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satisfying the decree and avoiding arrest, his client will not take steps for the arrest of the respondent within two months. The appellant will get his costs of this appeal and of the objection in the Court below.

JAMES, J.—I agree.

Appeal allowed.

ROWLAND, J.

S. A. K.

APPELLATE CIVIL.

Before James and Rowland, JJ.

GANJHU UPENDRA SINGH

v.

GANJHU MEGHNATH SINGH.*

Crown Grants Act, 1895 (Act XV of 1895)—grant of Jagir by Government—stipulation as to restraint against alienation—tenure, whether can be sold in execution of money decree—measure of liability to involuntary transfer.

In 1842 a tenure was granted as jagir in favour of G's ancestor in consideration of certain services, but the estate was subsequently forfeited to Government. In 1881 there was a formal dispensation with the services and a new grant, freed of those services, was made at a fixed annual rent. The new grant created a jagir for the descendants of an earlier jagirdar to enjoy so long as any descendants of the jagirdar should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mukarrari tenures with a liability to resumption if unauthorised transfer should be made. When the tenure was sought to be sold in execution of a money decree against the jagirdar, the latter objected, but his objection was overruled by the executing Court.

Held, on appeal, (i) that the tenure was a Crown grant affected by the Crown Grants Act of 1895 in such a manner

*Appeal from Appellate Order no. 257 of 1938, from an order of T. Luby, Esq., i.c.s., Judicial Commissioner of Chota Nagpur, dated the 29th July, 1938, confirming an order of Babu Hargobind Prasad Singh, Subordinate Judge at Ranchi, dated the 23rd May, 1938.

that the provisions of the Transfer of Property Act, 1882, did not apply to it, and that the grant took effect according to its tenor whatever might be the conditions laid down;

(ii) that the grant was of a limited interest which was not transferable either by operation of law or by voluntary alienation, and that the measure of liability to involuntary alienation was the power of voluntary transfer.

Sundararajulu Naidu v. B. Papiah Naidu(1), *Thakur Khitanarain Sahi v. Surju Seth*(2) and *Janaki Amal v. Marudai Chetti*(3), followed.

Golak Nath Roy Chowdhury v. Mathura Nath Roy Chowdhury(4) and *Keshab Chandra Pramanik v. Ajahar Ali Biswas*(5), distinguished.

Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Ltd.(6), referred to.

Per ROWLAND, J.—Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease, this is an implied surrender of the former lease which is thus determined.

When a Crown grant contains a prohibition against alienation of the estate, that prohibition must take effect in accordance with its terms.

Sheo Singh v. Raghubans Kunwar(7) and *Sundararajulu Naidu v. B. Papiah Naidu*(1), followed.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of James, J.

K. K. Banarji and *S. N. Bose*, for the appellant.

S. M. Mullick (with him *S. N. Banarji* and *L. K. Chaudhury*), for the respondent.

JAMES, J.—The appellant is a judgment-debtor who holds a jagir under Government in Ranchi district. His ancestor enjoyed a tenure which was created in 1842 by the proprietor of the Barkagarh estate, granted in consideration of services to be

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(1) I. L. R. [1938] Mad. 767.

(2) (1931) I. L. R. 10 Pat. 522.

(3) (1937) A. I. R. (Mad.) 864.

(4) (1891) I. L. R. 20 Cal. 273.

(5) (1914) 19 Cal. W. N. 1182.

(6) (1931) I. L. R. 59 Cal. 1, P. C.

(7) (1905) I. L. R. 27 All. 634, P. C.

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rendered as barkandaz. The estate was subsequently forfeited to Government and in 1881 there was a formal dispensation with the services which the jagirdar had to render as barkandaz and a new grant was created of the tenure freed of those services at an annual rent of Rs. 48-8-0. The new grant created a jagir for the descendants of an earlier jagirdar Ratan Singh to enjoy, so long as any descendants of Ratan Singh should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mokarrari tenures any part of the tenure with a liability to resumption if unauthorised transfer should be made.

The opposite-party sought to bring this tenure to sale in execution of his money decree; but the jagirdar objected that his jagir could not be brought to sale. The Subordinate Judge dismissed this objection on the ground that the tenure in favour of the petitioner's ancestor did not come into existence by the grant of 1881 and on the general ground that where there is a stipulation in a lease restricting the right of transfer by the lessee, his interest can be sold in execution of a decree. The judgment-debtor appealed to the Judicial Commissioner who maintained the order of the Subordinate Judge and dismissed the appeal.

Mr. S. N. Bose on behalf of the appellant argues that this is a grant of the same nature as the Crown grant which was the subject-matter of proceedings before the High Court of Madras in *Sundararajulu Naidu v. B. Papiiah Naidu*(¹) where it was held that the actual interest possessed by the decree-holders was merely a right to enjoy the rents and profits during their lives and that the tenure enjoyed under a grant from the Government of Madras with a prohibition against alienation could not be sold in execution of a decree. Mr. Bose also refers to the decision of the Judicial Committee in *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Ltd.*(²), but there

(1) I. L. R. [1938] Mad. 767.

(2) (1931) I. L. R. 59 Cal. 1, P. C.

the conditions of the enjoyment of the estate of the Nawab of Murshidabad had been determined by formal legislation and there could be no question regarding the inalienability of the immoveable property affected by that legislation. Mr. Bose also lays some stress upon the decision of Macpherson and Dhavle, J.J. in *Thakur Khitanarain Sahi v. Surju Seth*(¹) wherein the basis of the decision, to use the language of Macpherson, J., was that "property is not liable to sale by the Court unless the judgment-debtor has a disposing power over it for his own benefit. The measure of liability to involuntary alienation is the power of voluntary transfer". This part of the decision of the Division Bench of this High Court was cited with approval by Sir Owen Beasley, C.J. in *Janaki Amal v. Marudai Chetti*(²).

Mr. S. M. Mullick on behalf of the respondent argues in the first place that this jagir ought not to be regarded as a Crown grant at all because it was originally created by a private landlord as a service tenure. He suggests also that the restriction on transfer merely renders the purchaser liable to find that the grant may be resumed by the superior landlord after purchase, but that it cannot prevent the tenure from being brought to sale in execution by a Court. In *Golak Nath Roy Chowdhury v. Mathura Nath Roy Chowdhury*(³) which is cited by Mr. Mullick it was held that a restriction on assignment in the lease did not apply to an assignment by operation of law taking effect against the will of the lessee by a sale in execution proceedings. Mr. Mullick also cites the decision in *Keshab Chandra Pramanik v. Ajahar Ali Biswas*(⁴) where it was held that the condition in a permanent lease that the landlord would re-enter if the tenant made any transfer of the land demised did not

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prevent a sale by the Court. The learned Judges in this latter case distinguished the lease before them from the lease which was under discussion in *Vyankatraya v. Shivrambhat*⁽¹⁾ on the ground that in the Bombay case there was a distinct prohibition on the tenant's permitting his tenure to be attached or sold in execution; and Mr. S. M. Mullick argues generally that prohibition against transfer in a grant or a lease does not affect the liability of the tenant to have his estate brought to sale against his will.

Now in the first place it appears to us that it cannot be reasonably held that the tenure which is here in question is not a Crown grant, or that it is not a grant which is affected by the Crown Grants Act of 1895 in such a manner that the provisions of the Transfer of Property Act do not apply to it, so that it takes effect according to its tenor whatever may be the conditions laid down. It is possible that the ancestors of the jagirdar enjoyed this tenure on different terms before the grant was made in 1881; but there is nothing to indicate that the ancestors of the tenure-holder ever at any time enjoyed a tenure which could be transferred or could be brought to sale in execution of a decree. The tenure for which services had to be rendered as barkandaz could certainly not be alienated without the consent of the grantor to whom the services were to be rendered. When in 1881 these special services were commuted for an increased money rent payable by the jagirdar, the jagir would have become transferable if no restriction had been made in the grant; but the grant did make a clear restriction and it granted a limited interest which was not transferable. In the cases of the Calcutta High Court cited by Mr. S. M. Mullick it was remarked that involuntary alienation would not be a breach of a covenant not to assign; but we are not here concerned with a covenant not to assign, but with a grant by

(1) (1883) I. L. R. 7 Born. 256.

the Crown of a limited interest which was not assignable either by operation of law or by voluntary alienation. Mr. Mullick criticises the view expressed in *Thakur Khitanarain Sahi v. Surja Seth*⁽¹⁾ that "the measure of liability to involuntary alienation is the power of voluntary transfer" pointing out that a Mitakshara coparcener may have his interest brought to sale in execution although he has no power of making a voluntary transfer; but the Mitakshara coparcener can always by separating himself from the joint family obtain a disposing interest over his own share and where involuntary transfer is allowed in this way, the creditor is merely compelling the coparcener to do what he himself has power to do by applying for a partition.

The interest enjoyed by virtue of the grant of 1881 is a strictly limited interest in this way that it is to be enjoyed by the heirs of Ratan Singh and by nobody else and that what is granted is not a property which the heirs are to treat as their own in the sense that they may if they please transfer it to somebody else; it is a property created in the manner in which so frequently jagirs in India are created by the Crown which can be enjoyed only by the heirs of the grantee and cannot be alienated or assigned. No more can be brought to sale in execution of the decree than the judgment-debtor himself enjoys; and the judgment-debtor here possesses no right in the corpus of the property which can be assigned or which can be brought to sale. The only manner in which the decree-holder can utilise for his own benefit the interest of the jagirdar in this property is by obtaining the appointment of a receiver of the rents and profits until his decree is satisfied or during the life-time of the judgment-debtor whichever might be the shorter period.

I would set aside the decisions of the Courts below and allow this appeal with costs. This jagir cannot

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be brought to sale in execution of the respondent's decree.

ROWLAND, J.—I agree and would like to add a few observations. The Subordinate Judge rested his decision on the view that the Crown Grants Act did not apply to this tenure, and, secondly, he was of opinion that if it did apply, it was of no advantage to the judgment-debtor. His view that the Crown Grants Act did not apply was entirely erroneous. He thought that the tenure was not to be considered to be a tenure created by and held under the terms of the grant of 1881 but an older tenure which had merely been continued by that grant. The true position was that the lessee by accepting a new grant had made an implied surrender of the former lease. That is the position contemplated in section 111(f) of the Transfer of Property Act. Where a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the previous lease this is an implied surrender of the former lease which is thus determined. The observation of the Subordinate Judge that the Government having only stepped into the shoes of Thakur Biswanath Sahi Deo on account of the confiscation of his estate, was not entitled to impose a fresh condition as regards the transferability of the tenure in question is plainly unsupportable. The Crown Grants Act was passed in order to prevent the Courts from saying that the Crown could not grant lands on such and such terms. Then the Subordinate Judge in construing the restrictions imposed on transfer has proceeded on a view which is supported by some authority in respect of grants made by private persons to private persons containing covenants against alienation. Now such covenants are referred to in section 10 of the Transfer of Property Act. The restriction on alienation is void except in a lease where the condition is for the benefit of the lessor or those claiming under him; and the validity of the condition has generally come in question in

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connection with the claim of the lessor to forfeit the lease. The Courts have generally been reluctant to enforce such forfeiture; but the principles of those decisions do not seem to me to be applicable in the other class of cases where the restriction on alienability is expressed either in a Statute as in *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Ltd.*⁽¹⁾ and *Thakur Khitanarain Sahi v. Surju Seth*⁽²⁾ or in the case of a grant from the Crown. In *Sheo Singh v. Raghubans Kunwar*⁽³⁾, the Judicial Committee of the Privy Council considered the case of an estate granted by a Sanad in which provision had been made for descent by primogeniture which was said to be at variance with the custom of the family. It was held that the Crown Grants Act was a complete answer to the contention that it was not open to the Crown in making a grant to alter the ordinary rules of succession in respect of the estate. When a Crown grant contains a prohibition against alienation of the estate that prohibition must take effect in accordance with its terms as held in *Sundararajulu Naidu v. B. Pappiah Naidu*⁽⁴⁾. In all this class of cases the rule in my view is that laid down by Macpherson, J. in *Thakur Khitanarain Sahi v. Surju Seth*⁽²⁾: "The measure of liability to involuntary alienation is the power of voluntary transfer. The latter is taken away from the holder by the statute so far as sale or attempted sale of the property is concerned and the exercise of it is rendered void. Full ownership is cut down—the holder's power of disposition for his own benefit is restricted to the profits accruing within his lifetime". That being so, a creditor can only proceed in execution against the profits accruing and not against the estate or tenure itself.

S. A. K.

'Appeal allowed.

(1) (1931) I. L. R. 59 Cal. 1, P. C.

(2) (1931) I. L. R. 10 Pat. 582.

(3) (1905) I. L. R. 27 All. 634, P. C.

(4) I. L. R. [1938] Mad. 767.