CHANDI CHURN BARUA AND OTHERS (PLAINTIFFS) *v.* SIDHESWARI DEBI (DEFENDANT).

P. C.* 1888 April 24 & 26.

[On appeal from the High Court at Calcutta.]

Grant, Construction of—Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.

A Hindu owner cannot make a conditional grant of a future interest in property in favor of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant.

The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing *covenantees*, to give the villages to them in the event specified. *Held*, that in either view, it was equally ineffectual.

Held, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendant you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance.

APPEAL from a decree (8th July 1884) of the High Court, reversing a decree (21st September 1881) of the Subordinate Judge of the Goalpara District.

The appellants, who were plaintiffs in the suit, were a family named Barua, of the Kayest caste, which for many generations had members in the service of the Rajas of Bijni. The respondent was the widow of the late Raja, who died after the institution of this suit against him, and who represented him on this appeal.

* *Present:* LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

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Of the Raj estate, that part, within which the villages now claimed were situate, had been in British territory since 1765, and the villages were settled in the pergunnah named Khutaghat; the rest of the raj estate having, since the annexation in 1864 of the Eastern Dooars, formed, like that pergunnah, part of the Goalpara district. Before 1765, the Baruas were in possession of three other villages under grant from the Rajas. They now claimed further possession of four villages in addition, under an instrument purporting to have been executed on the 15th Pous, of the Pergunnah year 1185 (December 1778), by the then Raja of Bijni, Mukund Narain Bhup. This purported to be in favor of the undermentioned Baruas, besides others of the family, who had died childless, *viz.*, Dharamsil Barua, grandfather of the plaintiff, Nandkumar Barua, and Kamlakant Barua, grandfather of the plaintiffs Chandi Churn, Jagarnath, and Chunder Madhub, agreeing that the three mouzahs, Kaitpara, Shamraipara, and Mauriagaon, that were at that time in the possession of the ancestors of the plaintiffs, should remain in their possession from generation to generation; that the sons, grandsons, heirs and representatives of the Raja Bahadoor should in future maintain the sons, grandsons and heirs of the persons in whose favor the gift was made; and that in default of this, they should relinquish to them the possession of other four mouzahs, namely, Bhotgaon, Dingaon, Daborgaon, and Salbari; and the heirs of the persons in whose favor the gift was made should be at liberty to take possession of these mouzahs, and to enjoy and possess the same as rent-free properties, by paying annually Rs. 190 as *mangon* to the estate of the Raja. And the plaintiffs alleged that in breach of that undertaking to support them by service from generation to generation, the Raja in April 1876 dismissed the first plaintiff from his service, and did not provide the other plaintiffs with service, though they were fit and proper persons and made application. And on that ground they claimed possession of the four villages.

For the defence, the genuineness of the instrument was denied, as also the plaintiffs' allegation that they were competent for the Raja's service. It was also contended for the defence that, supposing the plaintiffs to have any right to maintenance out

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of the defendant's estate, the profits of the three mouzahs, already in their possession, were sufficient.

Issues were fixed by the Subordinate Judge, who found the instrument to be genuine, and held that the plaintiffs were entitled to have possession, according to the presumable intention of the parties, of the four villages. On the issue fixed by the Judge as to whether there had been any breach of the terms of the document of 1776, his decision was as follows:—

"In this document, Raja Mukund Narain recites that the grantees have, from the days of his ancestors, been supported (*parwarish*) in various ways (*har shurate*), such as by service in the kingdom, *and* by grants of villages and lands. The various ways in which they have been supported are explained to be by 'service in my kingdom *and* (not *or*) by grants of villages and lands.' The *parwarish* consisted of these two things; not of one or the other, but of both. Mukund then goes on to say that he also supports them (*pratipalan*) in the same manner (*shei mate*), *i.e.*, by service *and* by grants of villages and lands. The word *pratipalan* has clearly the same meaning as the word *parwarish*. The expression *shei mate* places this fact beyond doubt. A pure Bengali word is substituted for a Hindustani word. The Raja then says that in case in his time, or in the time of his descendants, they or their descendants should not be supported (*pratipalan*) in various ways (*har shurate*), he then and there assigns to them these seven villages as a permanent remuneration or allowance. We have already seen what the *pratipalan har shurate* means. After having thus assigned to the grantees these villages, he goes on to revoke the assignment, saying that, as they were at that time being supported (*pratipalan*) by the profits of three of the villages *and* by other means, he will not make over to them the other four villages. That they are to continue to hold the three villages on the terms they were then holding them on. He then goes on to say,—'If ever in the time of my descendants you are not provided with the means of maintenance (*pratipalan ná kare*), then let those descendants of yours who may be living at that time (*i.e.*, when there is failure of *pratipalan*) produce this deed and hold all the seven villages at a quit-rent of Rs. 100.

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"Now, what is this maintenance (*pratipalan-parwarish*), the failure to continue which by his descendants is contemplated by Mukund? It is clearly the *pratipálan*, the *parwarish* by various ways, *i.e.*, by service *and* by grants of land. This maintenance, as I have shown, consisted of two things, and a failure to give service, or a failure to give grants of lands, or both, would each and all constitute a breach of the terms of the document. And as no member of the Barua family is now maintained by service in the raj, although the family still hold the three villages stated by Mukund to be in their possession in 1185 Perganati, there has been a breach of the terms of the document. This breach took place on the 1st Bysack 1283 B. E., when Chandi Churn was dismissed by the defendant. This dismissal is admitted."

The Subordinate Judge, accordingly, decreed in favor of the plaintiffs.

This, however, was reversed by the High Court on appeal. A Division Bench (GARTH, C.J., and BEVERLEY, J.), after expressing doubts as to the genuineness of the instrument, gave judgment on its terms as follows:—

"Assuming that there is a sufficient consideration for the Raja's promise (about which there may be some doubt), in whose favor is the deed made?

"Is it a provision for all the Barua family in perpetuity, however many hundreds or thousands they may number?

"Does the continuance of the grant depend upon the whole Barua family continuing to serve the Raja or to reside within his jurisdiction?

"Would the grant be valid, although all the Barua family, or the large majority of them, deserted the Raja's territories, and those three or four only, or some or one of them, continued in his service?

"Or would the grant be valid if any of the Barua family refused to remain in the Raja's service at all, or proved themselves faithless or incompetent?

"All these points have been raised before us, and they present very serious difficulties, and we much doubt whether in point of law the instrument, if genuine, is enforceable at all. But

assuming that it might be so under a different state of circumstances, and that the present plaintiffs were in a position to enforce it, can it now be said that the Raja has committed any breach of the contract, or that he is liable in any way to the present plaintiffs?

"We are clearly of opinion that he is not, and our reason for that opinion seems so unanswerable that we think it needless to deal with the other points in the case, which might perhaps present more difficulty.

"The plaintiffs' case is that one of them, Chandi Churn Barua, has been dismissed from the Raja's service, and that the other have not been employed by the Raja, although they are competent men, and willing to be so employed. This the plaintiffs contend is such a breach of the Raja's contract as entitles them to be placed in possession of the four other villages, Bhotegaon, Kaitpara, Daborgaon, and Salbari.

"The Raja says that as a matter of fact the plaintiff No. 1 was dismissed because he proved a faithless servant, and he also says that the other plaintiffs are incompetent men. But whether he is right or wrong in this, what possible ground is there for the plaintiffs' present claim?

"It is clear that by the terms of the agreement the Raja Mukund Narain does not undertake to keep the whole Barua family in his service, nor any particular member or members of that family. All he undertakes to do is to support them, and it is only in case of the family not being supported that the four additional villages were to be placed at their disposal."

The suit was accordingly dismissed.

On an appeal by the plaintiffs,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the interpretation placed on the terms of the instrument of 1778 A.D. by the Subordinate Judge was a sound one, and that it was a genuine document. That Judge had correctly construed the Bengali words referred to in his judgment, as denoting that the maintenance was to consist of two things, service and grants of land, not merely means of subsistence, from their own or other resources. Moreover no issue had been fixed on the question whether the possession of the villages formerly given to

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the Baruas was a sufficient maintenance for all the family; and the conclusion of the High Court on this point was disputed by the appellants. Even if the descendants had not been shown to be without any means of support, still, upon the correct construction of the grant, the suit had been rightly decreed by the Subordinate Judge; and the judgment of the High Court should be reversed.

Mr. *R. V. Doyne* for the respondent was not called upon.

Afterwards, on April 26th, their Lordships' judgment was delivered by

LORD WATSON.—This suit was brought by the appellants in the year 1880, before the Court of the Subordinate Judge at Goalpara, for possession of the four mouzahs of Daborgaon, Salbari, Dingaon, and Bhotegaon, which are part of the Bijni Raj estate in Assam. The original defendant was the late Raja Kumud Narain; and since his death the estate has been represented by his widow, the Ranee Sidheswari Debi, who is respondent in this appeal. The foundation of the appellants' claim is a deed alleged to have been executed by the Raja Mukund Narain, the ancestor of the defendant, in 1185 Perganati (1778 A.D.) in favour of certain members of the Barua family, to which the appellants belong. The document, according to the translation made by the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms:—

"Let peace and health rest upon your dwelling, O Kasi Nath Barua, dewan, O Ram Nath Barua, O Dharmasil Barua, O Komlakant Barua, O Ram Jibun Barua. Inasmuch as because of my having caused the daughter of Kasi Nath Barua, dewan, to lose caste by taking her away, you and all your connexions having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and forasmuch as from the days of the Maharajas, my deceased ancestors, you have all along been supported in various ways (*such as*) by service in my kingdom and by (*grants of*) villages and lands; and as I too am supporting you in the same manner, and as you have now become dispirited and (*therefore it is proper*) that I should show you even greater

kindness, (*I have determined that*) a means of support, that is, a perpetual wage, should be given to you; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways (*by me or by my descendants*), then, as a means of maintenance, that is to say as wages, I do hereby assign to you seven villages, namely, Shamraipara, Mauriagram, Daborgaon, Salbari, Kaitpara, Dingaon, and Bhotegaon in the nature of a fixed (*perpetual*) remuneration. However, as you are now being supported by (*the profits derived from*) three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants (*you will now hold*), and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance (*by them*), then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages, and also of the four villages (*now held*) khas (*by me*), enjoy possession of them rent-free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs. 100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed that Kasi Nath and Ram Jibun, two of the four grantees named in the deed, died without issue; and that the appellants are the living representatives of the other two, *viz.*, Dharmasil and Komolkant Barua. They are still in possession of the three mouzahs of Shamraipara, Mauriagram, and Kaitpara, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these mouzahs now yield an annual return of 4,000*l.* sterling. As might be expected in these circumstances, the appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Raja

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was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grant to descendants became at once operative in their favour, when the late Raja dismissed Chandi Churn from his service in 1876, and declined to employ either him or any other of the appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court: "Is the document filed genuine, and are the plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the respondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law; that at any rate the contingency upon which it depends is the failure of the Raja to provide maintenance, and that no claim can lie so long as the appellants have sufficient means of maintenance derived from her predecessors in the Raj.

The Subordinate Judge gave the appellants a decree in terms of their plaint. He found as matter of fact that the deed was genuine, and he held as matter of law that the conditional grant to descendants is valid and effectual, and that it became operative whenever the Raja failed to support them by giving employment as well as land. On appeal the High Court reversed his decree, and dismissed the suit with costs. The learned Judges (GARTH, C.J., and BEVERLEY, J.) held that the onus being upon them, the appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable, they held that the descendants of the four Baruas named in it have, according to the just construction of the instrument, no right to the four mouzahs so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words: "If ever in the time of

my descendants you are not provided with the means of maintenance." It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent promise that these Baruas and their descendants shall in future be "supported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the Raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raja, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contrac but a covenant running with the Raj estate, and binding

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its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of opinion that the judgment of the High Court must be affirmed and the appeal dismissed and they will humbly advise Her Majesty to that effect.

The appellants must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

C. B.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABAYESWARI DEBI (PETITIONER) *v.* SIDHESWARI DEBI (OPPOSITE PARTY).*

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November 26.

Superintendence of High Court—Criminal Procedure Code (Act X of 1882, s. 144)—Charter Act, 24 & 25 Vic., c. 104, s. 15—Order to abstain from certain act.

A Deputy Commissioner passed an order, under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the ryots of two specified pergunnahs. And also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *Adda* or *Kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order:

* Criminal Motion No. 371 of 1888, against the order passed by M. A. Gray, Esq., Deputy Commissioner of Goalpara, dated the 1st of October 1888.