Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Durgadut Singh (since deceased) and others v. *Maharaja Sir Rameshwar Singh Bahadur; and of Taradut Singh* alias *Taranandji* v. *Maharaja Sir Rameshwar Singh Bahadur and others, from the High Court of Judicature at Fort William in Bengal; delivered the 29th June,* 1909.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ANDREW SCOBLE.

[*Delivered by 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 (herein-after called the Mortgagee) against Durgadut Singh (herein-after called the Mortgagor) and others to enforce a mortgage dated the 14th April, 1892, described therein, of a certain pergunna named Jabdi.

[26] P.C.J. 80. L. & M.—27/5/09. 125—Wt. 98.

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 herein-after mentioned should be cancelled.

The mortgage was given for the large sum of Rs. 470,858 8a. 5½p., 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 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 pergunna 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 pergunna 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 (8 June 1807), granted by

the Maharaja to 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 Kirit 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. *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (L. R. 8 I. A., 248); *Rani*

Sartaj Kuari v. *Rani Deoraj Kuari* (L. R. 15 I. A., 51, at pp. 65, 66); and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (L. R. 26 I. A., 83). 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 Appellants' Counsel, indeed it could not be successfully disputed, that, if the male 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 ed., p. 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.

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." (*Rani Sartaj Kuari* v. *Rani Deoraj Kuari*, 15 I. A., 51, at p. 66). 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.

LONDON: Printed for His Majesty's Stationery Office,
By LOVE & MALCOMSON, LTD., Dane Street, High Holborn, W.C.
1909.