PRIVY COUNCIL.

DURGADUT SINGH
v.
RAMESHWAR SINGH;
AND
TARADUT SINGH
v.
RAMESHWAR SINGH.

*P.C.**
1909
May 13, 14; June 29.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Maintenance—Grant to junior members of family for Maintenance —"Babuana" property, nature of—Power of Grantees to alienate—Custom of Darbhanga Raj—Property not inalienable merely because it is impartible—Liability of "Babuana" to sale in execution of decree—Evidence of Custom.

Property granted as "*babuana*" to a junior male member of the Darbhanga Raj family in lieu of money maintenance was admittedly impartible, descending to the eldest male heirs of the grantee and being held and managed by the person to whom it descended for the maintenance of himself and his family. The Government revenue was conditioned to be paid by the grantee, or the person to whom the property descended, not directly to Government but through the Maharaja:—

Held, that such property, though impartible, was not by reason of that fact inalienable. Property so granted may be alienable.

Udaya Aditya Deb v. *Jadablal Aditya Deb* (1), *Sartaj Kuari* v. *Deoraj Kuari* (2), and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards* (3) followed.

Notwithstanding its impartibility the subject of such a grant came, in the absence of any special custom regulating its enjoyment within the principle laid down in Manye's Hindu Law, 7th edition, page 415, paragraph 321, that "in cases governed by the Mitakshara Law a father may sell or mortgage, not only his own property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character . . . and such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties."

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ANDREW SCOBLE.

(1) (1881) I. L. R. 8 Calc. 199; L. R. 8 I. A. 248.
(2) (1888) I. L. R. 10 All. 272, 288, 289; L. R. 15 I. A. 51, 65, 66.
(3) (1899) I. L. R. 22 Mad. 383; L. R. 26 I. A. 83.

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Semble : If the male descendant in whom property so granted was for th time being vested failed to pay the Government revenue as stipulated, and th Maharaja was himself obliged to discharge the claim of the Government, h might sue the defaulter for the amount so paid, and execute his decree by sal of the "*babuana*" property.

A family custom to the effect that property granted for maintenance by "*babuana*" grant was inalienable, was held to be not established.

Absence of evidence of alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of alienability.

Sartaj Kuari v. *Deoraj Kuari* (1) followed.

Two consolidated appeals (Nos. 10 and 11 of 1908) from two judgments and decrees (10th April 1905) of the High Court at Calcutta, one of which (the subject of appeal No. 10) affirmed a judgment and decree (29th March 1901) of the Subordinate Judge of Mozufferpur; and the other (the subject of appeal No. 11) reversed a judgment and decree (13th July 1903) of the second Subordinate Judge of the same Court.

In the first appeal (No. 10) the defendants, and in the second appeal (No. 11) one of the plaintiffs were respectively appellants to His Majesty in Council.

Appeal No. 10 arose out of a suit (114 of 1899) which was brought on 14th December of that year by the present respondent, the Maharaja of Darbhanga, to enforce a mortgage deed, dated 14th April 1892, executed by the appellant, Durgadut Singh, whereby the latter mortgaged the share of himself and his family in certain villages in pergunnah Jabdi. On that mortgage deed the mortgagee had, on 11th February 1895 and 21st August 1896 respectively, obtained two decrees against the mortgagor, his sons and grandson (now appellants) for arrears of interest due on the mortgage, and the amount decreed in each case was declared to be a charge on the property mortgaged.

Appeal No. 11 was preferred in a suit (89 of 1901) brought on 14th August of that year, in which the plaintiffs (who were minors) were the fifth son of Durgadut Singh, one Jibender Singh (now deceased), and the present appellant Taradut Singh

(1) (1888) I. L. R. 10 All. 272, 289; L. R. 15 I. A. 51, 65.

(a grandson of Durgadut Singh), who sued by his mother as next friend; and the defendants were the present respondent, Rameshwar Singh, and Durgadut Singh and his four other sons. Of the defendants, however, only Durgadut Singh and the present respondent appeared and contested the suit, in which the plaint prayed that the decrees of 11th February 1895 and 21st August 1896 should be set aside on the ground of the negligence of the persons who acted as their guardians in those suits, and also for a declaration that the mortgage of 14th April 1892 was invalid on the ground that the mortgaged property being *babuana* given for maintenance was not alienable.

This latter contention formed the main question for determination in the present appeals.

The appeal to the High Court in the suit, out of which appeal No. 11 arose, will be found reported as *Rameshwar Singh* v. *Jibender Singh* (1), where the facts are sufficiently stated as well as in their Lordships' judgment on these appeals. In that appeal the decision of the Subordinate Judge that the property was inalienable was reversed by the High Court (RAMPINI and CASPERSZ JJ).

In the suit to enforce the mortgage deed (the subject of the present appeal No. 10) the same contention was raised by the defendants. The Subordinate Judge held (*inter alia*) that there was nothing to show that the property was inalienable, and gave the plaintiff (the present respondent) a decree. The appeal to the High Court in this case was heard by the same Judges and together with the appeal in the other suit, but a separate judgment was delivered, the material portion of which as to the alienability of the property was as follows :—

"The defendant No. 1, Durgadut Singh, is one of the relatives of the plaintiff. He is the grandson of the common ancestor Maharaja Madho Singh. His case is that Maharaja Madho Singh when abdicating in favour of his eldest son, Chhattar Singh, made a grant in favour of his younger son, the defendant No. 1's father, Babu Kirat Singh, of certain properties for the maintenance of himself and his male descendants. Now, the contention of the appellant is, that such property being for maintenance is inalienable. But, unfortunately, there is no evidence either documentary or oral to prove this contention.

(1) (1905) I. L. R. 32 Calc. 689.

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There was admittedly a deed granting the *babu* Kirat Singh, but it is not produced. It is further a of this grant in existence, but it has not been produ that has been put before us is a sanad granted by Ma. Chhattar Singh on the 18th June 1807, which contain. sanad in respect of pergunnah Jabdi has already been gi kumar Babu Kirat Singh.' This is all.

"From these words we are asked to reconstruct the grant in favour of Babu Kirat Singh and to construe it as containing a condition to the effect that the property was inalienable for ever. We are unable to do this. From the evidence of the Maharaja and other members of the family, it appears to us to be clear that *babuana* property was subject to three conditions: (i) that the Maharaja for the time being remained the recorded proprietor of it; (ii) that the Government revenue was paid through the Maharaja; (iii) that, on failure of male issue of the grantee, the property reverted to the Maharaja. But there is no evidence nor any *data*, from which we can infer that the property was inalienable during the continuance of the lines of the grantee and of his male issue. Such property might be inalienable according to family custom, but there is no evidence, far less proof, of any such custom prevailing in this suit.

"It is also very much against the hypothesis of the property being inalienable that this plea was not raised in either of the previous suits, or by the defendant No. 1 himself in his written statement in this suit.

"On his own showing, the defendant No. 1 was willing to transfer the property by means of a usufructuary mortgage transaction, and if he was competent to deal with it in any one way, the theory of a limited estate must disappear. It is, also, worthy of note that Government revenue paid by the Maharaja can be realized by suit from the holder of *babuana*, whose property would then become liable to be sold in execution of the decree so obtained.

"It also appears to us that the remote contingent interest reserved to the Maharaja cannot detract from what is, virtually, an absolute estate of the grantee and his male descendants, among whom may be reckoned adopted sons. We are, therefore, unable to recognize in these Babuana-holders, the status of protected proprietors who may not contract debts affecting their landed property. Again, in the bond in suit there is a clear declaration by the defendant No. 1, that—'I, the declarant, my present and future heirs and representatives, have a full joint *milkiat* right in them (the mortgaged properties).' The word *milkiat* means, of course, the interest of a *malik*, or proprietor, and this, it seems to us, was all along the view taken by the defendants of their rights under the grant of *babuana*."

The High Court, therefore, dismissed the appeal.

On these appeals,

J. A. Simon, K.C., and *G. E. A. Ross*, for the appellants in both appeals, contended that on the construction of the grant, the property being *babuana* was not alienable. The nature

of the grant and its object and intention were to be looked at. Here the object of the grant was to make sufficient provision for the grantee and the male members of his family to enable them to maintain their status as Maharaj Kumars or Babus. If the property granted were liable to alienation the very object of the grant would be defeated; it could not have been the intention of the grantor that that should happen. The Government revenue on the property granted for *babuana* was to be paid by the grantee, not directly to the Collectorate but through the Maharaja, the grantor, by which restriction, it was submitted, it was intended that the subject of the grant was to remain in the grantor, the grantees only getting the benefit of the usufruct for maintenance. From the nature of the grant it was meant to be inalienable by the grantee. If the subject of the grant were alienable, and alienation was made of it so as to greatly reduce, or wholly extinguish, the provision made for the maintenance of the members of the branch of the family to which the grant was made, the burden of maintaining them would, inasmuch as they were entitled to be suitably maintained, be thrown again on the grantor, which could never have been his intention. The impartibility of the property would be also in favour of its being inalienable. [LORD MACNAGHTEN referred to *Udaya Aditya Deb* v. *Jadablal Aditya Deb* (1).] Reference was made to *Gunesh Dutt Singh* v. *Moheshur Singh* (2), a case recording a previous litigation in the family to which the present parties belonged, where the assignment of the Raj to the eldest son was only allowed "on condition of provision being made for the younger sons." It was submitted, therefore, that the incidents of the property were of such a nature that the holders thereof for the time being could not have absolute and transferable rights and interests therein which they could sell or mortgage: and Transfer of Property Act (IV of 1882) section 88; Mayne's Hindu Law, 7th edition, page 524, paragraph 395; *Rameshar Bakhsh Singh* v. *Arjun Singh* (3),

(1) (1881) I. L. R. 8 Calc. 199; L. R. 8 I. A. 248.
(2) (1855) 6 Moo. I. A. 164.
(3) (1900) I. L. R. 23 All. 194; L. R. 28 I. A. 1.

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Karim Nensey v. *Heinrichs* (1) and *Aziz-un-nissa* v. *Tasadduq Husain Khan* (2) were referred to.

It was then contended on the evidence that a custom existed in the family that in such grants the subject of the grant was inalienable; there was a contract as it were that the property should not be alienated, and for a long period it was never alienated.

Sir R. Finlay, K.C., DeGruyther, K.C., and *E. U. Eddis*, for the respondent, contended that the property was alienable. Impartible property was not inalienable in virtue of its impartibility: *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards* (3). In the absence of any restriction on alienation, the property must be assumed to be alienable. No intention to restrain alienation was shown by the mode of payment by the grantee of the Government revenue; if the condition for payment were not fulfilled, and it remained unpaid, and the grantor had to pay it to the Government, he could sue the person for the time being in possession of the subject of the grant for the share of the revenue which had not been paid, and execute any decree he obtained by sale of the property granted for maintenance. But, if any restraint on alienations had been intended, it would have been void as creating a perpetuity; an estate tail was illegal under the Hindu Law: *Tagore* v. *Tagore* (4), *Raikishori Dasi* v. *Debendranath Sircar* (5), and Transfer of Property Act (IV of 1882) section 10, were referred to: and reference was made to Mayne's Hindu Law, 17th edition, page 415, paragraph 321, as to the power of alienation by the father of a Hindu joint family, the principles of which would, it was submitted, apply to the present case. No custom of inalienability was proved: the fact that there was no alienation for a long time proved nothing except that there was probably no occasion for it; certainly it did not show a

(1) (1901) I. L. R. 25 Bom. 563; L. R. 28 I. A. 198.
(2) (1901) I. L. R. 23 All. 324; L. R. 28 I. A. 65.
(3) (1899) I. L. R. 22 Mad. 383; L. R. 26 I. A. 83.
(4) (1872) L. R. I. A. Sup. Vol. 47, 54, 66, 67, 70; 9 B. L. R. 377, 396.
(5) (1887) I. L. R. 15 Calc. 409; L. R. 15 I. A. 37.

custom that the property was inalienable. The evidence was gone into to show that there had been alienations of the property, and that they had been made without any objection ever being taken as to the inalienability of the property.

J. A. Simon, K.C., in reply. The analogy drawn between an estate in tail and such an estate as that in suit was not accurate; the former could be barred, but the *baluama* grant could not be.

The judgment of their Lordships was delivered by

June 29.

LORD ATKINSON. In this litigation two appeals, numbered 10 and 11 of 1908, and subsequently consolidated, have been lodged against two decrees of the High Court of Calcutta, both dated the 10th April, 1905.

The first decree, in Appeal No. 10 of 1908, affirmed a decree of the Subordinate Judge of Mozufferpur, dated the 29th March, 1901, pronounced in a suit, No. 114 of 1899, brought by Maharaja Sir Rameshwar Singh Bahadur (hereinafter called the mortgagee) against Durgadut Singh (hereinafter called the mortgagor) and others to enforce a mortgage, dated the 14th April, 1892, described therein, of a certain pergunnah named Jabdi.

The second decree, in appeal No. 11 of 1908, reversed a decree of another Subordinate Judge of Mozufferpur, dated the 13th July, 1903, pronounced in a suit, No. 89 of 1901, instituted by Taradut Singh, the grandson of the mortgagor, a minor, through his mother, his guardian and next friend, against the mortgagee, the mortgagor (his grandfather), and others, to have it declared that the said mortgage was void and that the two decrees based upon it hereinafter mentioned should be cancelled.

The mortgage was given for the large sum of Rs. 4,70,858 8*a*. 5½*p*., repayable on the 15th April, 1897. It reserved interest at the rate of 10 per cent. per annum, payable on the 15th April in each year. Compound interest at the same rate was to be charged in case of default in the payment of the

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interest on the days named, and a right was given to the mortgagee to sue for arrears of interest as they became due. A considerable portion of the sum secured was paid in cash to the mortgagor, who was then heavily indebted, and the balance was paid to his creditors. The interest having fallen into arrear, the mortgagee, on the 31st July, 1894, instituted a suit in the Court of the Subordinate Judge of Mozufferpur against the mortgagor and all the members of the family of which he was the head, two of whom were minors, to recover interest and compound interest due on the mortgage from the 14th April, 1892, to the 15th April, 1894. Of all the members of the family made defendants the two minors alone appeared and pleaded to the effect that the mortgage was unconscionable, that it was not executed for necessity, and that their shares in the pergunnah as joint Hindu property should be released.

The Subordinate Judge found in favour of the plaintiff in the suit on the issues raised on these pleas, and on the 11th February, 1895, gave a decree for the amount sued for.

The interest due on the 15th April, 1895, having fallen into arrear, the mortgagee, on the 12th September, 1895, again instituted a suit in the same Court against the same parties to recover the arrears. The same defendants appeared and pleaded the same pleas with the same result, that the Subordinate Judge found in favour of the plaintiff, the mortgagee, and on the 21st April, 1896, gave a decree for the amount claimed.

The suit out of which the first of the present appeals arises was instituted on the 14th December, 1899, by the mortgagee in the same Court against the same parties to recover the sum due upon the mortgage for principal and interest by sale of the mortgaged property. Several defences were put in by the different defendants, not only raising the issues already decided upon in the two previous suits, but raising, for the first time, the issue upon which the decision of these appeals mainly, if not entirely, turns, and to which the arguments addressed to their Lordships on behalf of the parties on both sides were chiefly directed, namely, whether the fact that the grant of the

pergunnah Jabdi, made originally in 1807 by the then head of the family, Maharaja Madho Singh, to his son, Kirat Singh, was admittedly a *babuana* grant—that is, a grant for the maintenance of the grantee and his family, descendible to his male descendants—rendered the property inalienable by the mortgagor, Durgadut Singh, the son of the original grantee, to whom it had descended, and the mortgage therefore void. The Subordinate Judge delivered his judgment on the 29th March, 1901, holding that, notwithstanding the fact that the grant was a *babuana* grant, the property was alienable, and the mortgage therefore valid. And the High Court, by their decree of the 10th April, 1905, upheld that decision.

The second suit was instituted on the 14th August, 1901, about five months after the date of the decree of the Subordinate Judge in the former suit against the mortgagor and mortgagee and others. It claimed, amongst other things, to have it declared that the mortgage of the 14th April, 1892, and also the two decrees of the 11th February, 1895, and 21st April, 1896, were invalid and ineffectual, and that the decrees should be set aside; and also that the sale in execution of these decrees of certain properties, mentioned in the schedule No. 2 attached to the plaint, should be set aside, and that the plaintiffs should obtain a decree for possession of the same. The fundamental ground on which the claim to this relief was based is set forth in paragraph 4 of the plaint in these words:—

> 4. That the said pergunnah Jabdi which was given as '*babuana*' grant was given for maintenance of Maharajkumar Babu Kirat Singh and his male descendants; and the said Maharajkumar Babu Kirat Singh or any of his male descendants had no right to transfer it;

but nothing whatever is alleged in the plaint as to whether this inalienability is one of the incidents attaching to all *babuana* grants of this kind, or is only attached to this particular *babuana* grant by virtue of some custom prevailing in the family or tribe to which all the parties concerned belong.

Neither the grant by the Maharaja Madho Singh, the head of the family, to his son, Kirit or Kirat Singh, nor a copy of it was produced, but an attested copy of a sanad dated the 13th Jeth Sudi, 1214 (8th June, 1807) granted by the Maharaja to

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his eldest son and successor Sri Chhatar Singh, was produced. It contains the following statement or recital :—

A sanad in respect of pergunnah Jabdi has been already granted to Maharajkumar Babu Kirat Singh, in respect of pergunnah Pariharpur Ragho, to Maharajkumar Babu Gobind Singh, in respect of pergunnah Pachahi to Maharajkumar Babu Ramapat Singh, giving the same to them for their maintenance as *babuana* grants. Two horses and one elephant for riding have been given to each. The said Maharajkumar the Babus will enjoy the *malikana dastur* and profits of the said pergunnahs. They will continue to pay the Government revenue of the said pergunnahs to you and you will pay into the Collectorate the same together with the Government revenue of the Raj. The said Babus will attend upon you properly and you will treat them as Babus.

It was conceded that the lands, or usufructs, granted by this *babuana* grant to Kirat Singh, the father of Durgadut Singh, were impartible—descending to the eldest male heirs of the grantee to be held, or managed, by the person to whom they descend for the maintenance of the family—and that, on failure of male descendants, they reverted to the Raj and became the property of the Maharaja for the time being, or that the interest granted then ceased to exist, whatever it might be ; and, further, that meanwhile the Government revenue should be paid by the grantee, or the person to whom the property should descend through the Maharaja. There is no provision, express or implied, that the interest granted should be inalienable. It is no doubt impartible—that is to say, those who for the time being are entitled to be maintained out of it cannot have it divided amongst them by proceedings in the nature of partition. It by no means follows, however, that it is, by reason of this fact, inalienable: *Udaya Aditya Deb* v. *Jadablal Aditya Deb* (1), *Sartaj Kuari* v. *Deoraj Kuari* (2) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao* v. *The Court of Wards* (3). On the contrary, these authorities establish that property, though impartible, may be alienable. In the present case it was almost, if not entirely, conceded by the appellant's counsel, indeed it could not be successfully disputed, that, if the male

(1) (1881) I. L. R. 8 Calc. 199; L. R. 8 I. A. 248.
(2) (1888) I. L. R. 10 All. 272, 288, 289; L. R. 15 I. A. 51, 65, 66.
(3) (1899) I. L. R. 22 Mad. 383; L. R. 26 I. A. 83.

descendant in whom the property or interest granted was for the time being vested failed to pay the stipulated Government revenue to the Maharaja for the time being, and the latter was himself obliged to discharge the claim of the Government, he might sue the former for the amount so paid, and, if necessary, recover the amount decreed to him by sale of the interest granted for maintenance, since it never could be permitted that the subject of the grant should be enjoyed and the condition upon which it was made disregarded.

But an involuntary alienation of this kind, brought about by the default of the person in whom the property or interest was for the time being vested, would as effectually defeat the claims of all the members of the family who were at the time, or might thereafter become, entitled to maintenance out of this property or interest as would any voluntary alienation of it. Yet the main contention of Mr. Simon, on behalf of the appellants, was, as their Lordships understood it, this, that every member of a family of which a Maharaja, as owner of a Raj, was the head had such an inextinguishable right to maintenance out of the Raj that, if the property or interest, the subject of a *babuana* grant, made, as in the present case, for the maintenance of a particular branch of the family, was permitted to be alienated, the right to maintenance of the present and prospective members of that branch against the Raj would revive *toties quoties*, which would be most unjust and oppressive to the owner of the Raj, and destructive or injurious to the rights of the members of all the other branches; but no authority in support of this theory as to the peculiar nature of the right to maintenance was cited, and those above mentioned refute it.

The result of the authorities as to the right to alienate is thus summed up in Mayne's Hindu Law (7th edition, page 415):—

> In cases governed by the Mitakshara law, a father may sell or mortgage not only his own share but his sons' shares in family property, in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and . . . such transaction may be enforced against his sons by a suit and by proceedings in execution to which they are no parties.

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Notwithstanding the impartibility of property granted by a *babuana* grant, it comes apparently, in the absence of some special family custom regulating its enjoyment, within this principle. Pressed by this state of the law, the appellants endeavoured to prove the existence, in the family to which the parties on both sides belonged, of a family custom to the effect that property granted for maintenance by a *babuana* grant, such as that proved in this case, was inalienable. It is not necessary for their Lordships to express any opinion as to the legal validity of a custom such as is suggested, tying up, as it would, property for, possibly, many generations, because they are clearly of opinion that, not only have the appellants failed to prove the existence of this custom, but that the only evidence given in reference to dealings with the estate disproves it.

"The absence of evidence of an alienation, without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of inalienability": *Sartaj Kuari* v. *Deoraj Kuari* (1). But in this case numerous instances were proved in which alienations of small portions of the property took place, and in not a single instance was it proved that any objection, based upon the alleged custom, was raised by any one to an actual, or threatened, alienation. It was raised in the present suits for the first time.

Their Lordships are, therefore, clearly of opinion that both the decrees of the High Court were right, and should be affirmed, and that both appeals should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the mortgagee's costs of the appeals.

Appeals dismissed.

Solicitors for the appellants: *Downer & Johnson.*

Solicitors for the respondent: *Sanderson, Adkin, Lee & Eddis.*

(1) (1888) I. L. R. 10 All. 272, 289; L. R. 15 I. A. 51, 66.

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