

(1947) 08 PAT CK 0019
In the Patna High Court

Markanda mahapatra

APPELLANT

Vs

Varada Kameswar Rao Naidu and Others

RESPONDENT

Date of Decision : 08-08-1947

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Article 148

Citation : AIR 1949 Patna 197

Hon'ble Judges : Sinha, J;Shearer, J

Bench : Full Bench

Judgement

Sinha, J.—This is a plaintiff's appeal from the decision of the learned Subordinate Judge of Berhampur, dated 18th March 1940, dismissing his suit for possession of village Chitrakari Lakshmipuram in the district of Ganjam, which he claimed as his service tenure, as also for ac counts of the usufruct of the disputed property and for payment of such amount as may be found due on such accounting. There was also an alternative prayer that, if the plaintiff were adjudged not to be entitled to the relief claimed, he, along with such other of the defendants second party as may be found to be so entitled, may be granted those reliefs. The following genealogical table, which is not, in dispute between the parties, may be useful in understanding the plaintiff's case and the defendants' pleas in bar of the suit (omitting unnecessary names):

(See genealogical table on page 199.)

2. The plaintiff's case is that the village in question is a service tenure granted to Chitrakar Harekrishna Mahapatra, the ancestor of the

Chitrakar Harikrishna Mahapatro		Jogi Mahapatro		_____		
Samo Nityananda				_____		
Gopmath=Jivan				Nilakantha=Hira	Padmanabha=Dalimo	
		Narasinga Kurmanatha	Lashminarayan	Tarini Chandra Appanna		(d.

issueless) | _____ Dinabandhu Bonamali (D. 5) Basudebo (D. 6) Ballabha
| | | | | Narayan | Simhadri Bbimo | | | | (D. 2) (D. 3) Narayan (D. 4)
Syamasundar | | (D. 7) Brundaban (D. 8) | | | _____

_____ | | | | madanmohan

Lobongi Boroio Lakshman (D. 14) | | | | _____

_____ | | | | | Hari Krishna Gouraohandra Ramalinga

Satrughono Markanda Simhadri Gourahari (D. 9) (D. 10) (D. 11) (D. 13)

(Plaintiff) (D. 15) (died) plaintiff and of the defendants second party, that is to

say, defendants 2 to 15. This grant is said to have been made about 200 years

before the institution of the suit, as would appear from para, 1 of the plaint. But

the documentary evidence would make it out that the grant was made in or

about the year 1700 A. D. by the then Raja of Parlakhemedi as a remuneration

for painting the idols in the temples of Sri Jagannath Swamy in the town of

Parlakhemedi and of Gopinath Swamy in Luhuri. That grant is said to have been

confirmed in 1862 by the Inam Commissioner after making necessary and proper

enquiries, and the title deed was issued in the name of Samo, a grandson of

Harekrishna, and of Gopinath, his great grandson. The grant is claimed to have

been made for public and religious service, and was as such impartible and

inalienable both by law and custom. The office, as a remuneration of which the

said grant is said to have been made, is alleged to devolve upon the person or

persons in the family of the original grantee appointed as chitrakar (painter)

from time to time by the Maharaja of Parlakhemedi in his capacity of the trustee

and Dharniakarta of the aforesaid deities. The plaintiff then made a detailed

statement of the transactions in respect of the inam village between members of

his family and the defendant first party, that is to say, defendant 1 or his

predecessors-in-title, which will be noticed in detail hereinafter. The plaintiff

claims that the usufruct of the village has satisfied the usufructuary mortgages in

favour of defendant 1 or his predecessors-in-title, about ten years before the

institution of the suit. The plaintiff laid his claim on the ground that he had been

appointed by the Maharaja of Parlakhemedi defendant 16 seven or eight years

before the suit when the cause of action is alleged to have arisen. It may be

noted that the suit was commenced in forma pauperis, and the appeal also was

allowed to be prosecuted as a pauper.

3. The suit was contested by defendant 1 only chiefly on the allegations that not

the whole village but only 50 acres out of the village was granted by an ancestor

of defendant 16 to the original grantee as an absolute grant burdened with the

service of painting the idols aforesaid but not for any public or religious service;

that the grant was not inalienable and impartible by law and custom as alleged

by the plaintiff, or that it devolved for the time being on a member of the family

of the grantee appointed as chitrakar; and that, as a matter of fact, all the share-

holders in the grantee's family have been exercising rights of ownership by

alienating their respective shares in the grant by gifts, mortgages and sales to

third parties. Defendant 1 claimed to have acquired absolute title to the property

in suit by a number of private sales by some of the defendants second party or

their ancestors as also by auction-purchase at court sales, as will presently appear. It was also claimed on behalf of defendant 1 that he had acquired rights by adverse possession against the true owners, as he had been possessing the whole village since after 1922 when the usufructuary mortgages had been fully satisfied. It was also pleaded that the suit was barred by limitation and by res judicata in view of certain decisions to be noticed hereinafter in detail. It was also contended that neither the plaintiff nor defendant 16 had any right to sue for possession, as the reversion in the inam was vested in the Government. Some of the defendants second party filed formal written statements supporting the plaintiff's case.

4. The most important issues joined between the parties were: (1) what is the extent of the original grant to the plaintiff's ancestor; (a) what is the nature of the grant and whether the previous decisions between the parties on that question operated as res judicata either against the plaintiff or defendant 1;(3) whether the sales in favour of defendant 1 were valid and binding on the plaintiff; (4) whether the suit is barred by limitation and whether defendant 1 has acquired title by adverse possession; and, lasly, whether the plaintiff is entitled to accounts from defendant 1 in respect of the usufruct of the property in suit.

6. On a review of the evidence, oral and documentary, adduced on behalf of the parties, the learned Subordinate Judge held that the extent of the original grant was only 50 acres, that the rest of the lands of the village were possessed by the plaintiff's family by way of encroachment; that the previous decision of the District Judge of Ganjam could not operate as res judicata against defendant 1 as regards the nature of the grant; that the original grant in respect of the 60 acres was a service tenure for painting the idols, being in the nature of a religious and public service, and was inalienable, and, consequently, the sales were invalid ; but that as regards the remaining lands of the village, which are outside the grant proper and "freehold ordinary joint family property," the sales were valid and binding on the plaintiff and the defendants second party. On the question of limitation and adverse possession, he held that the suit was barred by limitation and adverse possession of defendant 1 in respect of the 50 acres of the inam proper. In the result, he dismissed the suit with costs to defendant 1. The plaintiff was made liable to Government for the amount of court-fees leviable on the plaint.

6. It will be convenient to state in a chronological order the admitted facts of the case or facts which have been proved by unimpeachable documentary evidence. The original grant appears have been made to Chitrakar Harekrishna Mahapatra about the beginning of the 18th century by the then Maharaja of Parlakhemedi for painting the idols aforesaid. The grant was confirmed by the Inam Commissioner after making the necessary enquiries in 1865, and the title deed, Ex. A(2) confirming the grant to Samu and Gopinath, representing the two branches extent of the original grantee's family, was granted in February 1868.

It is stated that Samu and Gopinath were the holders of the inam for the time being, and that.

this inam is confirmed to you and your successors,. subject to the existing quit rent of Rs. 10-0-0 payable to the zamindar per annum, to be held without interference so long as the conditions of the grant are duly fulfilled.

In 1885, three registered usufructuary mortgage bonds were executed in respect of the entire village in favour of Madan Patro as representing; his family. Those documents have not been produced, and the exact terms thereof are not before the Court; but it is said that they were for a term of years. The terms of those mortgages-were extended by fresh mortgages executed in 1899 and 1900.

7. In 1905, Madana Patro aforesaid instituted a suit to recover possession" with mesne profits-against the mortgagors and the members of their family on the allegation that the defendants held the village in three equal shares, and that they had, with the help of the other defendants who were cultivating raiyats, taken wrongful possession of the property, although the plaintiffs were entitled to continue in possession of the property until 1910-11 in liquidation of the entire mortgage debt covered by the three mortgages of the year 1885 and the six mortgages of the years 1899 and 1900. The suit was contested by the defendants on the ground that they had tendered" the mortgage money outstanding on those transactions. But the Court (District Judge of Ganjam) decreed the suit, holding that the tenders were not valid, and that the defendants should pay to the plaintiffs the amount found due within the time fixed by the Court, and that, in default of such payment, the plaintiffs be placed in possession of the mortgaged property until the debt was discharged. From this decision of the trial Court, dated 30th September 1907, an appeal was preferred to the Madras High Court by one Baya Sao, who was the transferee from the original plaintiff. The judgment of the High Court is Bx-D, from which it will appear that the decision of the trial Court was reversed, and the plaintiff, appellant was held to be entitled to continue-in possession until the mortgage dues had been satisfied. The judgment of the High Court is dated 7th March 1911.

8. In pursuance of the decree of the High-Court, delivery of possession was given to Baya Sao on 5th March 1914. In the meantime in the years 1908 and 1909 nine simple mortgage bonds-appear to have been executed by different branches of the family of the grantee in favour of defendant 1, or Baya Sao, or some other, persons who may be described as the predecessors-in-interest of defendant 1. Between the years 1914 and 1918, six sale-deeds were executed by some of the defendants second party in respect of one-ninth share each in the village in payment of the simple mortgage bonds executed by them respectively. In 1946, some of the defendants who had not executed sale-deeds in respect of their shares, instituted a suit, being Suit No. 74 of 1916, for declaration that the sale-deeds of the years 1914 and 1915 in respect of four-ninths share in the equity of redemption were invalid. One of the issues raised in that suit was whether the

village was alienable and partible, and the Court was inclined to hold that the inam was inalienable and impartible, though the plaintiffs in that suit had admitted that the produce had been divided into nine shares for the nine branches of the family then in existence. The Court held, in the result, that defendant 6 was in possession as transferee of the rights of the mortgagee-decree-holder in the suit which went up to the Madras High Court, as aforesaid, and as such the plaintiffs' suit for possession must fail.

9. As the suit was dismissed with costs to the contesting defendant, who was defendant 6, he could not have gone in appeal from the judgment in which the finding was recorded by the Court in favour of the plaintiffs to the effect that the inam was inalienable and impartible. This has been sought to be utilised as *res judicata* in this suit also against defendant 1 who was defendant 6 in that suit. In 1919, some of the defendants, including the plaintiff's father, who had not executed sale-deeds in respect of their remaining three-ninths in the equity of redemption, made an application u/s 47, Civil P.C., which was registered as E.A. 87 of 1919, for accounts and for possession on the ground that the mortgage decree passed by the Madras High Court, as stated above, had been satisfied. This case, along with E.A. 29 of 1921, was heard by the District Judge of Ganjam who held that the mortgage dues as ordered by the Madras High Court had not been satisfied until the end of 1330 Fasli as claimed by the applicant-judgment-debtors. In that view of the matter, the application stood dismissed by the District Judge's order dated 5th May 1923. In the meantime, defendant 1 as plaintiff instituted two suits, being Suit No. 3 of 1922 and Suit No. 4 of 1922, for enforcing the mortgages executed by the defendants in those suits in respect of one-ninth and two-ninths share in the equity of redemption. Those suits were decreed, the first on contest and the second *ex parte*.

10. Delivery of possession appears to have been taken of the two ninths share on 28th March 1924, (*vide* Ex. 3(f)) and of the one-ninth share on 22nd November 1924, (*vide* Ex. 3(j)). Thus, by that time defendant 1 had obtained sale deeds in respect of six-ninths and auction sales resulting in delivery of possession in respect of the remaining three-ninths share in the equity of redemption. On the basis of these transactions, defendant 1 claims that the families of the plaintiff and the defendants second party have lost all interest in the village, even the equity of redemption, in respect of the usufructuary mortgages which formed the subject-matter of the suit which went up to the Madras High Court, and which the District Judge had held to be subsisting until May 1923. On the other hand, these transactions of sale and auction sale and delivery of possession have been attacked by the plaintiff as invalid and, at any rate, inoperative to affect his interest, that is to say, of the holder of the inam service tenure for the time being, on the footing that he acquired the right to sue by virtue of the appointment to the office of painter in 1931, about seven years before the suit was instituted on 12th April 1938. On the other hand, on behalf of the contesting defendant, it has been contended that the plaintiff's claim is barred by *res judicata* by virtue of the decision, though *ex parte*, in suit No. 4 of 1922, of the

Subordinate Judge's, Court of Berhampur. He also claims the property by adverse possession since after the alleged full discharge of the usufructuary mortgages sometime in 1922.

11. The first question which was raised in this Court on behalf of the appellant, as the finding of the learned Subordinate Judge was against him, was the question of the extent of the inam grant. (After discussing the evidence his Lordship concluded that the whole village, and not only 50 acres in the village, constituted the grant. His Lordship proceeded:)

12. The next question that arises for consideration is the nature of the grant which admittedly was made about the beginning of the eighteenth century to the common ancestor of the plaintiff and the defendants second party. According to the plaintiff, it was a Devadayam Mokhasa village granted by the then Raja of Parlakhemedi for rendering the "religious service" of painting annually the idols already referred to. It was also alleged by the plaintiff that the inam, being for public and religious service is inalienable and impartible both by law and custom, and it devolves on the person or persons in the family of the grantee appointed as chitrakar from time to time by the Maharaja of Parlakhemedi, and that the income of the village was in lieu of the services to be rendered by them. It was also stated that the other members of the family excepting those discharging the services referred to above had no right to possession or enjoyment of any interest in the village, the same being a mokhasa village and as such impartible and inalienable. Those are all the allegations in the plaint bearing on the nature of the grant. It was further averred that, in 1862, the grant was confirmed by the Inam Commissioner on condition of rendering the services for which the grant had originally been made. On the other hand, the contesting defendant denied that it was devadayam or was meant for religious services or that it was for public and religious purposes and as such inalienable and impartible or that the inam devolved on a member of the family of the grantee appointed as chitrakar from time to time or that the other members of the family had no right to the lands or the emoluments as alleged in the plaint, Though it was admitted by defendant 1 that it was "an absolute grant burdened with the service of painting the idols", it was an inam which was alienable and partible in which all the members of the family were interested as share-holders, and had been dealing with the property with third parties by gifts, mortgages and sales. Hence, in the words of the Judicial Committee, according to the plaintiff, it was "the grant of an office the performance of whose duties was remunerated by the use of the lands of the village"; whereas, according to the defendant, it was "the grant of an estate burdened with a certain service."

13. The best evidence to determine this question would have been the original document, if any, whereby the grant was made. But, according to the earliest document on the record, Ex. B, it was stated by the then holder of the inam Samo Mahapatra, that "the pattas "checkbandi" etc., documents relating to this were lost during the Maharata insurrections". According to this earliest statement

of the then holder of the village made in respect of the state of affairs up to 1261 Fasli (1851 A. D.), the grant was made:

For being enjoyed permanently, to one chitrakari (painter) Harekrishna, the ancestor of the present Mokhasadar, for rendering services as painter.

This earliest description of the nature of the grant by the grandson of the original grantee is more consistent with the view that it was the grant of an estate burdened with the service of painting the idols, and not the grant of an office the performance of whose duties was to be remunerated by the usufruct of the lands of the village.

14. Learned Counsel for the appellant laid great stress on the last sentence in that statement to the effect that "this village has at present been in the enjoyment of the present Mokhasadar in order of succession." In my opinion, this statement is rather equivocal: it may be consistent with either view of the matter. The term "succession", on which particular stress was laid, may be used in the sense of succession to the office or of succession to the property by inheritance. In the extract from the Inam Register of the village of 1271 Fasli (1861 A.D.), vide Ex. I(a), the inam is shown as hereditary, and "the present holders" of the inam were Samo and Gopinath in equal shares. In Ex. I(b), extract from the Inam Register of the year 1866, the same two persons are shown as holding the inam, the classification of the inam being "painting service". The subsequent transactions, including the enquiry by the Inam Commissioner, or his assistants, proceed on the assumption that it was a service tenure of a religious nature. Hence, the title deed, which followed the enquiry aforesaid by the Inam Commissioner, was granted to Samo and Gopinath as "holders of the inam for the time being", upon which great stress was laid by counsel for the appellant. He also emphasised the fact that, according to the recitals in this document of title granted by the Inam Commissioner:

This inam is confirmed to you and your successors...so long as the conditions of the grant are duly fulfilled.

15. Learned Counsel for the plaintiff-appellant contended that the grant was to successors, and not to assigns also, thus indicating, according to his contention, that it was not to be transferable. This contention may be sound so far as it makes the grant inalienable; but it does not throw any light on the question of whether it was a grant of an office as distinguished from the grant of an estate. As the original title deed evidencing the grant is not forthcoming evidence of subsequent dealings with the property may be admissible to show the nature of the grant. With reference to the genealogical table of the family of the grantee, it would appear that out of four branches of Jogi Mahapatra, only two are extant. In the documents referred to above, Samo of the one branch and Gopinath of the other branch were shown as owning an equal share in the village; but in the mortgage transactions of the year 1885, referred to above, instead of the two branches owning half and half, the property is shown as being possessed in three

equal shares, one share by one branch and two shares by the other branch, by some process not known to law nor explained in the evidence in this case, and, in the mortgage transactions of the year 1908 and 1909, nine simple mortgage bonds, each in respect of one-ninth share in the village, were executed, and the subsequent transactions of sale either voluntary or involuntary proceed on the same basis of each branch having one-ninth share, that is to say, accepting the previous division of the property in three equal shares. These transactions, if they are any evidence of the nature of the original grant, would indicate that the property was not certainly impartible, though it may have been in-alienable. Such a state of affairs would be inconsistent with the plaintiff's case that the grant created an office which was to be remunerated by the usufruct of the village, because an office presupposes an appointment following a certain rule of succession, if the office were to be hereditary. It is common ground between the parties that the grant was to the family; according to the plaintiff, it was one or more members of the family to be nominated by the then Raja of Parlakhemedi, who should hold the office of the painter; whereas, according to the defendant, the grant was to the entire family, and every member of the family was entitled to render the service without there being any occasion or necessity for making a nomination by the Raja.

16. Ordinarily, if the grant meant to create (an office, it would also indicate the rule of succession to the office, and ordinarily such a rule is lineal primogeniture. But in this case the plaintiff is not the eldest in the eldest line; as a matter of fact, he is the eldest in the youngest line of the younger of the two branches. The plaint also is silent as to the course of devolution of the office. Impartibility presupposes the existence of a rule of succession whereby the office is to be held by a certain determined person holding the office for the time being. But there is no indication in the pleadings or in the evidence of any such course of devolution. On the question of appointment also we have the evidence of the plaintiff as p. w. 1. Though he speaks of his own appointment as the holder of the office, he does not speak of the appointment of his predecessors in office *eo nomine*. He speaks of his father, his uncle and his grandfather, thereby meaning Gopinath, as doing the work of painter before him. But his evidence that only one man holds the office at one time, and that he has to be selected from the family, presumably by the Raja, is not borne out by the documentary evidence on the record, inasmuch as the documents, already referred to, speak of Samo and Gopinath being holders for the time being simultaneously. Hence, his statement that only one man holds the office at a time does not appear to be correct. Similarly, his evidence that the income of the Mokhasa (service tenure) is enjoyed by the office holder to the exclusion of the other members of the family is wholly contradicted by the documentary evidence already referred to. Since 1853, as we have seen, the indications in the record are that the property in question was held by two branches of the original grantee's family, subsequently the property came to be held by three branches in equal shares not strictly in accordance with the rules of Hindu law of inheritance, and later still by

nine sub-branches of the family. This would go to show that the evidence that the property is held by one member of the family at a time and is enjoyed by him as the holder of the office for the time being is not correct. Hence, in my opinion, there is no satisfactory and sufficient evidence in support of the allegation that the grant related to an office which was remunerated by the usufruct of the village, only one member of the family holding the office to the exclusion of the others either in the discharge of the duty attaching to the grant or in the enjoyment of the property. It is, therefore, not surprising that it was conceded by the lawyers for the parties at the trial, as it appears at p. 29 of the paper-book, that the grant was of land burdened with service, and that it was Government, and not the zamindar, who could resume the grant on failure to perform the service. These concessions in so far as they may be said to be on questions of law, are not binding on the parties; but, in so far as they are estimates of the evidence on the record, they may be said to be conclusions on questions of fact.

17. It may also be relevant to note that the statutory provisions in the Madras Presidency made from time to time relative to public offices held in a village do not admittedly apply, nor have they been shown ever to have applied, to the grant in question. Madras Regulation xxv of 1802 or Madras Regulation VI of 1831 or Madras Act II[2] of 1894 and Madras Act III[3] of 1895 do not apply to the present case. If those provisions had been applicable, other considerations would arise as would appear from the judgment of Varadaohariar J. in the case of Nidadavole Ramalingam v. Nidadavole Veerabhadradu AIR 1935 Mad. 914. These statutory provisions being out of the way the case has to be decided with reference to the evidence on the record and the case law bearing on the question of the nature of the tenure in this case.

18. Sir Lawrence Jenkins C.J. in the case of Lakhamgavda v. Keshav Annaji 28 Bom. 305 has summarised the case law in these words:

The cases appear to us to establish that the combination of an interest in land and an obligation as to service may fall at least under three heads; there may be a grant of land burdened with service, there may be a grant in consideration of past and future services, and there may be the grant of an office the services attached to which are remunerated by an interest in land.

And he further ruled that in either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required; but, in the absence of a provision to that effect, lands held under those grants are not resumable at all. In the present case the question of resumability does not arise.

19. One of the earliest cases of the Madras High Court decided by a Pull Bench was the case of Venkatas v. Rama 8 Mad. 249. It related to a hereditary village office and the result of enfranchisement of the in am lands. In the course of his judgment, Turner C.J. observed that, under Regulation VI of 1831, the

emoluments attached to the office of village karanam were wages for the performance of public duties, and further observed as follows:

When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue Authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument.

20. With reference to the question of alienability and partibility, he made the following observations:

Although Regulation II of 1806 had expressly declared that the lands attached to the office should be inalienable from the office, it happened in some instances that while one member of a family was recognized as the office holder, other members enjoyed parts of the inam binds which constituted the emoluments of the office. This enjoyment was not and could not be recognized as legal (Circular Orders, Board of Revenue, 26th October 1858; 19th March 1852; Maclean's Standing Orders of the Board of Revenue, page 244; *Alyamalumm v. Vencatoovian* 2 M.S.D. 85, and could only be held by sufferance on the part of the persons actually appointed to the office.

These observations may have been of some assistance to the appellant in the sense that it may have been argued on his behalf with some amount of plausibility, as was attempted to be done by learned Counsel for the appellant, that the instances of dealings with the property in specific shares were mere attempts by other members of the family to assert a title which was not vested in them. But the argument can avail only when it is satisfactorily proved that an office was created in the present instance, and the usufruct of the village was only meant to be the emoluments of the office. But, as already indicated, in this case there may have been the office of painter, but there is no indication in the documentary evidence, in this case that it was to be a particular person following a particular line of devolution: on the other hand, the indications are that the entire family was beneficially interested in the inam lands and perhaps collectively responsible for the due performance of the duties, the rendering of which was condition precedent to the holding of the inam lands.

21. The decision of the Full Bench of the Madras High Court, referred to above, had been adversely criticised in later decisions of the same Court in *Subbaraya Mudali v. Kamu Ghetty* 23 Mad. 47 and *Gunnaiyan v. Kamahchi Ayyar* 26 Mad. 339; but the Judicial Committee of the Privy Council in the case of *Musti Venkata Jagannadha v. Musti Veerabhadrayya* AIR 1922 P.C. 96 approved the Full Bench decision in *Venkata v. Rama* 8 Mad. 249, and disapproved those in the two later cases, referred to above. In the course of their judgment, their Lordships of the

Judicial Committee made the following pertinent observations:

It is accordingly clear that since that time in Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

On the other hand, in the present case it is both parties' case that the lands are held on a hereditary basis, and none but a member of the family can discharge the duties attaching to the holding of the tenure. The plaintiff has nowhere made out the case that it is open to the Raja of Parlakhemedi to appoint a stranger to the plaintiff's family to perform the duties attaching to the tenure. Hence, in my opinion, it cannot be said that the original grant created an office, and the lands of the village in question were only meant as a remuneration for the services to be rendered by the holder of the office for the time being.

22. If the grant did not create an office, but created a tenure in land burdened with the performance of certain services can it be said that the lands comprising the tenure could be alienated without reference to the service? In this case the service was of a religious and public nature in so far as the painting of deities in the two religious establishments containing the temples could not be done by anybody and every body, and the temples are open to public. According to the plaintiff's evidence, the painting could be done by persons of a class who could be allowed to touch the deities, and, therefore, the permission of the Raja was necessary. Furthermore, painting of the deities in question required knowledge of the technique, as described by the plaintiff in his evidence, and naturally, therefore, it was of specialized nature. That is a reason why the plaintiff's family, being painters by hereditary profession, was commissioned by the then Raja of Parlakhemedi to perform those services. In the nature of things, therefore, as the usufruct of the lands went with the service, which was to be confined to the plaintiff's family as chosen by the Dharmakarta, the properties could not be allowed to go out of the family. If the properties were transferred to persons not qualified to perform the duties attaching to the tenure, the very object of creating the tenure would be defeated. Hence, apart from considerations of precedents, in my opinion, it is clear that the lands comprising the tenure are inalienable.

23. In the case *Neti Anjaneyalu v. Sri Venugopal Rice Mill Ltd.* AIR 1922 Mad. 197 it was held by a Full Bench that lands held on temple service tenure are not subject to attachment in execution of a decree, as the sale of such lands is opposed to public policy and the nature of the interest affected. Their Lordships in that case approved the previous decisions of that Court in the cases of *Pakkiam Pillay v. Seetharama Vadhyar* V M.L.J. 134 (relating to a spiritual office in a village); *Govinda Goundar v. Ramien* AIR 1915 Mad. 335 (relating to a

service inam for the performance of service in a temple); and Venkataranga Charlu v. Krishnamma Gharlu 12 I.C. 710 (the exact nature of the service inam not being clear from the report). In the case of Subbayya v. Settipalli Ramayya A.I.R.1925 Mad. 1046 it was held by a single Judge of that Court, following the decision in Neti Anjaneyalu v. Sri Venugopal Rice Mill Ltd. AIR 1922 Mad. 197 that Devadayam inam lands are inalienable. A Division Bench of the same Court decided in the case of Kadiyala Baswayya Naidu v. Munisami Reddi AIR 1925 that the inamdar cannot effect a valid sale of the inam property, and that such a sale is not valid even during his life time, though it is legal for him to alienate lands burdened with public services temporarily by way of a lease for a term. The nature of service to be rendered by the inamdar was that of musicians in a temple. Their Lordships relied upon the observations in the Full Bench decision reported in Neti Anjaneyalu v. Sri Venugopal Rice Mill Ltd. AIR 1922 Mad 197).

24. Other instances of inalienable service inams are reported in the case of Sundara Raju v. Seshadri AIR 1928 Mad. 35 (archakam service inam); in the case of Velu Pillai v. Secretary of State AIR 1928 Mad. 852 (relating to an inam granted for the support of the piper of a temple at Madura); in the case of V.E. Ramanathan Chettiar v. Kalidasa Kavandan AIR 1936 Mad. 559 (temple service inam); in the case of Soora Ramakrishnamma v. Pasumarti Verikata Subbiah AIR 1935 Mad. 252 (Desabandham inam, that is, grant of land or of revenue as compensation for the construction of a tank, well or channel); and in the case of Lakshmadu v. Ramudu AIR 1939 Mad. 867 following the cases reported in Soora Ramakrishnamma v. Pasumarthi Venkata Subbiah A.I.R 1935 Mad. 252 V.E. Ramanathan Chettiar v. Kalidasa Kavandan AIR 1936 Mad. 559 and Gokavarapu Swami v. Satheyya AIR 1936 Mad. 283. The last case of Gokavarapu Swami v. Satheyya AIR 1936 Mad. 283 was the decision of a Full Bench of the Madras High Court in which their Lordships held that the attachment of the standing crop on the potter service inam land in execution of a decree is contrary to law in view of the provisions of Section 5 of Madras Act III [3] of 1895. Hence, this case stands on a special footing, and those considerations do not apply to the present case. But, all the same, the preponderance of judicial authority appears to be in favour of the view that service inams, whether they are tenures in land burdened with service or are in the nature of a service to be remunerated by the usufruct of the land, are inalienable. The distinction between those two kinds of service tenures may be relevant on the question of resumability or of whether the holder for the time being holds in his own rights by virtue of appointment or through his predecessor by way of inheritance. This distinction will have to be discussed when the question of res judicata and adverse possession will be canvassed hereinafter. Hence, this case will have to be decided on the footing that the tenure created not an office to be remunerated by the usufruct of the land but was a tenure in land burdened with the service aforesaid. That being so, each successive holder must be deemed to hold the tenure not by virtue of appointment of the incumbent as upon a vacancy but by virtue of his succeeding to the tenure by inheritance.

25. The next question to be determined is the plea of res judicata. So far as the plea is raised against defendant it rests on the decision: of the District Judge in Original Suit No. 5 of 1917 in which some members of the plaintiff's family, including his father, had sued the other members and defendant 1 for a declaration that the sales in favour of defendant 1 were invalid. The finding in that case was that the village was a religious service tenure which was not alienable and partible. This finding has been sought to be used as res judicata against defendant 1. But the answer to this plea of res judicata is that the suit was dismissed on the finding that the plaintiffs had no right to sur, inasmuch as they were estopped by their own transactions of the mortgages aforesaid from questioning the alienations. As the "suit was dismissed, the successful defendant could not have gone up in appeal to have the adverse finding on the issue of res judicata set aside. Hence, it is perfectly clear that the plaintiff cannot successfully urge the plea of res judicata against defendant 1. On the other hand, the decision in Original Suit No. 4 of 1922 is sought to be used as res judicata against the plaintiff, who was a party to that suit. The learned Subordinate Judge had held, on the authority of the decision of their Lordships of the Judicial Committee in Jalandhar Thahur v. Jharula Das AIR 1914 P.C. 72 that the decision, albeit an ex parte decision in that suit, was not res judicata against the plaintiff, inasmuch as he was claiming in his own rights as successor to the office of painter. In my opinion, this finding is not correct. Having already held that the tenure in question was not an offence but a hereditary interest in land subject to rendering of service, the plaintiff cannot be said in law to have acquired an interest in the property except by inheritance. In the mortgage suit, the plaintiff's father and the plaintiff himself could have and should have pressed the issue which was raised in the written statement to the effect that the tenure was a religious service inam, and, therefore, not inalienable; but that issue was not pressed, as the defendants kept ex parte. If the issue had been pressed, it would have been a very material issue to be determined in that case before the mortgage suit could have been decided one way or the other. The learned Subordinate Judge has observed that for all practical purposes the plaintiff at that time was a stranger to the property, and, therefore, he could not have pressed that issue to a decision. In my opinion, in view of the findings already recorded as to the nature of the tenure in question, the reasoning of the learned Subordinate Judge on the issue of res judicata cannot be supported.

26. The next important question which falls to be determined is whether the private sales in respect of the six-ninths share and the auction sales in respect of three-ninths share in the tenure were valid and binding on the plaintiff. Before this question is tackled, it is necessary to determine the validity of the earlier mortgages by virtue of which the defendant had been holding possession of the property. The tenure having been held to be inalienable, it cannot but be held that those usufructuary mortgages were invalid. But it has not been questioned by the appellant that the mortgagee, having continued in possession for more than twelve years, had acquired a title by adverse possession and such

mortgagee. Hence, by the year 1898, the mortgagee had acquired by lapse of time the status of usufructuary mortgagee notwithstanding the finding as regards the inalienable character of the tenure. Thereafter, the different branches of the family created simple mortgages in favour of different persons whose interests now vest in defendant 1. Those mortgages merged in the subsequent sale-deeds in respect of two-thirds interest in the tenure and auction sales in respect of the remaining one-third. But these subsequent simple mortgages and sales, either voluntary or involuntary, must all be equally held to be invalid. Those transactions, therefore, are not binding on the plaintiff. The question whether the plaintiff can get rid of those transactions must depend upon the answer to the question whether or not the suit is barred by limitation and adverse possession of defendant 1 for more than twelve years subject of course to the decision on the issue of *res judicata*.

27. It has been argued on behalf of the appellant that the well-recognised principle "once a mortgage always a mortgage" must be applied in its full force to the present case. The argument is put like this. Defendant 1 or his predecessor in title acquired the status of a usufructuary mortgagee in respect of the entire tenure by the end of the year 1898, as already indicated. The plaintiff would have sixty years under Article 148, Limitation Act, to redeem those mortgages, and whether the sixty years is counted from 1885 or 1898 the present suit cannot be said to be out of time. This argument assumes that the equity of redemption was still intact, ignoring the sales in respect of two-thirds interest in 1914-1915 and the auction sales in respect of one-third in 1924. Learned Counsel for the appellant contended that these transactions were invalid and that, therefore, the defendant's possession as usufructuary mortgagee continued in spite of those invalid sales. He very strongly relied upon the decision of their Lordships of the Judicial Committee in the case of *Khierajmal v Daim* 32 I.A. 23. In that case their Lordships held that the equity of redemption still subsisted, inasmuch as some of the heirs of the original mortgagees were not parties to the suit, and, therefore, the Court had no jurisdiction to sell their interest in the mortgaged property. On the question of possession, their Lordships made the following observations:

Bat there have been no separate dealings with the equity of redemption as a distinct subject of property. Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar of defence to a suit for redemption if the parties are otherwise entitled to redeem.

In that case on a consideration of the facts and circumstances peculiar to that case, their Lordships came to the conclusion, which was a mixed question of law and fact, that the equity of redemption in respect of a portion was still

outstanding.

28. But, in my opinion, the facts and circumstances of this case are not similar to those of the case before their Lordships. In the present case, the mortgagors have themselves entered into several transactions purporting to extinguish the equity of redemption, thus converting the possession so far held as mortgagee into that of a vendee. It is true the transactions of sale, as already indicated, were invalid. But even an invalid transaction supported by possession for the statutory period confers the right purported to be created by the invalid transactions. It was further argued by learned Counsel for the appellant that it was held by the District Judge in May 1923, that the usufructuary mortgages were still subsisting. It was argued on the basis of that judgment that, in the first place, defendant 1 did not put forward his claim as a vendee, and, secondly, that, whatever his claim was the finding inter partes was that the usufructuary mortgages still subsisted. It is true that defendant 1 did not put forward his purchases of the years, 1914-15; but it must be remembered that the litigation was a continuation of the suit which went up to the Madras High Court for possession by the usufructuary mortgagee as such. That litigation had commenced in 1905 as a result of the dispossession by the mortgagor, and that litigation was fought throughout on the basis of the relationship of mortgagors and mortgagee. Secondly, it has also got to be noted that the mortgagee had not entirely wiped out the equity of redemption until he purchased the one-third share at auction in 1921. Hence, it was in the interest of the mortgagee to use as a shield his usufructuary mortgages against the claim of the plaintiff and his family for possession of the property which was made on the footing that the mortgages had been satisfied out of the usufruct since after the judgment and decree passed by the Madras High Court in 1911.

29. It was further contended on behalf of the appellant that defendant 1, never asserted his title as a purchaser except in the present litigation. But it must be remembered that defendant 1 obtained delivery of possession in 1924 in execution of decrees passed in original suits Nos. 3 and 4 of 1922. It should also be noted that in the case which went up to their Lordships of the Judicial Committee, *Khia Rajmal v. Daim* 32 I.A. 23 there was no evidence of any delivery of possession as purchasers; whereas in this case formal delivery of possession was taken through-Court once in respect of two-ninths and again in respect of one-ninth share in the tenure on the assumption that the remaining six-ninths or two-thirds share had already passed as a result of the private sales. It was further pointed out on behalf of the appellant that there is no evidence of any change in the character of possession in respect of the remaining two-thirds share which were purported to have been dealt with by the private sales. That is so. But it has been rightly pointed out on behalf of the respondents that, where the mortgagor and the mortgagee both agree by a consensual act that the possession hitherto held as mortgagee should now be held as vendee, such a transaction is tantamount to delivery of the property by the vendor to the vendee.

30. Reliance was placed in this connection on the decision of a Full Bench of the Allahabad High Court in *Sohan Lal and Others Vs. Mohan Lal and Others*, . In that case their Lordships considered a large number of decisions including two decisions of their Lordships of the Privy Council in the case of *Khiaranjmal v. Daim* 32 I.A. 23 and in the case of *Corea v. Appuhhamy* 1912 A.C. 230. Their Lordships have made the following observations at p. 1008.

The case, however, is different where a change in the character of the possession is brought about by an agreement between the parties or with their express consent, as distinguished from a mere acquiescence. I do not see why, if both parties agree and intend that from a particular date the possession of the mortgagee over the property should cease to be that of a mortgagee and be adverse as against the mortgagor, such a change cannot be recognized or be effectual. As a result of the act of both the parties, a person may have adverse possession even though he also has a legal title as a co-sharer or mortgagee.

This case entirely supports the contention raised on behalf of the respondents. To the same effect are the decision of the Madras High Court in *Kandaswami Mudaliar v. Ponnuswami Mudaliar* AIR 1929 Mad. 16 and *Usman Khan v. N. Dasanrta* A.I.R .1914 Mad. 578.

31. It is well recognised principle that a mortgagee cannot, by a mere assertion of his own or by a unilateral act on his own part, convert his possession as mortgagee into that of an absolute owner. But where, as in the present case, the bilateral acts of the parties, referred to above, though invalid and, therefore, inoperative to convey title on the dates of those transactions, would operate to give adverse possession which, if continued for the statutory period, would ripen into a good title. A Division Bench of the Court in the case of *Baldeo Singh v. Shekh Muhammad Akntar* AIR 1939 Pat. 488, has recognised the principle that in proper casts it is open to the Courts to find that there was such an acquiescence on the part of the, mortgagor as amounted to a release of the equity of redemption. In other words, where both the mortgagor and the mortgagee agree by a transaction, to which they are parties, that the character of possession as mortgagee should change into that of possession as absolute owner in spite of the invalidity of the transaction to convey title at once, the possession so given can operate on the expiry of the statutory period to create title by adverse possession.

32. In this connection reliance was placed by learned Counsel for the appellant on the decision of a Division Bench of this Court in *Mir Wajid Ah v. Alidad Khan* AIR 1940 Pat. 45. But in this case as in the case of *Khiarajmal v. Daim* 32 I.A. 23, the equity of redemption was purported to be sold out by auction sale to which one of the cosharers was not a party, and their Lordships held that the equity of redemption was wiped out in respect of the shares" of those cosharers, who were parties to the mortgage decree, but that the share in the equity of redemption belonging to the other co-sharer, who was not represented in the mortgage action, still remained intact in spite of the lapse of more than twelve

years. Unlike those cases, in the present case it is the consensual act of the parties, and not merely the unilateral assertion of the mortgagee alone, which has the effect of wiping out the equity of redemption. Reliance was also placed on the provisions of Section 60, T.P. Act, especially the proviso to the effect that the right conferred on the mortgagor to redeem the property continues until it has been extinguished by act of the parties or by a decree of a Court. It is contended that the right of redemption has not been extinguished in this case either by act of the parties or by a decree of a Court. That is so. But the act of the parties, coupled with possession for more than twelve years after that act, has the same effect as the act of the parties, if that act were valid (invalid?) in law.

33. It was also contended that there has been no decree of the Court holding that the right of redemption has not been barred. But, if, as a result of the court sales in respect of the one-third interest in the tenure, the defendant acquired an inchoate right (assuming that it was 30 in spite of *res judicata*), it ripened into a full right of absolute ownership by lapses of the statutory period. Though the section does not speak of extinguishment of the right of redemption by operation of law, as distinguished from act of parties or by decree of Court, it is clear on the authorities that it may take place by operation of law, for example, where the mortgagee acquires the equity of redemption by inheritance or by adverse possession or the mortgagor acquires the mortgagee's right by inheritance. Hence, though the adverse possession in favour of defendant 1 did not begin to run from 1914-15 as a result of his purchases, as the one-third share in the equity of redemption remained outstanding, his acquisition of those outstanding shares in the equity of redemption in 1924 would start the running of time by way of adverse possession in that year, and the suit, having been commenced in April 1988, is barred by time under Article 144, Limitation Act.

34. It was contended on behalf of the appellant that time would begin to run against the appellant only from the year 1931 when he was appointed to the office of painter. But this argument is based on the assumption that each successive holder of the office gets a fresh start of limitation, for which, in my opinion, there is no warrant. In view of my finding that it was not an office which was created by the grant but a tenure inland burdened with service, no question of each successive holder can arise, because each succeeding holder of the tenure acquires it through its predecessor and not independently of him.

35. It was also contended on behalf of the appellant that Article 148, Limitation Act, and not Article 144 would apply to the present case. Article 148 would apply to a case where the right to redeem or to recover possession is still intact. But, if I am right in holding that defendant 1 has acquired the right of full owner by adverse possession for more than twelve years, there is no equity of redemption outstanding on which Article 148 could operate. If nothing had happened after the creation of the usufructuary mortgages in 1885, or their extension 14-15 years later, the equity of redemption would still have been outstanding. But the

events which have happened, namely, the simple mortgages in 1908, sale-deeds in 1914-15 and the auction sales in 1924 and the delivery of possession thereunder, have, as already pointed out, the effect of extinguishing the equity of redemption. In that view of the matter, it must be held that the suit is barred by limitation and adverse possession.

36. In view of the findings recorded above, it must also be held that the plaintiff, or any other member of his family, is not entitled to accounts and to other reliefs by way of recovery of money on the foot of the usufructuary mortgages aforesaid. It must also be held that the Court below was right in holding that the plaintiff was entitled to no relief, and that the suit had been rightly dismissed with costs.

37. As a result of these considerations, the appeal must be dismissed with costs. There must also be a decree against the plaintiff-appellant in favour of the Government for the amount of court-fees leviable on the memorandum of appeal in this Court.

Shearer J.

I agree.