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and the fee of Rs. 10 paid on the memorandum of appeal. The payment should be made by the 8th of January. The question of payment of the deficit on the plaint will be considered after the realization of the deficit court-fee on the memorandum of appeal.

[*Note*—Subsequently the Vakil for the plaintiffs appellants argued that the plaintiffs-appellants should be required to pay court-fee on the value of their share in the property sold and not on the value of any larger share. An examination of the plaint showed, however, that the value of the plaintiffs' share was Rs. 29,000 the jurisdiction value of the suit, on which the Taxing Officer had in the above order assessed court-fee.

The appellants then paid the deficit of Rs. 945 on the memorandum of first appeal and the appeal was admitted and registered. Thereafter, the appellants were called upon by the Registrar to make good the deficiency of Rs. 945 due from them on their plaint, and as they declined to pay, the Registrar placed the appeal before the proper Bench for orders.]

DAS AND BUCKNILL, JJ.—The view taken by the learned Registrar is entirely correct. The appellant must make good the deficiency within a month from to-day. If the deficiency is not made good within a month from to day, let the matter be put up to the Bench for disposal.

[*Note*—The deficiency of Rs. 945 due on the plaint was also paid.]

APPELLATE CIVIL.

Before Das and Adami, JJ.

GOLAM NABI

v.

CHOWDHURY BASUDEB DAS *

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December, 2.

Jagir——*construction of* sanad——*grant to grantee and his heirs, effect of*——*Cuttack Land-Revenue Reg. 1805* (*Ben. Reg XII of 1805*), *sections 25 and 34*——*Bengal Revenue Free* (Badshahi *Grants) Regulation, 1793* (*Ben. Reg. XXXVII of 1793*), *Section 15.*

Where a *sanad* made a grant of a *jagir* of certain properties in the district of Cuttack to the grantee and his heirs, *held*, that the grantee took an absolute and hereditary interest in the properties

* Circuit Court Cuttack. Appeal from Original Decree No. 14 of 1919 from a decision of Babu Pramatha Nath Bhattacharji, Sub-Judge of Cuttack, dated the 20th August, 1919.

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conferred by the *sanad* and that he and his successors-in-interest had the right to alienate the said properties.

Held, further, that the grantee derived his title from the *sanad* and not from section 34 of the Cuttack Land-Revenue Regulation, 1805, which confirmed the grant.

The words "for ever" in section 34 of the Cuttack Land-Revenue Regulation, merely expressed the intention of the paramount authority not to resume the grant and did not fetter the grantee's power of alienation.

The words "otherwise expressed in the grant" in section 15 of the Bengal Revenue-Free (*Badshahi Grants*) Regulation, 1793, include a grant to the grantee and his heirs.

Dosibai v. *Ishvardas Jagjivandas* (1), followed. *Sheikh Zumeeloodeen Mahomed* v. *Russick Chand Addy* (2), doubted.

The facts of the case material to this report were as follows—

On the 23rd December, 1803, the British Government granted certain *jagir mahals* to Fateh Muhammad and his heirs by a *sanad*. These *mahals* were situated in the district of Puri and comprised Pergana Manikpatna, Pergana Bajrakote, Pergana Maland, Pergana Garjit Andhari, Touzi Gopinathpur and Killa Parikud. The *sanad* was confirmed by section 34 of the Cuttack Land-Revenue Reg., 1805. Subsequently Fateh Muhmmad died leaving two sons, Karar Muhammad and Muhammad Ismail. The former died leaving his brother Ismail as his sole heir. The latter died in 1848 leaving him surviving (*i*) has first wife Mohiuddin Bibi, (*ii*) two daughters by her, Rahaman Bibi and Waziran Bibi, and (*iii*) one son, Zamiruddin, and one daughter, Asmatunnissa, by a predeceased wife, Hazra Bibi. After Ismail's death the shares of his heirs were determined by two decisions of the *Sadar Amin's* Court. Mohiuddin obtained a 2-annas share, Jamiruddin a 5-annas 12-gandas shares, and Waziran, Rahaman and Asmatunnissa each obtained a 2-annas 16-gandas share. After Ismail's death Rasikchand Adhya, one of his creditors, brought to sale a portion of the *mahals* in execution of a decree. Zamiruddin objected to the sale and his objection was eventually upheld by the Calcutta High Court [See *Sheikh Zumeeloodeen Mahamed* v. *Rassick Chand Adhya* (2)]. Both the daughters of Mohiuddin died in her lifitime. Her shares therefore increased

(1) (1891) I. L. R. 15 Bom. 222. (2) (1862-64) W. R. (Sp. No. 85).

by inheritance from them to 2-annas 19-gandas and 2-karas.

On the 1st January, 1857, Mohiuddin conveyed to her son-in-law, Rosan Mahammad, by means of a *kabala*, a 2-annas share in all the *mahals* except Parikud.

On the death of Mohiuddin Bibi her share devolved on her mother, Makdum Bibi, and her brother, Kadir Mohammed.

On the 7th May, 1858, Makdum and Kadir executed a *kabala* in favour of Rosan's son, Sultan Mahammad conveying to him a 10-gandas 1-kara 2-krants share in all the *mahals* except Parikud and also conveying a 19-gandas 2-karants share in Gopinathpur.

On the 24th May, 1858, Makdum and Kadir executed in favour of Choudhry Ragunath Das a *kabala* conveying an 8-gandas 3-krants share in all the *mahals* except Gopinathpur.

On the 7th September, 1859, Rosan executed a *kabala* in favour of Choudhury Raghunath Das conveying to him a 1-anna 5-gandas share in all the *mahals* except Parikud and Gopinathpur.

On the death of Mukdum Bibi her sole heir was Kadir. Golam Nabi, the plaintiff, was Kadir's son. He instituted the present suit for a declaration of his title to a 2-annas 19-gandas 2-karas share in the *mahals* and for confirmation of possession, or in the alternative, for recovery of possession of the share after setting aside the *kabalas* mentioned above on the ground that they were void. The defendants were (*i*) the descendants of Chowdhury Raghunath Das, and (*ii*) the descendents of Rosan and Waziran. The first party defendants claimed to have a 1-anna 13-gandas 3-karants share in the *mahals* and the second party defendants claimed to have a 1-anna 5 gandas 1-kara 2-karants share. Although three of the second party defendants filed written statements which were subsequently withdrawn the suit was contested by the first party defendants only, and was dismissed.

The plaintiff appealed to the High Court.

B. N. Dutt, *G. C. Roy* and *S. C. Chatterji*, for the appellant.

J. N. Bose, *B. N. Sinha*, *S. N. Mullick* and *P. C. Palit*, for the respondents.

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DAS, J.—This appeal arises out of a suit for declaration of title to certain *jagir mahals* which formed the subject-matter of a grant by the British Government to one Fateh Muhammad on the 23rd December, 1803. The main question raised in this appeal is whether, by the terms of the grant, the properties became inalienable in the hands of Fateh Muhammad and his successors-in-interest. The plaintiff claims that the properties which were the subject-matter of the grant are inalienable and asks for a declaration that certain *kabalas* executed by his predecessors-in-title are wholly inoperative so as to affect his interest. There are two sets of defendants, the Chowdhury defendants and the Muhammadan defendants, the latter being members of the family of Fateh Muhammad. The suit is contested by the Chowdhury defendants who base their title on the *kabalas* executed in their favour by the predecessors-in-title of the plaintiff. Of the Muhammadan defendants, the majority did not appear; but three of them, defendants 20—22, in the first instance filed a written statement contesting the plaintiff's claim, but subsequently they withdrew from that position and admitted the plaintiff's title. A question arises whether the plaintiff was not in any event entitled to a decree in regard to the interest that is in defendants 20—22.

It is unnecessary to trace the devolution of the property in all its stages; but it is common ground that Mohiuddin Bibi became ultimately entitled to 2-as. 19-gandas 2-karas share in the *jagir mahals*. Mohiuddin Bibi was the widow of Muhammad Ismail who was one of the sons of the original grantee. It is also common ground that upon the death of Mohiuddin her share devolved, under the Muhammadan law, on her mother Mukdum Bibi and her brother Kadir, and that upon Makdum's death, Kadir became solely entitled to her share. The plaintiff is the son of Kadir; and it is not disputed that he would be entitled to succeed in the action, provided he makes good his point that the properties are inalienable and provided he can get over certain other defects which have been raised in the written statement.

The *kabalas* on which the defendants rely are four in number; *first*, the *kabala* of the 1st January, 1857, by which Mohiuddin Bibi conveyed to her son-in-law, Rosan, 2-as. in the *jagir mahals* except Parikud; *secondly*, the *kabala* of the 7th May, 1857, by which Mukdum Bibi and Kadir conveyed 10-gandas 1-ka. and 2-krants in all the *mahals* except Parikud to Sultan Mahammad, the son of Rosan Muhammad; *thirdly*, the *kabala* of the 24th May, 1858, by which Makdum Bibi and Kadir conveyed 8-as. 3-krants in all the *mahals* except Gopinathpur to the predecessors-in-title of the Chowdhury defendants, and, *lastly*, the *kabala* of the 7th September, 1859, by which Rosan Muhammad conveyed 1-as. 5-gandas in all the *mahals* except Parikud and Gopinathpur to the Chowdhury defendants.

Various subsidiary questions have been raised by the defendants in their written statements, the most important of these being, whether the plaintiff ever obtained possession, as he asserts, of the *jagir mahals*. If he did not, then his suit must fail on two other grounds: *first*, on the ground of limitation; and *secondly*, on the ground that he has not in this suit asked for consequential relief though on his own allegations he is entitled to a decree for possession. [*See* section 42 of the Specific Relief Act]. I have, however, not thought it necessary to go into these questions, because, in my opinion, the plaintiff's suit must fail on the main question that has been argued before us; it is that question which I proceed to discuss.

The terms of the grant are to be found in the *sanad*, dated the 23rd December, 1803. The appellant contends that the terms are also to be found in section 34 of Regulation 12 of 1805. So far as the *sanad* is concerned it recites that the grantee has for a very long time served at Thana Malwa and other *mahals* mentioned in the *sanad* and has, after deducting the usual costs of collection from the annual income of the *mahals*, appropriated the balance which the Government was entitled to receive, in lieu of his salary, and then the *sanad* proceeds to make the grant in the following terms:—

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"You and your heirs have the right to receive the whole of the balance, if any, of the amount of the fair annual rent aforesaid left after deducting therefrom the said usual costs, the collection of rent of the aforesaid *mahals* shall be managed by you and your heirs in accordance with the laws and orders of the said Government and you and your heirs shall exercise your right in this respect."

In my opinion there is nothing in this document to suggest that the properties were by the terms of the grant made inalienable as a condition of the grant. It was a grant not in indefinite terms, but to Fateh Muhammad and his heirs, and there is nothing in the grant to control the ordinary meaning of the words. The terms of the grant in no way differ from the terms of the grant which their Lordships of the Judicial Committee had to consider in the case of *Dosibai* v. *Ishvardas Jagjivandas* (1). It was argued in that case that the grant being a grant of the *jagir* operated as giving a succession of life-interests to the grantee and his heirs for the time being. To this contention the Judicial Committee replied as follows:—"There is no principle or authority which gives any warrant for such a contention. It is true that when a *jagir* is granted in indefinite terms, it is taken to be for the life only of the *jagirdar*. But where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest." The decision of the Judicial Committee is a distinct authority in favour of the view pressed before us on behalf of the respondents; and I must hold that there being nothing in the grant to control the ordinary meaning of the words, Fateh Muhammad, on the construction of the *sanad* itself and apart from the consideration of the Regulation which I shall presently consider, took an absolute interest in the properties which were conveyed to him by the *sanad*.

But it was argued that whatever construction may be placed on the *sanad* itself, the effect of section 34 of Regulation 12 of 1805, which confirmed the grant made to Fateh Muhammad, was to make the subject-matter of the grant inalienable. That section runs as follows :—

(1) (1891) I. L. R. 15 Bom. 222.

"The Commissioners having likewise granted a *sanad* to Fateh Muhammad, *jagirdar* of Malud, entitling him and his heirs for ever in consideration of certain services performed towards the British Government, to hold his lands exempt from assessment, such *sanad* is hereby confirmed."

In my opinion there is nothing in this section which controls or in any way limits the grant already made to Fateh Muhammad. It purports to do nothing more than confirm the *sanad* granted by the Commissioners to Fateh Muhammad. The title of Fateh Muhammad was based not on section 34 of the Regulation but on the *sanad* granted by the Commissioners, and for the terms of the grant we must go, not to the Regulation, but to the *sanad* itself. Now it will appear that section 25 of Regulation 12 of 1805 provides that all the provisions of Regulation 37 of 1793 shall be in force in the Zillah of Cuttack which are not superseded and rendered of no effect by the rules following section 25 of Regulation 12 of 1805. Section 15 of Regulation 37 of 1793 provides that *jagirs* are to be considered as life-tenures only, and that the life-tenures are to expire with the life of the grantee, unless otherwise expressed in the grant. The question, therefore, resolves itself into this: Is there anything in the grant itself which makes the *jagir* conferred on Fateh Muhammad hereditary; if not, the *jagir* must be considered to be a life-tenure of Fateh Muhammad. On this point the decision of the Judicial Committtee in the case already cited is conclusive. In that case the Judicial Committee had to consider the effect of section 15 of Regulation 37 of 1793. Their Lordships said: "The principle that *jagirs* are to be considered life-tenures" only "unless otherwise expressed in the grant" is expressly laid down in the Bengal Regulations [See Regulation XXXVII of 1793, section 15]. Their Lordships considered that it is "otherwise expressed in the grant" when the grant is made to the grantee and his heirs. In the case before us the grant was expressly made to the grantee and his heirs. I must hold therefore that the *jagir* being a grant to the grantee and his heirs could not be considered the life-tenure of Fateh Muhammad.

It was strenuously pressed before us that the words "for ever" occurring in section 34 of Regulation

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12 of 1805 are sufficient in themselves to cut down the ordinary meaning of the words employed in the *sanad*. Now section 15 of Regulation 37 of 1793 enacts that, if it is otherwise expressed in the grant, the *jagirs* will not be considered as life-tenures. The question is, not whether section 34 provides that the grant made to Fateh Muhammad was to be considered the life-tenure of Fateh Muhammad, but whether in considering the grant itself we are able to come to the conclusion that the *jagir* is not to be considered the life-tenure of the grantee. But quite apart from this consideration, I do not think that the words "for ever" in any way touch the point in controversy between the parties. In my opinion those words express the intention of the paramount authority not to resume the grant; they do not in any way make the grant inalienable.

When we consider Regulation 12 of 1805 as a whole, it will appear that there are distinct provisions in the Regulation itself prohibiting, in certain cases specified in the Regulation, the holders of the grants from selling or otherwise transferring the properties. For instance section 18, clause (6), runs as follows:—

"The present possessors of lands held exempt from the payment of revenue, under all life grants declared by the preceding clause not to be hereditary, are prohibited from selling or otherwise transferring them, or mortgaging the revenue of them for a longer period than their own lives; and all such transfers and mortgages are declared illegal and void."

So again the 6th clause of section 26 runs as follows:—

"The present possessors of lands now exempt from the payment of revenue, under such *jagir* or other life grants made previous to the 14th October, 1803, and declared by the preceding clause not to be hereditary, are prohibited from selling or otherwise transferring them, or mortgaging the revenue of the lands for a longer period than their own lives; and all such transfers and mortgages which have been or may be made are declared illegal and void."

It seems to me that if there was any intention on the part of the legislature to prohibit Fateh Muhammad or his heirs from either selling or mortgaging the properties which were conveyed to them by the *sanad* already referred to, it could have carried out the intention far more clearly by expressly prohibiting him or

his heirs from selling or otherwise transferring them as it has done in the 6th clause of section 18 and in the 6th clause of section 26. In my opinion the words " for ever" occurring in section 34 cannot receive the construction which has been suggested by the learned Vakil on behalf of the appellant.

It was argued lastly that there are decisions of the Calcutta High Court which conclude the point. Now it is not suggested that those decisions operate as *res judicata* between the parties ; but it has been argued that they are decisions of very high authority and that as such they ought to be followed by this court. The first of these decisions is referred to in *Shaikh Zamil-oodeen Mohemed* v. *Russick Chand Addy* (1). It appears that the original grantee incurred certain debts to Russick Chand Addy, and Russick, in execution of the decree which he obtained, attached the rights and interests of the judgment-debtor in the *jagir*. After the death of the original grantee the question arose as between his son Md. Jamiruddin, the grandson of the original grantee, and the judgment-debtor, and it was urged on behalf of Jamiruddin that the grant being for the life of Fateh Muhammad and inalienable in its nature the properties which were comprised under the grant could not be sold in execution of any decree either against Fateh Muhammad or Md. Ismail. The case first came up before Mr. Justice Steer and Mr. Justice Campbell. Mr. Justice Steer declined to decide the question which was raised by Jamiruddin. He thought that the right, title and interest of the judgment-debtor whatever it was, could be sold in execution of the decree, leaving the question as to what passed by the sale to be determined in a title suit between the parties. Mr. Justice Campbell took the opposite view. He thought that in order to prevent multiplicity of proceedings it was absolutely necessary to decide the question in controversy between the parties. He conceded that if the land had merely been held under a Government grant to the donee and his heirs for ever the tenure might be held alienable ; but he thought

(1) (1862-64) W. R. (Sp. No.) 85.

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that as the grant was confirmed by an express law, that is to say by section 34 of Regulation 12 of 1805, it followed that the grant so made by law to a man and his heirs for ever was of the nature of a perpetual entail. Stopping here for a moment, I do not think that perpetual entail is recognised either amongst the Hindus or the Muhammadans; but the learned Judge thought that the case was analogous to the case of the Parsee Baronet. The statute of which the learned Judge was thinking is Act 20 of 1860 which was an Act for settling certain properties which belonged to Sir Jamsetjee Jeejeebhoy so as to accompany and support the title and dignity of a baronetcy conferred on him and the heirs male of his body by Her Majesty the Queen-Empress of India. It will appear, however, on a reference to that statute that there was a perpetual entail expressly created by the statute and section 10 of that Act provided in express terms that —

"neither the present Baronet nor any of the heirs male of the body of the first Baronet in whose favour trusts are hereinbefore declared of the dividends, interest, and annual income of the said stocks, funds, and securities, or to whom the said Mansion House and hereditaments called Mazagon Castle shall stand limited under this Act, shall transfer, dispose of, alien, convey, charge or encumber the said stocks, funds and securities, or any part thereof."

In other words, the grantee was expressly prohibited from alienating the properties which formed the subject-matter of the settlement or any portion thereof. There is in the case before us no express prohibition at all in the case of Fateh Muhammad and I am wholly unable to agree with the view which was taken by Mr. Justice Campbell in the case cited. The next case is not reported, but is to be found at page 61 of tke paper-book. That was a decision of Mr. Justice Kemp and Mr. Justice Campbell, dated the 9th February, 1864, and between the same parties. There is no decision there; it merely followed the previous decision which has already been referred to.

As I have said before these decisions do not operate as *res judicata* between the parties. They are undoubtedly entitled to weight as authoritative decisions of the Calcutta High Court, but I am unable to agree with the view which was taken in those cases.

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I am compelled to follow the decision of the Judicial Committee, and as I am of opinion that the decision of the Judicial Committee in the case to which I have referred is conclusive on the point, I must hold that there is nothing either in the grant or in the Regulation which in any way makes the subject-matter of the grant inalienable. I agree with the view which has been taken by the learned Judge in the Court below on this point.

A question was raised as to whether the plaintiff is not in any event entitled to a decree as against the defendants Nos. 20 to 22. As I have already mentioned these defendants in the first instance filed a written statement contesting the claim of the plaintiff but subsequently they withdrew from that position and admitted the plaintiff's title. The question is: is the plaintiff in any event entitled to a decree as against them? Now it will appear that they filed a joint written statement. So far as defendants Nos. 21 and 22 are concerned, they are minors, and in view of the decision at which the learned Subordinate Judge arrived, it was plainly impossible for him to grant the plaintiff a decree as against the interests of the minors. So far as Sona Bibi, defendent No. 20, is concerned, the learned Subordinate Judge ignored altogether the admission made by her. It is within the discretion of the court to ignore an admission made on a point of law if it so thinks and I am not prepared to say that in dismissing the plaintiff's suit in its entirety, the learned Subordinate Judge committed any error. The question as to whether the plaintiff was in any event entitled to a decree as against Sona Bibi was not argued before the learned Subordinate Judge, and I do not propose now to go into that question. It is unnecessary to enter into other questions, because the plaintiff's suit must fail on the construction of the *sanad* and the Regulation. I must dismiss this appeal with costs.

ADAMI J.—I agree.

Appeal dismissed.