the Peshwa was not merely of the land revenue but of the soil. The Inam Commissioner in para. 30 of his decision observes as follows :—

"It appears clear, therefore, that the original grant of A. D. 1761-62 was neither revoked nor altered by the Peshwa and that the villages claimed were made over and continued in lieu of the Saranjam of Rs. 12,000 per annum sanctioned by the Peshwa. The allusion to them in accounts consequently in any other terms than as Saranjam is erroneous."

Besides it does not seem to me very material to inquire as to what the Peshwa thought of his grant to Balwantrao. He may have treated the right to hold the land as resumable with the Saranjam or not. The question is what happened when the British Government acquired the territory and whether they confirmed the Saranjam as an ordinary Saranjam or Saranjam involving a grant of the soil. Then for some years

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there was disturbance of possession by Tippoo Sultan. But Mr. Coyaji has fairly conceded that such disturbance, which would be the result of invasion and force, would not indicate anything in favour of the view taken by the learned Judge.

It appears from para. 28 of the Inam Commissioner's Report and from other papers in the case that in 1818, 1836, 1839, and 1842 and 1863 fresh successions were recognized on payment of the usual Nazrana. There was nothing in this circumstance to show that the grant had any relation to possession of land as distinguished from the royal share of the land revenue. There is nothing to show that the Nazrana was calculated on any footing other than that representing the royal share of the land revenue. Besides it does not seem to me at all reasonable to base such an inference upon the fixing of the amount of the Nazrana. When the main question is one of recognizing the succession or of making a fresh grant, the question of Nazrana is a subordinate question; it is dealt with by the Government, there is apparently nothing like a settlement between the parties of the basis upon which the calculation is to be made, and there is no disturbance of actual possession. Further it is not contended in this case that these grants on various occasions have been grants of the soil. Under these circumstances I do not see any reason to think that the papers relating to the Nazrana can show any relation of the grants to the occupation of the lands as distinguished from the right to the royal share of the revenue. The evidence of the witness Bhaskarrao (Exhibit 232) which is relied upon by the learned Judge does not, in my opinion, support the theory that the amount of the Nazrana was calculated on any basis representing anything more than the amount of the royal share of the land revenue. The point was never put to him specifically on behalf of the

respondents, and the general effect of his evidence taken as a whole is against any such theory.

The next circumstance relied upon is the fact that in 1842, on the report of the then Collector of Dharwar, the Government for the better management of the Jaghir owing to disputes between Pandurangrao and Ramchandrarao accepted the recommendation of the Collector, that the management be handed over to Appajirao the representative of the senior branch of the family. This, it is suggested, involved a disturbance of the actual possession of Pandurangrao. But admittedly it was for the purposes of management only and not for the assertion or alteration of any right; and it was clearly understood that the arrangement was only sanctioned as a temporary measure in the hope that parties would soon see that it was for their interest to accommodate their differences: see Exhibits 275 and 270. I am unable to hold that this is in any way inconsistent with the occupancy rights of the Saranjamdar.

Exhibit 242 which was put in by the claimants before the Inam Commissioner does not help the respondents in any way. There was no occasion then to differentiate between their rights of occupation and the royal share of the land revenue. The claimants had both the rights, and they were then putting forward a claim to the grant as a Sarva Inam, i.e., an absolute grant.

I have now dealt with all the evidence relied upon by the lower Court and by Mr. Coyaji in the argument before us, in connection with the nature and circumstances of the particular grant. I am unable to agree with the lower Court on this point. The net result of the examination of the evidence, in my opinion, clearly is that there is nothing to show that the original grant by the Peshwa was of the soil and not merely of the royal share of the land revenue or that it had any

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relation to the occupation of lands by Balwantrao, that when the British Government first confirmed the grants in favour of the descendants of Balwantrao, the original grantee from the Peshwa, they were in occupation of the lands, that the grants were as usual grants of the royal share of the land revenue, and had no relation to the possession of the lands, and that the right to resume the lands at the time of the resumption and regrant of the Saranjam was never put forward by the Government during the last century. Apparently it is put forward on the occasion of the resumption on Pandurangrao's death and is asserted for the first time in 1904 when there was a regrant in favour of Vithalrao; and it is not suggested that the record of the case discloses any prior instance of the assertion of such a right.

It remains now to deal with the view taken by the learned District Judge that "in the case of a Saranjam grant of land revenue it is a grant of the land revenue coupled with the right to make the best possible use of the land, and presumably the whole of this can be resumed." I am unable to agree with this view and in my opinion it does not derive any support either from the statutory provisions relating to Saranjams or from the decided cases bearing on the point. On the contrary the combined result of the Acts and decided cases is distinctly in favour of the plaintiff's contention.

First as to the statutory provisions, the law relating to Saranjams now in force in the territories with which we are concerned is to be found in Act XI of 1852 and the rules made by the Government in 1898 under rule 10 of Schedule B of the Act of 1852. Prior to 1852, there was Regulation XVII of 1827—particularly Clause 38—made applicable to the territories with which we are concerned by Regulations XXIX of 1827, and VII of 1830. There was Regulation VI of 1833, Clause 3 relating to the "general rules" referred to in

Clause 38 of Regulation XVII of 1827. These provisions have been discussed in some of the cases to which I shall have to refer hereafter, and I do not consider it necessary to go over the same ground again. I shall, however, deal with the provisions with reference to the arguments that have been addressed to us in this case. With reference to Clause 38 of Regulation XVII of 1827 read with appendix B, Mr. Coyaji has argued that the words 'resumption' and 'assessment' used with reference to Jaghir cannot mean the same thing. They must have different meanings, which is possible only if resumption has relation to possession of lands and not merely to the discontinuance of exemption from the royal share of the land revenue or assessment. The form of notice of the resumption of a Jaghir (appendix B) as compared with the form of notice of assessment (appendix D) has been relied upon in support of this argument. In the first place it seems to me that this argument ignores the obvious fact that the language of Clause 38 and of the form appendix B is applicable to all Jaghirs, i.e., to Jaghirs involving grant of the soil as well as to Jaghirs involving grants of the royal share of the land revenue, and the Clause is not worded with due advertence to the difference between the two classes of Jaghirs. Now the language is quite appropriate to Jaghirs, where there is a grant of the soil. But where there is a grant only of the royal share of the land revenue that language is not quite appropriate; and in such a case there may be no practical difference between resumption and levy of full assessment. The use of two different words is sufficiently justified by the fact that in certain Jaghirs they would mean two distinct things. But there is no rule of construction which compels the inference that the Legislature meant that in every case of Jaghir 'resumption' and 'assessment' must in the result mean two different things.

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That would be practically doing away with the substantial difference between the two classes of Jaghirs or Saranjams. Such an extreme view has not been taken in any of the reported cases and, in my opinion, this contention is subject to the infirmity that it establishes too much. Secondly, this clause is no longer in force and we are really concerned with Act XI of 1852 and the rules thereunder. Section 1 of Act XI of 1852 provides that Chapters IX and X of Regulation VII of 1827, which include the said Clause 38, do not apply to any of the Districts of the Bombay Presidency which were not brought under the general regulations of Government by Regulation XXVIII of 1827 of the Bombay Code. Now the territory with which we are concerned was brought under the general regulations by Regulations XXIX of 1827 and VII of 1830 and not by Regulation XXVIII of 1827.

Under Act XI of 1852, Schedule A, Rule 1, the duty of the Inam Commissioner extended to the investigation of titles of persons holding or claiming against Government the possession or enjoyment of Inams or Jaghirs; and the decisions of the Inam Commissioner under Rule IX of the same Schedule would relate to "the continuance, resumption or partial assessment of the land." Here the argument urged on behalf of the respondents with reference to "resumption" and "assessment" in Clause 38 of Regulation XVII of 1827 would apply equally. But I have already pointed out that at least so far as Inams are concerned the word resumption has a well defined meaning under Act XI of 1852 both according to the Government Resolution of 1854 and the decided cases; and there is no valid reason to suppose that it has any different meaning when applied to Jaghirs. Under Rule X of Schedule B of the Act of 1852, it is provided that the rules (under the Schedule) shall not be necessarily applicable to Jaghirs and

Saranjams, the titles and continuance of which shall be determined as heretofore under such rules as Government may find it necessary to issue from time to time. Now prior to 1898 apparently there were no rules except those mentioned in Col. Etheridge's Narrative of the Bombay Inam Commission (Government Selection No. CXXXII, N. S.). Referring to the rules framed under Rule X of Schedule B, Mr. Coyaji relies upon Rule 5 which provides that Saranjam shall be held as a life-estate, and that it shall be formally resumed on the death of the holder and shall be made over to the next holder as a fresh grant. I do not think that this rule touches the present point. The question is not what is the extent of the interest of the Saranjamdar in the Saranjam but whether the right to hold the lands forms part of the Saranjam and whether on the resumption of the Saranjam that particular right to hold the land comes to an end.

I have not so far referred to Act II of 1863, and I do not think that it has any bearing on the present point as under section 1, Clause (2), among other things lands granted or held as Jaghirs or Saranjams have been excluded from the operation of the Act.

Mr. Coyaji has argued that there is no scope in the case of successive life tenants like Saranjamdars to acquire any right to possession of land apart from the Saranjam. I am unable to accept this argument. I do not see any reason why it should not be possible for a Saranjamdar to create any occupancy right in respect of waste lands in his Saranjam, which is a grant only of the royal share of the land revenue, in favour of a third party or of himself. No authority is cited in favour of the view that no occupancy rights are possible in a Saranjam estate involving a grant of the royal share of land revenue. It is a position which I cannot accept in the absence of any authority.

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It was further urged that in the case of the Hebli Saranjam there could not be any occupancy rights, as there was no survey settlement. But the right to occupy the land can exist in villages where no survey settlement is introduced, and in such cases the royal share of the land revenue would have to be determined with reference to the rate obtaining in the village in which the land is situated : see Exhibit 260, para. 5.

As to the decided cases, it seems to me that they are in favour of the view that the right to the possession of the land in the case of the Saranjam grant of the royal share of the land revenue does not form part of the Saranjam and is independent of it. In the case of *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*[1] Sargent C. J. and Birdwood J. held in dealing with a Saranjam, after referring to the rule as to Inams, that no legislative enactment or Government Resolution had been cited in support of there being any difference between the tenures as to the effect of resumption by Government. The learned Judges further on refer to the observation in *Ramchandra* v. *Venkatrao*[2] and hold that the Saranjamdar may acquire occupancy rights, which as has been shown, remain unaffected by the resumption of the Saranjam except as to the assessment thenceforth payable to Government. This decision is binding on us unless it can be treated as overruled by any Privy Council decision. The learned District Judge has treated this decision as not binding upon him on two grounds, neither of which appears to me to be sound. I see no reason to suppose that the observation as to the effect of resumption by Government was made without due advertence to Regulation XVII of 1827 which has been referred to in both the cases (*Vishnu Trimbak* v. *Tatia Pant*[3] and *Ramchandra* v. *Venkatrao*)[2]. These cases

(1) (1885) 10 Bom. 112. (2) (1882) 6 Bom. 598.

(3) (1863) 1 Bom. H. C. R. 22.

are referred to and relied upon by the learned Judges in *Ganpatrav's case*.[1] I do not agree with the learned District Judge that the observation as to the occupancy rights being acquired by the Saranjamdars is an *obiter dictum*. The learned Judges set forth the contention on the point and dealt with it; it was for them to consider whether to decide it or not. As they have decided it, it is a part of their decision. It was open to them to base their decision on an additional and independent ground.

This view has been re-affirmed by Sargent C. J. in *Hari Sadashiv* v. *Shaik Ajmudin*[2]. This decision has been treated by the learned District Judge as not binding on the authority of the decision of the Privy Council in *Shekh Sultan Sani* v. *Shekh Ajmodin*[3].

It is necessary to examine this decision with a view to see whether it touches the point decided in *Hari Sadashiv's case*[2]. In the case before the Privy Council the principal question was whether the Saranjam and Inams claimed as part of the inheritance and property which had belonged to the deceased Sheikh Khan Mahomad were or were not political tenures to which the succession could be dealt with by the Government only at its discretion, apart from any jurisdiction of the civil Courts. There was no point in that case that the particular grant being only of the royal share of the land revenue, the right to the possession of the land did not form part of the Saranjam and that such right was not therefore resumable and regrantable by the Government. No such point having been raised, it was not considered and could not be treated as decided in a manner inconsistent with the decision in *Hari Sadashiv's case*[2]. Though it is not necessary for the purposes

[1] (1885) 10 Bom. 112. [2] (1886) 11 Bom. 235.
[3] (1892) 17 Bom. 431.

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of this case to express any final opinion, it seems from the terms of the grant firstly in the agreement of the 3rd July 1820 with Sheikh Mira II and secondly, in the document evidencing the continuation of the Saranjam in 1827 to Shekh Khan Mahomed II on the death of his father Shekh Mira II, that possession of the lands was given to the grantee on each occasion as part of the grant; at any rate it is not clear that the grant in that case was only of the royal share of the land revenue without any reference to the possession of lands. In a recent case this Court observed with reference to this Privy Council case that a reference to the report of the proceedings in that litigation will show that the lands in suit were held not to be the private heritable and divisible property of the defendants' lessor but to be held on political tenure as part of the Saranjam: see *Trimbak Ramchandra* v. *Shekh Gulam Zilani*[1].

Thus it may be that the terms of the particular grant in the Privy Council case were not before the Court in *Hari Sadashiv's case*[2] which related to the same Saranjam; and it is possible that the grant was then presumed, as it would now appear not correctly, to be a grant of the royal share of the land revenue. But the rule as to the right of the Saranjamdar to acquire occupancy rights when the Saranjam grant relates only to the royal share of the land revenue cannot, in my opinion, be treated as being inconsistent with the decision of their Lordships of the Privy Council in *Shekh Sultan Sani's case*[3].

There is no other decision of the Privy Council or of this Court which is inconsistent with the view taken by Sargent C. J. in *Ganpatrav's case*[4] and *Hari Sadashiv's case*[2].

(1) (1909) 34 Bom. 329 at pp. 338-339.
(2) (1886) 11 Bom. 235.
(3) (1892) 17 Bom. 431.
(4) (1885) 10 Bom. 112.

On the contrary, in the case relating to an Inam both the cases (*Ramchandra's case*[1] and *Ganpatrav's case*[2]) have been referred to with approval on this point: *Rajya* v. *Balkrishna Gangadhar*[3]. Mr. Justice Batty in *Balvant Ramchandra's case*[4] refers to the view of Sargent C. J. with approval.

Mr. Coyaji relied upon the case of *Jamna Sani* v. *Lakshmanrav*[5], but in my opinion the case does not help him. It relates to the Hebli estate and the grant by a Saranjamdar was claimed by the plaintiff as an absolute grant as being good beyond the life-time of the grantor, which the Saranjamdar could not make. The judgment shows that the only question considered and decided was whether a Saranjamdar could make an alienation which would be good beyond his life-time.

It seems to me on an examination of these decisions that the view taken by Sir Charles Sargent C. J. in *Ganpatrav's case*[2] has been accepted in this Presidency, and must be given effect to.

I am, therefore, unable to accept the opinion of the learned District Judge that in the case of a Saranjam grant of land revenue, it is a grant of the land revenue coupled with the right to make the best possible use of unoccupied land and that presumably the whole of it can be resumed. I hold that the Government can resume what they granted as Saranjam, viz., the royal share of the land revenue, and that the right to the occupation of the land subject of course to the payment of the full assessment can and does survive the resumption of the Saranjam. The plaintiff's occupation of the lands in suit cannot be disturbed in consequence of the resumption on Pandurangrao's death and regrant of the Saranjam to Vithalrao.

(1) (1882) 6 Bom. 598.
(2) (1885) 10 Bom. 112.
(3) (1905) 29 Bom. 415.
(4) (1905) 29 Bom. 480 at pp. 498-499.
(5) (1881) P. J. 6.

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It remains now to deal with the two objections based on the Revenue Jurisdiction Act and the Pensions Act.

The portion of section 4 of the Revenue Jurisdiction Act relevant to this case provides that no civil Court shall exercise jurisdiction as to any claim against Government relating to lands granted or held as Saranjam. It is contended for the respondents that the plaintiff's claim is barred by this provision. It would, no doubt, be barred if the right to the occupation of the lands in suit formed part of the Saranjam. But in the view I take of the case it is clear that the lands are neither granted nor held as Saranjam. As the Saranjam grant is limited to the royal share of the land revenue and the occupation of the lands does not form part of the Saranjam, the suit is not barred. The civil Court can well consider the plaintiff's claim to possession subject of course to his paying the assessment or the royal share of the land revenue according to the prevailing rates in the villages. I have already stated that the plaintiff's claim so far as it seeks to recover the Saranjam as a Sarva Inam is clearly barred by this provision. But his claim for possession stands on a different footing. Mr. Coyaji has relied upon the case of *Appaji* v. *The Secretary of State for India in Council*[1], in support of his argument on this point. This case was decided under the first paragraph of Clause (*a*) of section 4 and the judgment shows that the decision is based upon the inference to be drawn from the evidence in the case that the grant had relation to the occupation of lands, and was not confined merely to an exemption from assessment. The plaintiff's vendor in that case was put in actual possession of the land as a reward for his service. I do not think that the decision affords any basis for holding the present

[1] (1904) 28 Bom. 435.

plaintiff's claim barred under the provision of section 4 to which I have already referred.

It was suggested by Mr. Kelkar that the provisions of the Revenue Jurisdiction Act were bad as offending against the provisions of the Government of India Act of 1858 (21 and 22 Vic. Chapter 106). He relied upon the case of *Secretary of State for India* v. *Moment*[1]. The question raised in the general form does not arise in this case. Mr. Coyaji has, however, clearly pointed out that so far as the claims against Government relating to Saranjams are concerned the civil Court's jurisdiction was barred long prior to 1858. It will be enough to refer to the Regulations applicable to the territories with which we are concerned. Regulation XXIX of 1827, section 6, provides among other things that no claims against Government on account of Jaghirs shall be cognizable by the civil Courts; and this provision was extended to the District of Dharwar by Regulation VII of 1830, section 2. By Act X of 1876 these provisions were repealed and section 4, (*a*) so far as it relates to Saranjam or Jaghir was enacted. There is a slight change in the phraseology. But I think the expression "claim against Government relating to lands granted or held as Saranjam" in Act X of 1876 bears substantially the same meaning as the expression "claims against Government on account of Jaghir" in the Regulations.

The objection based on section 4 of the Pensions Act is clearly untenable. This point was not taken in the written statement, and the lower Court did not allow it to be raised at a late stage. We have, however, heard Mr. Coyaji on this point; and it is enough to say that the claim for possession of lands is not within the meaning of section 4 of the Pensions Act.

[1] (1912) L. R. 40 I. A. 48.

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Under section 4 of Act XXIII of 1871, no suit relating to any pension or grant of money or land revenue conferred by the British or any former Government can be entertained by the civil Courts. The claim for the possession of lands subject to the payment of the royal share of the land revenue does not relate to pension or grant of money or land revenue conferred by the British or any former Government. This point has been fully dealt with by Mr. Justice Batty in *Balvant Ramchandra's case*[1] and the judgment in that case contains all the reasons for the conclusion that such a claim is not barred by section 4 of the Pensions Act. Mr. Coyaji has relied upon *Ramchandra* v. *Venkatrao*[2] and *Dattajirao Ghorpade* v. *Nilkantrao*[3] in support of his argument. *Ramchandra's case*[2] has been fully discussed by Mr. Justice Batty in the judgment to which I have just referred, and I desire to express my agreement with the grounds upon which the case is distinguished and not accepted as an authority for the view that a claim for possession of lands falls within the scope of section 4 of the Pensions Act. *Dattajirao's case*[3] was decided on its special facts and does not support the respondents' contention.

No other objection to the plaintiff's claim for possession of the property in suit has been urged on behalf of the respondents.

There has been no argument before us on the points contained in issues Nos. 4, 5 6, 7 and 8 in the lower Court, and they have not been pressed in appeal.

Mr. Kelkar suggested that the grant of the Saranjam to Vithalrao in the life-time of his father Chidambarrao was not valid. But that is a matter which it is not

(1) (1905) 29 Bom. 480 at pp. 490-498. (2) (1882) 6 Bom. 598.
(3) (1914) 39 Bom. 352.

open to the civil Courts to consider: see *Shekh Sultan Sani* v. *Shekh Ajmodin*[1]; and it is clear that in any event Chidambarrao and not the plaintiff could complain of it.

On these grounds I am of the opinion that the plaintiff's claim for possession of the property in suit should be allowed subject of course to the condition that he will be liable to pay the full assessment or royal share of the land revenue according to the prevailing rates in the village to the defendants or rather to defendant No. 2.

There is no reason why the plaintiff should not be allowed mesne profits for three years prior to the date of the suit and future mesne profits. Of course in calculating the mesne profits due allowance must be made in favour of the defendants for the royal share of the land revenue.

As to costs, it is true that the plaintiff put forward an untenable claim to the Saranjam on the footing that it was a Sarva Inam. But the ground upon which he succeeds here was substantially the basis of his claim in the lower Court: and as he has succeeded in his main contention, I think he is entitled to his costs in both the Courts.

I would, therefore, reverse the decree of the lower Court, and allow the plaintiff's claim for possession subject to his liability to pay the royal share of the land revenue. I would further allow him mesne profits for three years prior to the date of the suit, and from the date of the suit to the date of the delivery of possession or the expiration of three years from this date, whichever event first occurs, the mesne profits to be determined by the lower Court. The rest of the plaintiff's claim is rejected.

[1] (1892) 17 Bom. 431.

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The plaintiff must have his costs throughout.

I desire to acknowledge the assistance, which we have received from the very lucid and able arguments addressed to us in this case.

BATCHELOR, J.—I entirely agree both with the conclusion and with the reasons for it.

Decree reversed.

R. R.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor, Mr. Justice Heaton, Mr. Justice Shah and Mr. Justice Marten.

1916. *December* 22.

BAPU APAJI POTDAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3) APPELLANTS *v.* KASHINATH SADOBA GULMIRE (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 54—Agreement for sale of immoveable property—Possession taken under the agreement—No registered conveyance—Suit by vendor to recover possession—Agreement for sale, whether a valid defence to the suit—Agreement capable of specific enforcement at the date of the suit—Specific Relief Act (I of 1877), section 3, illustration (g) and sections 12 and 27—Indian Trusts Act (II of 1882), sections 41, 95.

Where the plaintiff being the owner of certain immoveable property seeks to recover possession of that property and there are no facts operating to his prejudice it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant, who has taken possession under the agreement for sale and is willing to perform his part of it with the plaintiff.

SECOND appeal against the decision of G. K. Kanekar, First Class Subordinate Judge, A. P., at Sholapur, reversing the decree passed by H. V. Kane, Subordinate Judge at Sangola.

* Second Appeal No. 769 of 1914.