APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

DOSIBA'I, WIDOW OF JEHA'NGIRSHA'H ARDESIR, (ORIGINAL DEFENDANT), APPELLANT, *v.* ISHWARDA'S JAGJIVANDA'S AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1885. *July 7.*

Jághir—Grant—Sanad—Construction—Alienation—Sale.

On the 22nd of September, 1830, the British Government made a grant to Ardesir Bahádur in the following terms:—

"In consideration of the active and zealous performance of the duties entrusted to him by Government the Honourable the Governor in Council hereby gives and bestows upon Ardesir Bahádur, son of Dhanjisháh, and his heirs for ever, as *jághir*, the following four villages—Bhestán and Sonári in the Chorási Pargana, Kumwádá and Boriach in the Chikhli Pargana in the zilla of Surat, with the *jamá* and *moghái* of the same—now yielding an average net sum of rupees two thousand nine-hundred and ninety-two, one quarter, and ninety-six reas. The revenue of the said villages hereafter, whether more or less, to be collected by the said Ardesir Bahádur and his heirs from the 5th of June, 1830, and such *lawazims* or *haks* as are at present settled on those villages are to be disbursed by the said Ardesir Bahádur in the same manner as heretofore."

Held, having regard to the language of the grant and to the object with which it was made, *viz.*, to reward the past services of the grantee, that the introduction of the words "as *jághir*" was not intended to control the right of alienation inherent in the operative terms of the grant.

THIS was an appeal from an order made by Khán Bahádur Barjorji Edalji Modi, First Class Subordinate Judge of Surat.

The material facts of the case are as follows:—

On the 18th of October, 1866, the applicant, Ishwardás, having called upon the opponent Dosibái, as the representative of one Ardesir Dhanjisháh Bahádur, to pay a sum of money as the amount of six instalments alleged to be due on two mortgages executed on 18th July, 1833, and 12th August, 1847, the matter in dispute was submitted by the parties on the 18th October, 1866, to arbitration. The arbitrators made their award on the 3rd of December, 1866, which was filed by the First Class Subordinate Judge of Surat on the 20th December, 1866. Several applications

* Regular Appeal, No. 106 of 1883.

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were made for the execution of the award, but they were all rejected. The last order rejecting the application was confirmed by the High Court, on appeal, on the 28th September 1882.

An application was then made to the First Class Subordinate Judge to pass judgment in terms of the award. This was refused; but the High Court, in the exercise of its extraordinary jurisdiction, directed the Subordinate Judge "to proceed to pass judgment according to the award, to be followed by decree, and to afterwards proceed to dispose of the plaintiff's application." See *Ishwardás Jagjivandás* v. *Dosibái*[1].

The Subordinate Judge accordingly passed a decree in the following terms:—"That the plaintiffs (applicants) do recover Rs. 72,146-4-6 according to the conditions of the bond sued on, (dated 12th August, 1847), from the four mortgaged *jághír* villages, namely, Bhestán and Sonári in the Chorási Pargana and Kumwáda and Boriach in the Chikhli Pargana, and from the income of these villages and from all the property of the deceased Ardesir." The Subordinate Judge also made an order directing the sale of the property without previous attachment.

Dosibái thereupon made an application to set aside that order. This application having been rejected, Dosibái appealed to the High Court, and contended that the decree did not authorize a sale of the villages; that the sale should have been preceded by attachment; and that the sale, if authorized, was only of Ardesir's life interest in the villages, which had expired.

On the 9th of May, 1884, the High Court (Sargent, C.J., and Kemball, J.,) held that the intention of the mortgage deed, dated 12th August, 1847, was to enable the mortgagees, if they thought proper, to demand immediate payment on giving three months' notice of the balance due on the account, and, in default of payment, to recover it from the *jághír* villages and other property belonging to the mortgagor,—an intention which the Court considered could only be effected by sale of the *corpus* of the property. Under these circumstances the Court thought the expression "recover from the property" in the award was not to be read as simply as a declaration of lien, but as equivalent to an

(1) I. L. R., 7 Bom., 316.

authority to sell the property, which when clothed with a decree became an order to sell according to the usual mode of executing such orders, *i.e.*, by sale without attachment. The Court accordingly held that the First Class Subordinate Judge was right in ordering the sale of the villages so far as the form of executing the decree was concerned, but that it was open to Dosibái to contend that what the decree ordered to be sold was Ardesir's interest in the villages, which, according to her contention, determined at his death. This was a question relating to the execution of a decree in a suit, and, therefore, to be determined in execution under section 244 of the Code of Civil Procedure, Act XIV of 1882. The Court sent down the following issue to the Subordinate Judge for trial:—

"Had Ardesir only a life interest in the villages, the subject of the order in question?"

The Subordinate Judge found that Ardesir had an absolute interest in the villages under the *sanad* dated 22nd September, 1830, which ran as follows:—

"In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor in Council hereby gives and bestows upon Ardesir Bahádur, son of Dhanjisháh, and his heirs for ever, as *jághír*, the following four villages—Bhestán and Sonári in the Chorási Pargana, Kumwádá and Boriach in the Chikhli Pargana in the zilla of Surat, with the *jamá* and *moglái* of the same—now yielding an average net sum of rupees two thousand nine hundred and ninety-two, one quarter, and ninety-six reas. The revenue of the said villages hereafter, whether more or less, to be collected by the said Ardesir Bahádur and his heirs from the 5th of June, 1830, and such *lawazims* or *haks* as are at present settled on those villages are to be disbursed by the said Ardesir Bahádur in the same manner as heretofore."

The judgment-debtor, Dosibái, now contended before the High Court that the finding of the Subordinate Judge was erroneous.

Shántárám Náráyán for the appellant Dosibái.—The grant in this case was by way of *jághír*, though it was hereditary. It was *jághír* proper and inalienable. Sir John Malcolm, the

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Governor of Bombay, in his minute of the 25th of January, 1830, which led to this grant, spoke of it as "*inám*." In para. 6 of this minute he says:—"The merits of Ardesir have been, as before stated, brought to the notice of the Board by Mr. Romer. Mr. Anderson, who long and actively superintended the police of Surat, spoke to me in terms of the strongest commendation of this nature; and I found Mr. Sutherland, the Chief Judge of the Court of Circuit, equally warm in his praises. From these circumstances, which I was led by a consideration of his pretensions from the rank of his ancestors, who were *Kháns* of the Empire, and the honourable name acquired by his father, who died in the public service, to gratify his love of distinction by adding to his *khilát* (which included a *jiggah*, a horse and sword), the title of *bahádur*. I promised that a gold medal with a suitable inscription should be sent to him, and that the Government would further bestow an *inám* upon him as a permanent proof of the value in which it held his services." But the grant made was not as *inám*, but as *jághír*. Sir John Malcolm in para. 7 of his minute said:—"Perhaps a *nazrána* might be taken, or half the grant given in productive, and the remainder, or somewhat more, in waste, but improveable, land." Ardesir elected the former, and a *nazrána* was charged. A *nazrána* is an incident of a *jághír*, not of an *inám*.

In a minute by Sir John Shore, which appears at page 418 of Mr. John Herbert Harington's Elementary Analysis of the Laws and Regulations enacted by the Governor General in Council at Fort William in Bengal, it is said:—"A *jághír* may be defined to be an assignment in land or money for the support of a certain dignity, and for the troops annexed thereto. That it was either conditional or unconditional. The former implied that it was granted for the expenses of a particular office or station; the latter, that it was independent of any office or station, being appropriated for the maintenance of a dgnity, a suitable number of attendents, and the effective troops annexed to it. In the latter case it was granted for life, or until the Emperor should please to resume the dignity, or diminish it. In the former case it existed whilst the possessor continued in office only; and upon his removal or dismission devolved, either in whole or in

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part upon his successor." Professor H. H. Wilson gives a similiar description of the word *jághír*, and adds:—"The assignment was either for a stated term, or, more usually, for the life-time of the holder—lapsing, on his death, to the State, although not unusually renewed to his heir, on payment of a *nazrána* or fine, and sometimes specified to be a hereditary assignment: without which specification it was held to be a life tenure only * * * In the inability of the State to vindicate its rights, a *jághír* was sometimes converted into a perpetual and transferable estate; and the same consequence has resulted from the recognition of sundry *jághírs* as hereditary by the British Government after the extinction of the Native Governments by which they were originally granted: so that they have now come to be considered as family properties, of which the holder could not be rightfully dispossessed, and to which their legal heirs succeed as a matter of course without fine or *nazrána*." As to *jághírs* for military service, see West and Bühler's Hindu Law, page 173 (3rd ed.). The Privy Council in *Gulábdás Jugjivandás* v. *The Collector of Surat* (1) held that a *jághír* must be taken, *primâ facie*, to be an estate only for life, although it might possibly be granted in such terms as to make it hereditary. Tucker, J., said in *Krishnarár Ganesh* v. *Rangrár et al* (2), "the alienability of land granted as *jághír* or *inám* must be governed by the terms of each particular grant." In the case of *Rámchandra Mantri* v. *Venkatrár* (3) Melvill, J., laid down that "the grant in *jághír* or *saranjám* was very rarely a grant of the soil, and the burden of proving that it was in any particular case a grant of the soil lay very heavily upon the party alleging it." *Jághír* and *saranjám* are convertible terms; and as to *saranjám*, there is not a single case in which the sale of it has been recognized. The Summary Settlement Act (Bombay) VII of 1863 expressly excepts *jághírs*. It gives power to *inámdárs* to alienate at will; but Government will not permit alienations of *jághírs*—Selection from Government Records, New Series, No. 132, page 135.

Macpherson (with *Pándurang Balibhadra* and *Ganpat Sadáshiv*

(1) I. L. R., 3 Bom., 186. (2) 4 Bom. H. C. Rep., I, A. C. J. (see p. 24).
(3) I. L. R., 6 Bom., 598.

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Ráv).—The case turns upon the construction of the *sanad*. There would be no doubt as to the estate being absolute, hereditary, and alienable, but for the words "as *jághír*" used in the *sanad*. This is not a *jághír* proper. *Jághírs* proper are necessarily life holdings to secure future service, and there is generally no *sanad*—Steele on the Law and Custom of Hindu Castes, (ed. of 1868), pp. 207 and 208. Here there is a *sanad*, and the grant is hereditary and for past services. The circumstances under which the grant was made, show that the Collector of Surat spoke of the intended gift as *inám*, and Sir John Malcolm also spoke of it as *inám*. The instructions issued from the Secretariat were also for the grant of an *inám*. The description given by Wilson of *jághír* shows that *jághír* is not inalienable. The *sanad* in *Gulábdás Jagjivandás* v. *The Collector of Surat*(1) was of a different kind, and related to a *jághír* proper. The case of *Krishnaráv Ganesh* v. *Rangráv et al*(2) was the case of an *inám*. In the case of *Rámchandra Mantri* v. *Venkatráv*(3) the grant was of an ordinary *jághír*. In the case of *Awábáee* v. *Kooverbáee*(4) the grant to Pirozsháh, the brother of Ardesir, though more in the nature of a *jághír* proper than the grant in this case, was construed by the Sadar Diváni Adálat as subject to the ordinary liabilities of property.

Cur. adv. vult.

SARGENT, C. J.—The real question to be determined in this case is, whether Ardesir Dhanjisháh could alienate the four villages in question granted to him by the *sanad* of 22nd September 1830 beyond the period of his life. The *sanad* is as follows:—"In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor in Council hereby gives and bestows upon Ardesir Bahádur, son of Dhanjisháh, and his heirs for ever, as *jághír*, the following four villages—Bhestán and Sonári in the Chorási Pargana, Kumwáda and Boriach in the Chikhli Pargana in the zilla of Surat, with the *jamá* and *moglái* of the same—now yielding an average net sum of rupees two thousand nine hundred and

(1) I. L. R., 3 Bom., 186.
(2) 4 Bom. H. C. Rep., 1, A. C. J.
(3) I. L. R., 6 Bom., 598.
(4) 8 Har., 72.

ninety-two, one quarter, and ninety-six reas (Rs. 2,992-1-06). The revenue of the said villages hereafter, whether more or less, to be collected by the said Ardesir Bahádur and his heirs from the 5th June, 1830, and such *luwazims* or *haks* as are at present settled on those villages are to be disbursed by the said Ardesir Bahádur in the same manner has [? as] heretofore." The grant is, therefore, in express terms one of an absolute estate of inheritance in the revenue of the villages in question as a reward for past services, and, in the absence of the words "as *jághír*," would, it cannot be doubted, have vested in Ardesir the absolute right of alienation at his pleasure.

The question, therefore, is whether those words had any and what restrictive effect on the power of alienation which was otherwise inherent in the estate of the grantee. Now, no authority has been cited to show that they have that effect *ex vi termini*. A grant of a *jághír* or *saranjám* is, doubtless, *primâ facie*, a personal grant for the life of the donee; but, when made in terms or suffered to become perpetual, the distinction between such a *jághír* and an *inám*, which is generally alienable at the pleasure of the holder, is not easily drawn (as pointed out by Westropp, C.J., in *Krishnaráv Ganesh* v. *Ramráv*[1]).

The conclusion, we think, to be drawn from a perusal of the proceedings of the Inám Commissioner and the Government Records is that the question, whether a particular *jághír* is alienable or not, must, as Mr. Justice Tucker says in the case above cited, p. 24, "be governed by the terms of each particular grant," in the construction of which we may add, as pointed out by the Privy Council in *Gulábdás Jugjivandás* v. *The Collector of Surat*[2], the Court may seek for aid "in the surrounding circumstances and the object for which the *sanad* was granted." In that case the Privy Council by resorting to the history of the grant, which showed that the object was "to make a permanent provision for the maintenance of an important family," arrived at the conclusion that the *jághír* was not alienable beyond the life of the actual holder, although they held it to be, in terms, an hereditary one. The same conclusion would probably be arrived at

(1) 4 Bom. H. C. Rep., 1, A. C. J.

(2) I. L. R., 3 Bom., 189.

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when the grant is to ensure the rendering of certain services to the State. But in the present case the correspondence which passed between the Collector of Surat and the Governor in Council can leave no doubt that the sole object the Government had in view was to reward Ardesir, on his retirement from the police, for the faithful services he had rendered to Government for many years in that force.

It may be asked, what was the object the Government had in view by inserting the words "as *jághír*" into the grant. It may be that the intention was to reserve to itself a right to *nazrána*, as was directed to be done by the letter from the Secretary to Government, of 26th May, 1830, to the Collector of Surat; but, however that may be, we think that, having regard to the special language of the *sanad*, which is the most appropriate mode in an English document of conveying an absolute estate in fee simple to the grantee, and also to the object with which the grant was made, the introduction of the words "as *jághír*" was not intended to control the right of alienation inherent in the operative terms of the grant. We must, therefore, confirm the order appealed against, with costs on the appellant, including the costs of the finding on the issue.

Order confirmed.

REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

1885. July 8.

QUEEN EMPRESS *v.* GUJRIA.*

Municipal (Bombay) Act VI of 1873, *Secs.* 33 *and* 74—"*External alteration*"—*Opening of a new doorway in a building without notice to municipality.*

Opening a new external door is an "external alteration" of the building in which the door is opened, and such act done without the notice to the municipality, contemplated by section 33 of the Bombay Act VI of 1873, is an offence punishable under section 74 of the same Act.

Semble.—Where such act does not cause any inconvenience to any person, a light nominal fine is an adequate punishment.

THIS was a reference by H. E. Winter, District Magistrate of

*Criminal Reference, No. 82 of 1885.