Before Mr. Justice Birch and Mr. Justice Mitter.

UDDOY ADITTYA DEB (PLAINTIFF) *v.* JADUBLAL ADITTYA DEB (DEFENDANT).* 1879 *April* 8.

Mokarari Khorposh—Maintenance Allowance—Alienation—Impartible Estate.

The mere fact of the impartibility of an estate, or rather the mere fact that the succession to a zemindari is governed by the law of primogeniture, does not deprive the zemindar of his ordinary right to alienate it, or any portion of it, during his lifetime. Accordingly an ordinary mokarari lease, granted by a zemindar of lands forming portion of a zemindari, the succession to which is governed by the law of primogeniture, is valid, and the lands comprised in it, cannot be resumed on the death of the grantor by his successor. But a mokarari khorposh, or allowance for maintenance, or an estate for life in lieu of maintenance, granted by the owner of a zemindari impartible by special custom, but otherwise subject to Bengal law, to a member of his family, is resumable by his successor on the death of the grantor.

IN this case the zemindar (titular raja) of Patkoom sued to recover possession of lands held by the defendant, who was his younger and half-brother, under two instruments, both admittedly genuine,—one a mokarari patta, dated the 19th of Bysack 1275 (30th April 1868), the other a mokarari khorposh patta, or patta granted by way and in lieu of maintenance of 16th Aughran (30th November 1868) of the same year.

The grantor in both cases was the zemindar and titular raja of Patkoom, and the father of both the plaintiff and the defendant.

The first of these instruments, that namely of the 19th Bysack 1275 (30th April 1868), purported to be a mokarari grant, executed in consideration of the sum of Rs. 1,200 paid by the defendant Jadublal Adittya Deb, its effect being to assign to him and his descendants two villages, at a fixed annual rent of Rs. 85-10-2-2.

* Appeal from Appellate Decrees, Nos. 1518 and 1474 of 1878, against the decrees of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 6th May 1878, affirming the decree of Lieutenant-Colonel B. W. Morton, Deputy Commissioner of Manbhoom, dated the 30th July 1877.

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The second, that of the 16th Aughran 1275 (30th November 1868) was, what was known in the district of Manbhoom, where the property was situated, as a mokarari khorposh, or maintenance grant. It recited that eight villages had been previously assigned to Jadublall Adittya Deb for his maintenance as hakim,* and that it being desirable that the assignment should be formally recorded, this deed was accordingly executed. By it eight villages were made over to the defendant in khorposh right for his life, and on his death his male descendants were declared entitled to hold them at a fixed rent.

The plaint sets forth that, according to the custom prevailing in the raj of Patkoom, upon the death of a raja, his eldest son became raja, and took the entire pargana of Patkoom, the second son being styled hakim, the third koonwar, and the younger sons lals, each and all of whom were entitled to maintenance from the raja for the time being; that estates which had been assigned for maintenance by the former raja revert at his death to his successor in the raj, who could deal with such estates as he pleased. Admitting that grants had been made in favor of Jadublal, the plaintiff stated that the late raja had no authority to make any settlements of estates, beyond his own life, and prayed that the grants should be set aside.

The defendant stated that, according to the family custom, a khorposh grant could not be resumed in the lifetime of the donee. That the raja for the time being having absolute control over the whole zemindari of Patkoom, was fully competent to make mokarari grants on receipt of consideration.

The first Court held that the plaintiff had proved that the granting of the "mokarari khorposh" was contrary to the custom of Patkoom. The Deputy Commissioner, referring to a judgment passed by himself in an analogous case, stated that the customs of the raj of Patkoom were similar to those prevailing in the raj of Pachete, which had been the subject of judicial determination, and, being of opinion that such grants

* A title which appeared to have been invariably borne by the second brother, and not, as in this case, a younger son of the zemindar in possession.

enured only for the lifetime of the grantor, he gave the plaintiff a decree for possession of the villages comprised in the khorposh grant.

With regard to the mokarari grant, the Deputy Commissioner held that the right of the actual raja to alienate land in Patkoom was proved, and that whether consideration had passed or not, the grant was one which the late raja was competent to make, and he dismissed the plaintiffs' claim to the two villages mentioned in the mokarari patta.

On appeal the Judicial Commissioner confirmed the decree of the first Court as to the resumption of the "khorposh" villages, remarking that anything given to Jadublal by his father by way of maintenance would cease on the father's death, or be liable to resumption by the succeeding raja. The Judicial Commissioner also referred to a judgment of the Deputy Commissioner in another case in which that officer had decided that grants of permanent maintenance were, by the custom of this family, invalid.

As to the mokarari patta, the Judicial Commissioner held that the general power of alienation by the raja for the time being was proved, and that the plaintiff had failed to show any infringement of the family custom by the making of such a grant by the late raja. The order of the first Court was confirmed.

Against this order, both parties appealed to the High Court. The plaintiff, against so much of the order as declared the alienation of the two villages in mokarari to have been valid. The defendant, against that portion of the order which declared the plaintiff entitled to resume and obtain possession of the eight villages granted as mokarari khorposh.

Mr. *Woodroffe* and Baboo *Bamachurn Bonnerjee* for the appellant in No. 1474.

Baboo *Sreenath Dass* and Baboo *Rashbehary Ghose* for the respondent.

The same counsel and pleaders appeared for the same parties in the cross-appeal No. 1518.

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Mr. *Woodroffe* for the appellant.—This is not the ordinary case of a Hindu disposing of his own property in his lifetime. The holder of a zemindari or raj, of the peculiar and exceptional kind which has now to be dealt with by the Court, has no such unlimited power to dispose of it during his lifetime as belongs to an ordinary Hindu proprietor in Bengal. The practical result of the decisions of the lower Court is that the reigning raja could assign away *all* his property, to the exclusion of all his sons, to strangers. [MITTER, J.—Is not this case governed by Bengal law?] I submit that this is not so; but even assuming that Bengal law applies, I know of no law which would enable a man to alienate property which does not belong to him. The very nature of the grant, which created a raj of this description, only gave each successive owner of the grant restricted rights. There is no finding that such alienations are warranted by or in accordance with the general custom of this raj. The raj or estate in this case is admittedly *impartible*, by its creation an estate was created of a completely exceptional character. The ordinary rights, under Hindu law, of the younger brothers of each successive heir to the raj were sacrificed and expunged for the benefit of their elder brother. With what object was this sacrifice and deviation from the ordinary course of inheritance first imposed? Not arbitrarily, or out of a mere desire, when the rule of succession was so defined, to favor the interests of the next immediate heir in expectation. This object could have been easily attained without laying down a perpetual rule of succession. The real object, the only object, must have been from motives either of state policy or of family pride, to preserve the raj estate, or ancestral zemindari, intact, and to prevent the importance of the family of the man, who first obtained or created it, being obliterated by the subdivisions, which it would undergo if subjected to the ordinary Hindu law of inheritance. This object would be completely defeated if each successive owner had unlimited rights of alienation. It has never been suggested that the owner for life of an impartible raj or zemindari could dispose of it by will even to the extent of appointing his second or other younger son to be his heir to the exclusion of his eldest son. No such

attempt has, so far as I am aware, ever been made. It comes therefore to this, that if the lower Courts are right, the holder of an impartible raj or impartible zemindari is in the position of a tenant of a property settled in strictest entail, with this only exception, that though he has no voice in determining who shall succeed to his estate, he is at complete liberty to waste or depreciate it during his lifetime to the detriment or ruin of the heir whose rights he is otherwise powerless to defeat.

If, as the lower Courts have held (and in the face of past decisions it cannot now be doubted), the reigning raja cannot, as against his successor, grant irresumable allowances for maintenance to his own sons, with what reason can it be contended that he has full power to permanently diminish the value of the property by granting mokarari leases.—*Anund Lal Sing Deo* v. *Maharaja Dheraj Gurrood Narayun Deo* (1); *Raja Wooday Aditto Deb* v. *Mukoond Aditto Narain Baboo* (2); *Maharaja Kishen Kishore Manick* v. *Musst. Hurree Mala* (3).

Baboo *Sreenath Dass.*—I submit that the cases relied upon by the lower Court and by Mr. Woodroffe do not establish that the owner of the raj for the time being has not the power to make a permanent provision for his younger sons, or may not at his pleasure alienate a portion of the raj estate. They establish only, that when an allowance for mainteuance, or a grant of land in lieu of maintenance, is made by the raja or zemindar in possession in favor of a person who is by Hindu custom, or by the special custom of the family, entitled to maintenance from him, the grantee being a person, who, by Hindu law or by the special custom of the family, would also be entitled to have an allowance for his maintenance granted to him by the successor of the first grantor, then the first grant may be regarded as a determination by the head of the family of the amount which he intends during his life to allow as a personal allowance for maintenance to the person named in the grant. But if it be once admitted that the general powers of the raja or zemindar to alienate or grant mokarari leases are as extensive as those

(1) 5 Moo. I. A., 82. (2) 22 W. R., 225.
(3) 6 Sel. Rep., 155 & 156.

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of any other Hindu proprietor, and I submit they are, then what must be looked to, is the real intention of the grantor as discovered by the words of the grant. There is no such magic in the use of the word khorposh, which may have been used without its meaning having been distinctly understood, as to make it override and render unmeaning the express words of the grant. If the grantor has power to alienate, and the words of the grant show that he meant to alienate, full effect must be given to these words. In the present case, the words were to the defendant, "for life and on his death to his male descendants." Can language be clearer?

The judgment of the Court was delivered by

BIRCH, J.—As regards the defendant's objection, we think it is now too late to contend that the "mokarari khorposh" or maintenance grant is not resumable at the death of the grantor. Since the judgment in the case of *Anund Lall Singh* (1), it has invariably been held that maintenance grants conferred by the possessors of these impartible rajs in Chota Nagpore cease with the life of the grantor, and are resumable at the pleasure of the succeeding raja. But while the power of resuming vests in the successor on the raja's death, a corresponding obligation is imposed upon him by family custom to provide maintenance for his brothers according to their seniority and status in the family as hakim, koonwar, or lal. The Judicial Commissioner is, therefore, right in giving the plaintiff a decree as regards these eight villages, and the appeal of the defendant is, therefore, dismissed. Each party in that appeal to bear their own costs.

We have next to consider, whether the late raja had the power of alienating in perpetuity any portion of the zemindari, whether for valuable consideration, or as a gift. The estate is an impartible one, but the effect of impartibility does not seem to interfere with the ordinary law as to rights over property beyond this, that it makes the estate pass to the eldest son. It becomes his separate property subject to certain obligations imposed upon him of allowing maintenance to the other members of the family. His right to

alienate under the ordinary law, can only be restrained by some family custom, which has the effect of overriding and controlling the general law. Now, the only custom proved is that the estate descends to the eldest son to the exclusion of the other sons; to this extent the custom supersedes the general law as to the devolution of property, but beyond the custom, the general law must regulate all rights of property, and under the general law the taker of the property may make alienations or gifts. It is found by both the lower Courts upon the evidence in the case that such alienations have been and are made in the zemindari of Patkoom; and in other estates in Chota Nagpore of a similar character, it has been found to be the case that grants of jaghirs and mokararis have been made by the holder for the time being of the impartible estate.

It is contended by the learned counsel, who appears for the plaintiff, that the holder of an impartible estate is by the nature of his tenure debarred from diminishing the estate by any grants or gifts; that all he can do is to make maintenance grants, which grants enure only for his life; and the case cited as an authority for this proposition is the case of *Anund Lal Sing Deo* v. *Maharaja Dheraj Gurrood Narayun Deo* (1). We think that if that case is carefully examined, it does not warrant the construction that is sought to be put upon it. The dispute in that case arose between the defendant as representative of Kanchun Lall, and the plaintiff as the head of the family, the defendant's allegation being that the rajgee of Pachete had been equally divided in 1748 between Mumee Lall and Mohun Lall; that in 1773 Mumee Lall by compromise obtained the whole of the raj, save and except Pargana Kasairpore, which by deed of gift from Kanchun Lall, became the property of his adopted son Lathorgon, the gift being absolute, and in consideration of the compromise by the terms of which the raja recovered the rest of the moiety acquired by Mohun Lall in 1748.

The Sudder Court held, that the defendant's allegation of a division of the raj was false; that it was clear that Mumee Lall had been invested with the entire zemindari; that any grants made by the raja for the time being were liable to be annulled and

(1) 5 Moo. I. A., 82.

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cancelled by his successor. The pargana in dispute was declared to be part of the estate, and the grant was set aside as invalid.

Before the Privy Council the point considered was the title which Kanchun Lall had to the pargana of Kasairpore. It was admitted on the part of the defendant, appellant, that if the grant was a maintenance grant, it ceased with the life of the grantor; but the case he sought to establish was that the pargana had been given to Kanchun Lall for consideration, and that such alienations were within the power of the raja in possession of the estate. This he failed to establish, and it was held that there had been no division of the estate as alleged; that it had come entire to Mumee Lall; and that the grant obtained by Kanchun Lall was a maintenance grant, which admittedly lapsed on the death of the grantor. Their Lordships say that the inalienability of the zemindari had not been sufficiently established; and they do not decide the question raised before them by the respondent as to the power of the raja to bind his successors by a permanent grant of property belonging to the raj. The whole judgment is directed to the determination of the nature of the grant, whether it was a maintenance grant or not; and the decision being that it was a grant of that nature, the case was disposed of on that ground only.

So far as we are aware, it has never been held by the Privy Council that an impartible estate is inalienable.

Our attention has been called to an unreported judgment of a Division Bench of this Court, in which a remark is thrown out that alienations in perpetuity of an impartible estate are voidable, but the case in which this remark was made was one in which a maintenance grant was the subject of consideration and decision.

Accepting, as we must, the finding of the lower Courts that mokarari grants have been made in this zemindari by the rajas in possession, and being of opinion that such grants are not prohibited by law, or restrained by family custom in this zemindari of Patkoom, we must also dismiss the special appeal preferred by the plaintiff.

Each party to bear their own costs in this Court.

Appeals dismissed.