(1865) 01 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 3288 of 1863

Madhusudan Pal Chowdhry		APPELLANT
	Vs	
Piziruddin		RESPONDENT

Date of Decision: Jan. 9, 1865

Judgement

Norman, Officiating C.J.

1. The preamble of Regulation XIX of 1793 is as follows:-- "By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every biga of land demandable in money or kind, unless it transfers its right thereto, &c., or limits the public demand upon the whole of the lands belonging to an individual, leaving to him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter." As a necessary consequence of this law, if a zamindar made a grant of any part of his lands to be held exempt from the payment of revenue, it was considered void from being an alienation of the dues of the Government without its sanction; and section 10 enacts that "all grants fox holding land exempt from the payment of revenue that have been made since the 18th December 1790, or that may be here after made by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grants, either with regard to the property in the soil or the rents of it;" and the preamble of Regulation XLIV of 1793 states that it was "to be apprehended that many proprietors from improvidence, &c., might be induced to dispose of dependent talooks to be held at a reduced jumma, or fix the jumma of the dependent talooks now existing, &c., at an under rate, or let lands in farm, or grant pattas for the cultivation of land, at a reduced rent for a long time, or in perpetuity;" that "such engagements, if held valid, would leave it in the power of weak, improvident, or ill-disposed proprietors to render their property of little or no value to their heirs, promote vice and injustice, occasion a permanent diminution of the resources of Government arising from the lands, in the event of the rent or revenue reserved by such proprietors being insufficient for the discharge of the public demand

upon their estates, be an abuse of the great and lasting benefit which has been conferred upon the landholder by the possession of their lands being secured to them in perpetuity at a fixed assessment; and moreover he repugnant to the ancient and established usages of the country, according to which the dues of the Government from the land, as defined in Regulation I of 1793, are inalienable without its express sanction;" and by section 2 (which was afterwards repealed by section 2, Regulation V of 1812), it is enacted that "no leases or other engagements shall be made for a term exceeding ten years." Reading these Regulations together, it seems to have been the intention of the Legislature to treat the zamindars as agents or trustees for the Government, and, as such, bound to collect the Government share of the produce from each and every biga of land within their zamindaries. They are incapacitated from depriving themselves of the right and obligation of collecting the revenue, which by Regulation XLIV is declared inalienable, i.e., by the zamindar, without the express sanction of Government; and it is in accordance with that principle that all grants by zamindars, which exempt the grantees from liability to pay revenue to the zamindar, are declared null and void by section 10, Regulation XIX of 1793.

2. If, therefore, the grant now before the Court is to be considered simply as a rent-free grant created by a zamindar since 1790, I should feel bound to agree with the Court below, and say that it is null and void. This would be in accordance with the decisions of the late Sudder Court, Baboo Moodhnarain Sing v. Amirrunissa Begum S.D.A., 1852, 967, and Ahmed Alee Khan v. Moodhnarain Sing S.D.A., 1855, 395.

3. But first, we may observe that, by the acceptance of the grant in question, the grantee and his heirs are bound to allow the tenants of the zamindar in the village to take water; and that liability is one which might be enforced by the zamindari or his successors, owners of the zamindari for the time being, if the grantee failed to continue to distribute water; or, in other words, to allow the use of the water in the tank to the tenants of the village.

4. It is clear that the revenue or rent reserved to the zamindar need not be a money rent; it may be a portion of the crops, in specie, or apparently anything else having a money value. The word "rent" is large enough for that purpose. In Coke upon Littletou, 142 a, of Rent Service, it is said:-- "The rent may as well be in delivery of hens, capons, roses, spurres, bowes, shafts, horses, hawkes, pepper, cumin, wheat, or other profit that lyeth in render, office, attendance, and such like, as in payment of money."

5. The preamble of Regulation XLIV of 1793 goes on to recite that "it is essential that proprietors of land should have a discretionary power to fix the revenue payable by their dependent talookdars, and to grant leases, or fix the rents of their lauds for a term sufficient to induce their dependent talookdars, under-farmers, and ryots to extend and improve the cultivation of their lands, and that such engagements should be held inviolable in all cases, except where they may interfere with or affect in any shape the primary and indefeasible rights of the Government." Section 8 enacts that nothing in that

Regulation shall be taken to prohibit proprietors from granting a lease or patta for any term, or in perpetuity, for the erection of dwelling-houses or buildings for carrying on manufacture, or for gardens, or for other purposes.

6. So far from prejudicing the interests of the Government, the grant, by securing water for the use of the inhabitants of the village, appears to have been an essential means of placing the zamindar in a position to realize the Government revenue, and increasing the security of the Government. It was, therefore, clearly not within the mischief intended to be guarded against by the Regulations above referred to, and, therefore, may be said to be out of the purview of the enactment. (See Lord Coke"s 2nd Institute, page 886; Comyn"s Digest, Title Parliament, R., 15, R. 16).

7. Again, water may be treated as the produce of the land, a portion of which the zamindar and those authorized by him are entitled to take; and the right to take it may be considered as of the nature of a reservation of rent in kind.

8. It is satisfactory to me to find that similar grants were held valid by the late Sudder Court in Hurreemohun Das v. Prankishen Raee S.D.A., 1847, 447, in The Petition of Sheikh Kadir Id., 1856, 74, and in Lalla Haree Seekur Shaha v. Shaik Bukhtear S.D.A., 1858, 968. These decisions appear to be equally consistent with good reason and a sound construction of the Regulations.

9. I think that the grant was valid, and would reverse the decisions of the Court below with costs and interest.

Trevor, J.

10. The question referred to us for solution is, whether a rent-free grant of land, by a zamindar to an under-tenant, for the purpose of digging a tank, is legal or not. If it be null and void as against the policy of law, the successor of the grantor will, of course, be at liberty to resume the grant. If it be legal, no such power will belong to him.

11. The instrument in the case before us is, as to its terms, a grant, in fee-simple, of 22 bighas of the grantor"s revenue-paying estate, to the grantee, to be held by him free of revenue for ever; and it can in no way be construed as a lease, for there is no annual return or rent made by the grantee as tenant, either in labor, money, or kind. The condition in the grant, if condition it can be called, of giving water to others, is only a condition subsequent, and there is no contention on the part of the grantor that the grant is liable to be defeated in consequence of a breach of this condition. It is simply contended that the grant itself is of a nature contrary to public policy, and one that by Statute has been declared null and void. Had it been a lease, however small the rent reserved, it would have been legal under the terms of section 8 of Regulation XLIV of 1793; but as it is a grant involving that which the zamindar had not the power to grant, viz., the Government portion of the produce of the land granted in perpetuity, it is altogether, it seems to me, illegal and contrary to the policy of the law, as laid down in

Regulation XIX of 1793, viz., the common law of the country. It is laid down in the preamble of this law: "The ruling power is entitled to a certain proportion of the produce of every biga of land, until it transfers its light thereto for a term, or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce, and the sum payable to the public, whilst he continues to discharge the latter; as a necessary consequence of this law, if a zamindar made a grant of any part of his land to be held exempt from the payment of revenue, it was considered void, being an alienation of the dues of Government without its sanction." Section 10 of that law, in furtherance of this view of the common law of the country, declares that "all grants for holding lands exempt from the payment of revenue made by zamindars since 1st December 1790 are null and void, and no length of possession shall be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it."

12. The mere fact of the land granted being unculturable at the time the grant was made does not render that legal which, under other circumstances, would not be so. The fact of its unculturableness was an accident of the moment; and as the land was a portion of the decennially settled estate, the whole area of which forms the security for the Government revenue, it could not be alienated, revenue free, without the consent of Government. Neither can the fact of the grant, being for the alleged benefit of the villagers, render that legal, which is illegal in consequence of its being to the detriment of the interest of the State.

13. But it may be said that the grant in this case, though against the letter, is not against the spirit of section 10 of Regulation XIX of 1793, which prohibits only improvident grants, but not those made with a view to the benefit of the estate in which the land granted is situated; and that as the grant in this case is of the latter sort, it does not fall within the prohibition of the law. This position appears to me not to be tenable. The prohibition in the law is absolute, and under all circumstances, though doubtless the benefit of the State would be a strong ground for inducing Government to consent to the alienation of its portion of the produce of the land, and to legalize the grant.

14. Coming down to authorities, it appears that the late Sudder Court ruled, in 1847, in the case of Hurree Mohun Das v. Prankishen Raee S.D.A., 1847, 447, which ruling was followed in the subsequent case, decided in May 1858, Lalla, Hureesunker Shaha v. Sheikh Bukhtear Id., 1858, 968, that a grant similar to that in the present case was legal u/s 8, Regulation XLIV of 1793. But, notwithstanding the marginal note in which the words "grant" or "lease" occur, and looking to the tenor of the law itself, it is quite clear that that law only referred to leases on which a rent, however small, was reserved; and in no way applies to grants by which the laud granted becomes severed from the revenue-paying estate, of which it forms a part. With great deference, therefore, to the Judges who passed that decision, it seems to me to be altogether erroneous.

15. The view adopted above is in accordance with the judgment passed by the majority of the Judges in the case of Rajah Moodhnarain Sing v. Ahmed Alee Khan S.D.A., 1855, 395; but the reasoning of the dissentient Judge in this case is so striking at first sight that it requires a short consideration. After other remarks, Mr. Dick proceeds thus:-- "Grants of the nature in question, quoad the grantors and their heirs, affect not the public revenues. They affect merely their own rental. The grantor continues himself to pay the revenues; and if he do not, the estate is sold, and then the grant becomes null and void." This is, no doubt, in the main, true; and at the Decennial Settlement, the Legislature might, had it chosen, have relied on the Sale Law, to remedy any improvident act done by zamindars, and to restore estates to their original state. But it considered prevention better than cure; and with the former object, keeping in view the common law of the country, and the probable improvidence and weakness of the zamindars it had then created, it enacted Regulation XIX of 1793, and has thereby declared that all grants of the nature of that before us are null and void, and that no lapse of time shall give them validity. It follows that, as they are null and void in their inception, they can be resumed even by the grantor or his heirs, at pleasure.

16. I am of opinion, for the reasons above given, that the rent-free grant is illegal, and is liable to resumption. The question of assessment is not now before Court.

Loch, J.

17. The question in this case is, whether a zamindar can alienate any part of his permanently settled estate as rent-free, i.e., can he create a lakhiraj title in favor of any person to lands which form part of such an estate? If a proprietor make such a grant, is it invalid, and can the land he resumed by his successor?

18. Section 10, Regulation XIX of 1793, distinctly declares that "all grants for holding land exempt from the payment of revenue, whether exceeding or under 100 bighas, made since 1st December 1790, or that may be hereafter made by any other authority than the Governor-General in Council, are null and void." And the proprietor of the estate, within which such lands were situated, was required to collect the rent and dispossess the grantee of the proprietary right in the land, and re-annex it to the estate.

19. It is clear from these words that the power of re-annexing such lands, without application to any Court, was granted to proprietors, on the supposition that all lands so separated actually formed part of the permanently settled estate, and were liable with every other biga of land in the estate for their quota of the public revenue.

20. By section 8, Regulation XLIV of 1793, proprietors of estates were permitted to grant leases or pattas for any term of years, or in perpetuity, for the erection of dwelling-houses, manufactories, gardens, and other purposes. The above section, however, is not applicable to the document propounded in this case. It cannot, under any circumstances, he termed a lease in perpetuity, for it wants the element of a lease, viz.,

payment of rent in some shape or other. The deed is a distinct grant to hold 22 bighas of land, rent-free, i.e., lakhiraj; and the land is bestowed upon the grantee to enable him to dig a tank for the use of the public. Section 8, Regulation XLIV of 1793, has, therefore, nothing to do with this case.

21. Another element of confusion must be got rid of, viz., the interpretation put upon the word "revenue" in Regulation XIX of 1793. It has been said that the word is used indiscriminately to mean either revenue or rent according to the context. This appears to be a mistake. The word "revenue" is used in its proper meaning throughout the Regulation, and is not convertible with rent, though it comprises rent. A consideration of the purport of the law will at once show that the Legislature was dealing with a question of revenue only. The law first lays down the principle that the Government is entitled to a certain proportion of the produce of each biga of land, unless it transfers its right, either for a term of years or in perpetuity. In regard to all grants made previous to 1765, the Government gave up this right; but in regard to all lands held under grants made intermediately, it declared them liable to assessment, and that Government was entitled to enjoy the revenue so assessed. The Government then appropriated the revenue on lands exceeding one hundred bighas alienated under any one grant made previous to December 1790, and made over its right to the revenue assessed upon lands under one hundred bighas to the zamindars within the local limits of whose permanently settled estates such lands were situated. And the law further said that if any one claim to hold lands exempt from the payment of revenue under a grant made since 1790, his claim was not to be listened to for a moment, for the lands could be no other than a portion of the permanently settled estate within which such lands were situated. And this must be kept in mind that, in the limits of an estate, there could be only two classes of land, revenue-free created before 1st December 1790, and revenue-paying comprised in the estate at the Permanent Settlement. The word "revenue," therefore, as used in section 11 of Regulation XIX, is used in its proper sense. It was revenue claimable by the Government on lands held on invalid title, which revenue, and the right to claim which, Government had transferred to the zamindars. When so transferred, the revenue became rent.

22. It has been asked why, if a zamindar is able, as unquestionably he is by law, to alienate any part of his estate by sale or gift, he should be unable to create a rent-free tenure; that as he can give a perpetual lease at a quit-rent, there can be no good reason why he should not be able to forego his rent altogether; for if a rent-free grant be said to be injurious to the estate, a perpetual lease on a quit-rent, which the law allows him to make, might be equally injurious.

23. The reason why such rent-free grants cannot be made is that they are entirely opposed to the theory of the Permanent Settlement, and it is very remarkable how guarded the law has been on the subject, for while it allows the zamindar to give a lease in perpetuity, it never sanctions such an alienation as a lakhiraj or rent-free grant; and the reason is obvious when the principle of the Permanent Settlement is considered, which is

clearly laid down in the preamble of Regulation XIX of 1793,--that "the ruling power is entitled to a certain proportion of the produce of every biga of land, demandable in money or kind, according to local custom, unless it transfers its right thereto for a term, or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce, and the sum payable to the public, whilst he continues to discharge the latter; as a necessary consequence of this law, if a zamindar made a grant of any part of his lauds to be held exempt from the payment of Government revenue, it was considered void, from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution." The preamble then goes on to state that, previous to the accession of the Government to the Dewany, many such giants had been made, and proceeds to declare what course the Governor-General intended to pursue with regard to these lands.

24. The passage quoted from the preamble clearly lays down the principle upon which the revenue was assessed; what part of that revenue was to be considered as rent (viz., the difference between the assets of an estate and such portion of them as Government might think to appropriate), and it distinctly repudiates the zamindar"s right to make a grant exempt from the payment of revenue, such revenue necessarily comprising rent.

25. Now it is obvious that, if a zamindar grant lands to any one free of rent, he violates the above principle of the Permanent Settlement, for he not only alienates that portion of the assessment on each biga of land which the law permits him to appropriate, but he also gives up that portion which is the Government revenue, and thereby does a serious injury to the assets of the estate. He relinquishes the quota of the revenue with which each biga of a permanently settled estate was charged at the time of the settlement; and it is no answer to say that the whole estate is liable for the revenue, for it is not only that the integral estate is liable for the whole revenue assessed upon it, but each biga of land is responsible for its quota of that revenue. Suppose a zamindar were, by successive rent-free giants, to alienate the better part of his estate, so that, when it came into the hands of successors, the assets were insufficient to afford the Government revenue, surely it is not sufficient to say that at any rate the Government revenue is secured from the integral estate, and that a sale for arrears of revenue will put everything right, the auction purchaser having the power to set aside all previous engagements. The Government, however, has no wish that an estate should, by the act of any proprietor, be so impoverished as to descend as a burden to his successor, or that the assets of an estate be so reduced by the folly of one zamindar as to render it impossible for his successor to realize the Government dues from the lands, whose only course under such circumstances is to allow it to go to the hammer; consequently, the Government have prohibited such rent-free grants altogether.

26. It is a mistake to suppose that lands alienated by gift or sale are held exempt from their share of the Government revenue. The proprietor, who has made the alienation,

may pay the revenue out of his own pocket; but the untenableness of this supposition would he apparent on the application of any party, entitled to claim a partition, to the Collector to make a partition of the estate. He would proceed to assess every biga of land, and proportion the Government revenue thereon, irrespective of any private arrangements. And so with regard to perpetual leases. On the principle of the Permanent Settlement, it is assumed that the rent received from such lands covers the revenue as well as the zamindar"s rent. The zamindar may remit his share of the rent, but he has no authority to remit any portion of the revenue; and therefore a perpetual lease on a quit-rent, which does not provide for the full quota of revenue from each biga of land, is as invalid as a rent-free grant.

27. Looking at the terms of section 10, Regulation XIX of 1793, and at the principles of the Permanent Settlement, it appears to me that a zamindar has no power to make a lakhiraj or rent-free grant, even for public purposes, without the sanction of the Governor-General. If a zamindar wish to make a grant of the kind, his proper course is to apply to the Government, who alone have it in their power to remit any portion of it to be lakhiraj, revenue-free, as well as rent-free. And it further appears to me that, if a proprietor make such a grant, it being declared by the law null and void, his successor may resume and assess it. Under this view of the case, I would confirm the decision of the Judge, and reject the appeal with costs.

Pundit, J.

28. In India, that portion of the produce of lands which goes to the ruling power as its share is called revenue; and the produce (in money or kind) received from the cultivators by the persons entitled to collect, as well as the collection made (in kind or money) by other intermediate holders of different grade from those who are above those persons that collect, from the tenants of the lowest grade up to those who pay the revenue directly to Government, is called rent. That which persons, collecting from the lowest tenants or others of a higher grade, retain as their profits from collections made by them from intermediate persons, is also called rent. The word "revenue," however, is used indiscriminately for rent as well as for revenue, in many of the old laws preceding, as well as many of those passed in, 1793; and so in section 10 of Regulation XIX of 1793, the same confusion in expression is to be found; also in some other laws passed subsequent to 1793 (see Regulation III of 1821).

29. It is evident from the preambles of Regulations XIX and XLIV of 1793, that, before and in that year, it was believed to be the custom and the common law of the country that each biga of land was liable to pay its own quota of revenue to the ruling power.

30. Proceeding upon the principles of this common law with a view to protect the Government revenue due from estates that were as well as of those that were not permanently settled; and in order to prevent the zamindars from injuring their solvency to pay the assessment fixed upon their estates by the Decennial Settlement in 1790, it was

thought at that time advisable to enact certain rules which were afterwards embodied in the laws of 1793. By these rules, all the British officers, except the Governor-General, were prohibited from making any rent-free grants; and in estates permanently settled, the zamindars were restricted from settling their lands with any person under pattas written according to any form not approved of by the Collector, or for a term exceeding ten years, except for tanks, houses, gardens, &c. (see section 8, Regulation XLIV of 1793). The zamindars and all other persons were further prohibited from giving away, without the permission of the Government, any portions of the lands of their estate, without reserving some rent, which rent was supposed likely to represent in part or in whole, according to the quantity of the lands settled by the lease, the revenue due to the Government.

31. The British Government, on taking the administration of the country, found that, under the system prevailing before, emperors, subadars, rajas holding large landed property, zamindars and talookdars under them, had granted away lands by rent-free sanads, the effect of which transfers was to convey such proprietary rights as the party conveying could grant, without reservation of any rent, and which transfers, according to the common law of the country, were considered to be alienations of the revenue due to the Government from these lands. Certain officers under the British Government were also, from time to time, authorized to make such alienations, and many, not authorized, also made such grants. During the progress of the Decennial Settlement, and in 1793, when the laws of that year were enacted, it was thought to he a sufficient check against acts supposed to be injurious to the public rights, to declare that no grant or alienation should be made rent-free; and it was not considered at all expedient to rule further that the rent reserved in a lease should be equal to the proportionate revenue due to the Government from the lands leased out. It was not an easy matter to fix this proportion; and it was not thought proper to impose such a troublesome condition, because it had already been ruled that the zamindars generally could not settle for more than ten years, and that fraudulent or wrongful settlements made by them were not binding upon auction purchasers.

32. In about twenty years, the Government discovered that the imposition of restrictions upon settlement of land by zamindars, as made by the laws of 1793, was not at all necessary for protecting its rights, and were at the same time highly injurious to the improvement of the country at large. Accordingly, by Regulation V of 1812, power was given to the zamindars to make settlement for any term of years, or even in perpetuity, so far as they could do so. People had already, in one form or another, adopted long and perpetual leases with or without consideration, revived old, and created new tenures of the perpetual kind under different names; and so it was thought advisable in 1819, when Regulation VIII of that year was passed, to legalize all settlements made in direct opposition to former laws. It was not, however, even at that time, thought advisable to limit the power granted by Regulation V of 1812, by any restriction requiring that, when any estate or part of an estate is let out on lease, the rent reserved should not be less than the total or the proportionate share of the Government revenue due from the lands

let out.

33. The former strictness and jealousy by degrees slackened. New ideas came into operation, until in 1859, the present Revenue Sale Law was passed, which materially differs in spirit and principles from the rules adopted in the old laws for protecting the Government rights. In 1859, limitation was made applicable to suits for resumption of lauds alienated after 1790, whereby virtually, except as against auction purchasers, such grants were legalized. If the words of section 10, Regulation XIX of 1793, are strictly construed, rent-free grants subsequent to 1st December 1790 might be considered resumable even by the persons making such grants; and, accordingly, it might also he thought to be within the power of their heirs and successors and privies to re-attach the lands to the estates from which they were so alienated. It may appear to he unjust and inequitable that any person should have a right to take advantage of his own wrong, that grants made for consideration should be resumable by the party making the same, and that his heirs should he empowered to question the legality of the act of their predecessors. But perhaps the policy which dictated the laws preferred to protect the rights of the Government without any regard to the hardship or injustice noticed above. The earlier ideas regarding the mode of protecting the rights of the Government, began, however, to change by degrees, till they were materially altered into quite new principles now adopted by the Government upon this subject. While the law regarding the restricted power of the zamindars to make settlements of their lands was by degrees completely modified, the prohibitions regarding rent-free grants was not altered by any express enactment. The present Sale Law requires auction purchasers to respect certain settlements by the defaulter, if the amount of rent and other conditions of the lease were approved by the Collector before the sale. It has also made provision to the effect that, in some cases, it may, through the Collector, by notification at the time of the sale, require the purchaser to respect all incumbrances created before the sale, just as they are bound to respect leases given by themselves. At present, the Government is willing to sell its rights of receiving the revenue in consideration of a money payment in a lump sum.

34. If it be now held by my colleagues that by these modifications, up to 1819, and in subsequent years, the prohibitory provision of section 10, Regulation XIX of 1793, so far as it authorizes the grantor, his heirs, and privies to resume a rent-free grant made subsequent to 1790, is virtually modified without any express enactment to that purpose, I would at once agree in that opinion. I would also agree with my colleagues if they hold that, as regards such grants against those who have in "equity" no rights to resume, by a fiction of law it is to be assumed that the formal sanction of the Government has already been obtained by the grantees.

35. The observations of their Lordships of the Privy Council in the assessment case of Ranee Surnomoyee v. Maharajah Suttees Chunder Roy Bahadoor [(5)], to a great extent support this view. It is evident that, with regard to alienation since 1790, there was very little pressing necessity to make any law to limit the resuming powers of persons granting such invalid grants or of their heirs. These rent-free grants were very rarely given by the

proprietors in consideration of money. These were always pious and religious gifts. It was well known that Hindus and Mahomedans invariably respect such gifts of their own creation or of their predecessors, and think it a disgrace and sin to take away lands given to Brahmins, Saints, and Fakeers, as gifts during religions ceremonies for use and cultivation, or private houses, tanks, orchards, public temples, given for other religious and charitable purposes. Even purchasers by private sales or at auction for revenue, Hindus as well as Mahomedans, generally respected such grants, until about thirty years ago some Bengalees having become zamindars by private purchase or by public sales, turned a new leaf, and, braving the public opinion of their countrymen, began to exercise resumption rights, and so tempted some to follow their example. With regard to rent-free grants after 1765 up to 1790, out of regard to these time-honored feelings of the people, the Government, by section 3, Regulation XIX of 1793, provided that grants within ton bighas given for charitable and religious purposes, under certain circumstances and conditions, were not to be resumed. Actions for resumption by landlords were very rare before, and even now all zamindars, &c., do not exercise these rights. The resumption suits are comparatively confined to the districts of Hooghly, Burdwaa, and the 24-Pergunnas. The respect generally shown before, and the disrespect exhibited by some persons since the new idea has prevailed, related, and affects, not only the grants subsequent to 1790, but also invalid grants existing before that year. It was within the powers of the zamindars to give or withhold this authority to resume, when they made settlement of their lands with others on a long lease or in perpetuity; and it has been observed that in former times such a power was often withheld, even when patnis were granted for a consideration. This state of the feelings of the people shows why there was no pressing necessity to make any law about this matter of resumption. The zamindars and others holding inferior rights, having before 1765, and afterwards, according to the universal custom of the country, granted rent-free tenures, and these grants having been considered to be alienations to the prejudice of the revenue due to the ruling power, the Government thought proper to uphold such grants created previous to 1765. It kept the lands covered by grants from that time up to 1790, apart from the estates of which the Decennial Settlement was made, and from time to time made rules, before and in 1793, and after that time, for assessing such rent-free lands. Meanwhile, in estates permanently settled, parcels less than 100 bighas were (by section 6, Regulation XIX of 1793) made over to zamindars, without any additional revenue being imposed upon them for the same.

36. Looking to what had been done before, the Government was naturally afraid that the proprietors of permanently settled estates might again do what others, with less power, had done before; and so, after a long period, the Government might be required upon some grounds of expediency or hardship to uphold these new grants, just as it was compelled to hold good the grants made before 1765, and to make rules for assessing some of the grants from that year to 1790, with only the half jumma, just as it was afterwards in 1809 compelled to uphold indirectly, and partially, in estates no longer in its possession, against the present holders of these estates, grants created after 1790, by

applying rules of limitation to suits for possession and assessments of these grants. All lands not having been settled permanently in 1790 into estates, several zamindaris remained in the khas possession of the Government for a long time, and even now some lands are lying in the hands of the Government, which are not settled at all with any person as estates.

37. It was apprehended that the Revenue officers may create rent-free grants in properties thus held khas by the Government. In order to avoid this contingency, of which the Government was so much afraid, it thought proper to rule that all rent-free grants, without its permission, given after 1790, were null and void; and no length of possession was at any time likely to give any validity to these alienations. The object was much less to assist the zamindars in 1790 or 1793, or immediately afterwards, than to provide against the possibility of any claim of prescription being raised by any person, with reference to possession under any such rent-free grants of the 1st of December 1790, as regards the revenue due to the Government from these lands.

38. It was on these grounds that I, sitting with the Chief Justice in another case, tried before another Full Bench of five Judges (but in which, after all, no decision was pronounced) was inclined to hold that a zamindar creating or those holding under one who has created any such grant, were not authorized to resume, on the ground that what he or his predecessors had done was illegal u/s 10 of Regulation XIX of 1793. If the original prohibition was based on a common law of the country, it was equally a well-known common custom that any such grant is not ordinarily considered resumable by those who may have made it, as well as by those who hold under him. The laws in 1793 represented not only the ideas then entertained by the Government, but these laws, as well as those subsequently passed, also took cognizance of the well-known religious and social opinions and general conduct of the people of the country.

39. In this view of the case, it may perhaps be proper to uphold such grants, with a declaration that they are not binding against the Government or those entitled to hold under it, by right of an auction purchase. When, in 1859, the Government distinctly declared that an action for assessment and also for possession could be brought regarding rent-free grants made after 1790, I cannot decide that, in such cases, the right of those who are not auction purchasers is only to see the tenure assessed with a rent to the extent representing its portion of the Government revenue, and not to dispossess. For the purposes of this case, it is sufficient to notice that, when rules were made by the Government to protect revenue from all lands settled in an estate, it never proceeded to the extreme length of prohibiting the zamindars from digging tanks and wells, building houses for religious worship or for dwelling purposes, or planting orchards upon certain parts of their estates for private or for public use, and thus deprive themselves of all chance of getting any rent or produce in kind from these lands. In all laws regarding sales for revenue, provision however was made for certain reasonable rents being payable to the auction purchaser for lands so used by the defaulter. It does not, however, appear that any assessment could be made regarding lands upon which something was built or

done, which was not likely to yield directly any return to the auction purchaser, but at the same time was enjoyed by the public, and was not in the exclusive possession of any particular person.

40. As regards others than the auction purchaser, the use thus made of these lands, at least when made for public purposes, was in one sense no better than a rent-free alienation, and yet the heirs or representatives of those who may have made such transfers have not been considered to possess any power to assess the lands so alienated from the assets of the estate.

41. The power to grant a rassadi Progressively increasing or decreasing as the annual amount of revenue lease for the reclamation and cultivation of waste lands, beginning with a rent-free term for certain years and progressive rent afterwards, was, of course, never questioned, and is not within the prohibitions of section 10 of Regulation XIX of 1793. It does not also appear that the object of this section was to prevent any lands being given away rent-free for public purposes as in this case, for digging a tank in a village for procuring water, for raising or protecting the crops upon the lauds of that village, to a person who may be willing to incur the expenses of the digging, hut who nevertheless might not find it convenient to pay any rents for lands which he never intended to use as private property. It does not follow that such a grant was contemplated to he included within the alienations which the law had declared to be null and void. The letter of the law may cover such a case, but the object of the law was, and the subsequent modifications are, quite opposed to any such construction.

42. I do not think that it is stretching the words of the law beyond the legal limits allowed, or that it is opposed to the present state of the law, to decide that the grant of a portion of lands for any public purpose likely to improve the value of the estate is not null and void, though made rent-free, and without the formal sanction of the Government. I am not, however, prepared to state that a rent-free grant for tanks comes within the powers given to the zamindars by section 8, Regulation XLIV of 1793, as was held repeatedly by several Judges of the late Sudder Court. This section refers to leases for rents, and not to grants without any reservation of rents.

43. On these grounds I hold that the grant in this particular case is not resumable by the plaintiff. I would, therefore, decree the appeal, and reverse the decision of the lower Appellate Court.

Levinge, J.

44. The appellant''s pleader has contended that the grantor had a legal power to make this grant, and drew a distinction between a grant of land rent-free and revenue-free; and contended that a grant, worded as the one before the Court, was not null and void, under the provisions of Regulation XIX of 1793, section 10.

45. It was not pressed in argument that this grant came expressly within the terms of section 8, Regulation XLIV of 1793, which recognises the power of the zamindar to grant a lease or patta for years or in perpetuity, for the purposes of a tank, although the decision of 18th August 1847, in Huree Mohan Das v. Prankishen Raee S.D.A., 1847, 447, was quoted to show that a grant of land, rent-free, for such purpose, was held by the Court to be within the class of grants stated in that section. But it appears to me that this grant does not come within the category of grants expressly declared to he within the power of a proprietor to make by section 8 of Regulation XLIV of 1793, inasmuch as this grant is not a lease or patta--a distinction which does not appear to have struck the Court in the case above cited, when they ruled that the grant, rent-free, proved in that case, came within the terms of that section. On the other hand, I do not consider that the grant now before the Court falls within the class of grants prohibited by section 10 of Regulation XIX of 1793. The grants there contemplated do not appear to me to include or embrace gifts of land for the purpose of making a tank, even supposing that the term "rent-free" in a grant may be properly construed by this Court as meaning "revenue-free." Supposing that the provisions of that section aimed at protecting the income of the zamindar, by preventing its diminution by grants of portions of the estate, rent-free, as well as declaring that all grants made in derogation of the public revenue are null and void, still I think the object and language of this deed clearly shows that there was no other intention than to benefit the public and the parent estate at the expense and labor of the grantee, and that the grant can have no other effect; and I should require to be shown the clearest declaration of the law before I would hold this grant to be null and void.

46. Besides, I would remark that the language of that section does not seem strictly applicable to the grant before the Court, inasmuch as the section declares "that the proprietor is authorized and required to collect the rents from such land granted at the rates of the pergunna, and to dispossess the grantee of the proprietary rights in the land," words hardly referable to a bonk fide gift of land for the purpose of excavating a tank for the supply of water, to prevent the villages of the zamindari being deserted, and which was to be made and maintained at the expense of the grantee.

47. For the above reasons I would uphold this grant, and abstain from expressing any opinion on the abstract question, whether a grant by a zamindar of a portion of his proprietary rights in his estate, rent-free, is a grant wholly void as against the grantor, his heirs, and those claiming under him.

48. But as the Court at large are for going into that matter, and expressing an opinion, I do not shrink from stating my views.

49. I shall first consider the scope of Regulation XIX of 1793, and then allude to the 10th section, on which so much stress is laid, and under which, it is said, this grant is null and void.

50. Regulation XIX is declared by the printed title to be "a Regulation for re-enacting, with modifications, the rules for trying the validity of titles of persons holding lands exempted from the payments of revenue to Government." The concluding part of the 1st section,--"upon the above grounds, and with a view to facilitate the recovery of the public dues from land held exempted," &c.--shows that the whole aim of the Regulation is to secure the recovery of the dues of Government, and that it is not a Regulation passed to prevent a zamindar, as long as the land is not illegally granted free of those dues, from granting a portion of his zamindari free of rent payable to himself or his heirs or assigns.

51. The 15th section provides for suits, and declares that "the Collectors of the revenue are to defend all suits that may be instituted against Government by any person claiming a right to hold lands exempt from the payment of the public revenue."

52. The 24th section provides for the registry. It declares that "all persons, actually holding land exempt from the payment of public revenue in virtue of grants made previous to 18th December 1790," are allowed a fixed time to register in the office of the Collector of revenue; showing plainly, I think, all through the Regulation that it was introduced in 1793 to protect the public revenue, facilitate its collection, and effectually put an end to any pretence that lands could be held under grants made after 1790 free from the payment of revenue to the Government; in other words, it is publicly notified that lakhiraj holdings could not be created for derogation of the fiscal prerogatives of the Government. I take it that the grant now before the Court, or any grant using simply the terms "free of rent payable to the zamindar, his heirs or assigns," would not be termed a lakhiraj according to Wilson"s Glossary, i.e., a term applied to laud exempted for some particular reason from paying any part of the produce; and Mr. Tucker in Guruchurn Paramanik and Saduchurn Paramanik v. Odayenarain Mundal 6 Sel. Rep., 281, 282 thus defines it: "The tank has been improperly termed lakhiraj. It is not lakhiraj, for it has not been exempted as such from the general estate for which the zamindar pays revenue to Government."

53. The 27th section of Regulation XIX enacts that "all grants, not registered within the prescribed time, are declared invalid as far as regards the exemption from the payment of revenue, and the land be assessed with revenue, as directed by section 26;" and that section leaves that duty to the Collector, who, I am not aware, had any power to assess the amount of rent payable to the zamindar.

54. The 28th section informs the public of the effect of registry, and states that it is not to prevent the proprietor suing to recover possession of the soil, and the Collector suing to recover the revenue.

55. I, therefore, think that the language of the 10th sectionï¿½"all grants for holding land exempt from the payment of revenue, whether exceeding or under 100 bighas of land, that have been made since 1790, or that may be hereafter made by any other authority than that of the Governor-General in Council, are declared null and void,"--does not apply to a grant of land "free of rent;" and to read or construe the deed by the language of the

10th section is to interpolate another expression, extend its operation, make it express what it never intended, and nullify and avoid the deed made for good consideration.

56. And here I cannot avoid quoting a familiar passage from Broome''s Legal Maxims, where the construction of deeds is discussed and supported by so many authorities (see pages 482, 485):--

The construction, likewise, must be such as will preserve rather than destroy; it must also be favorable and as near the minds and apparent intents of the parties as the rules of law will admit; and, as observed by Lord Hale, Judges ought to be subtle to invent reasons and means to make acts effectual according to the intent of the parties, They will not, therefore, cavil about the propriety of words when the intent of the parties appear; but will rather apply the words to fulfill the intent than destroy the intent, by reason of the insufficiency of the words." Again:-- "If words have a double intendment, and the one standeth with law, and the other is against law, they are to be taken in the sense agreeable to law;" a passage peculiarly applicable to the term "rent-free" in the deed, as those who hold this deed void, do so on the ground that it must mean "revenue-free" likewise.

57. A grant exempt from the payment of revenue is not only declared by the 10th section to be null and void, but the section expressly requires the proprietor and the Collector to disposes the grantee. Now, can it be said that, if the land is simply granted free of rent payable to the zamindar, and he or the grantee is willing to pay the revenue, the zamindar and the Collector are bound to avoid the deed and dispossess the grantee? They certainly are, if "free of rent payable to the zamindar" means also "free of revenue payable to the Government."

58. A grant of land, rent-free, by a proprietor, does not more interfere with the revenue of the Government, or the position of the proprietor, than a lease in perpetuity, at a nominal rent of one rupee annually. This lease in perpetuity has just as much effect on the revenue (which is nothing) and on the income and resources of the zamindar, as a grant, free of rent, payable to the zamindar. Yet it is not disputed that the lease is binding: on the zamindar and his heirs. But, it is said, the grant is not legal, because it is contrary to the Regulations and against the policy of the law, which will protect the zamindar from improvident alienations though made on good consideration.

59. Supposing the deed, expressly granting the land, rent-free, contained a covenant between the zamindar and the grantee that the former and his heirs would pay the Government revenue, would the deed be null and void, because the land had been granted "rent-free," and would the zamindar and the Collector be bound to dispossess the grantee? I should think not. Again, if the grantee covenanted with the zamindar for the consideration expressed in the deed, and for which the land had been granted rent-free, that he would pay to the zamindar the quota of Government revenue, expressly declaring that it was a payment for the Government revenue, and not for or in lieu of rent, would the

deed be null and void? I should doubt it.

60. I shall now refer to the recognized powers and rights of the zamindars by referring to one or two of the earlier Regulations, with the object of showing that a grant of land within their estate, rent-free, is one they have power to make.

61. In Regulation I of 1793, section 9, Article 8, is to be found the following sweeping declaration:-- "That no doubt may be entertained whether proprietors of land are entitled, under the existing Regulations, to dispose of their estates, without the previous sanction of Government, the Governor-General in Council notifies to the zamindars, independent talookdars, and other actual proprietors of land, that they are privileged to transfer, to whomsoever they may think proper, by sale, gift, or otherwise, their proprietary rights in the whole or any portion of their respective estates, without applying to the Government for its sanction, &c."

62. Here is an explicit declaration, that the proprietor may transfer a portion of his estate without the sanction of the Government; and I am at a loss to see why they should not exercise this power, when they cannot by any alienation free the land from the tax or revenue payable to the Government.

63. I next refer to Regulation I of 1801, section 14, under which I think it is clear that the light of the zamindar to create a rent (not revenue) free tenure is recognized. This section declares that "by section 9, Regulation I of 1793, the zamindars and all other proprietors of land have been declared at liberty to transfer, by sale, gift, or otherwise, their proprietary rights in the whole or any portion of their respective estates; but by section 10 of the same Regulation it is required that all such transfers be notified to the Collector of the Zilla, &c., but until such notification and separation shall have been made, the whole of the estate is declared responsible to Government for the discharge of the fixed jumma assessed upon it, in the same manner as if no transfer had taken place."

64. I think, after that declaration, it could not be contended that, unless the notification to the Collector mentioned above were given, the grant of a portion of the estate in perpetuity would be null and void as against the grantors and his heirs, for some meaning must be given to the sentence, "but until such notification and separation shall have been made, the whole estate is declared responsible." I read that sentence to mean that the Government will not recognize the apportionment or grant of any part of the zamindari until notification; but I also treat it as recognizing the power of the zamindar to make a complete disposition of a portion of his estates with the option of having the whole zamindari held responsible for the revenue of the portion so disposed of. The above-quoted passage will dispose of any argument raised as to the interference with the revenue payable to the Government, as every fraction of the estate, including the part alienated, remains liable for its payment. The section I am quoting from goes on to declare:-- "If, therefore, any zamindar shall have disposed of his proprietary rights in any portion of his zamindari, whether under the denomination of an independent talook or

otherwise, and the talookdar or other person to whom the portion of an estate may have been so transferred shall have omitted to obtain a separate allotment of the public assessment thereon, in the mode prescribed by the Regulations, such transfer, as far as respects the rights of Government, must be considered invalid; and if the land so privately transferred, but not separately assessed, should have been since, or shall be hereafter, included in any public sale for arrears of revenue, the illicit and imperfect transfer must be deemed to have been altogether done away. In such cases the lands transferred, until publicly registered and separately assessed, form part of an undivided estate; and, as such, are liable to be sold for any arrear of revenue which may be due from any part of the estate." I think that in the above is to be found a recognition of the grant being binding on the proprietor and his heirs, and invalid as against an auction purchaser at a sale for arrears of revenue. It interprets the word "revenue" in the 10th section of Regulation XIX of 1793, as being confined to the revenue payable to the Government, and as not including rent payable to the proprietor of the entire zamindari.

65. If the zamindar cannot make the disposition I contend he has the power to make, what becomes of his proprietary rights? They are frittered away and controlled by a shadowy distinction. Those who contend that a zamindar cannot grant a portion of his estate to a member of his family free of rent payable to him or his heirs, admit he may lease in perpetuity so as to bind himself and his heirs at a peppercorn rent, an alienation just as injurious to the zamindari as a grant of a portion of a rent-free estate. Sir R. Barlow and Mr. B. Colvin, in their judgment of the 18th July 1855, in Ahmed Alee Khan v. Raja Modhnarain Singh S.D.A., 1855, 395, use the following language:-- "In fact the law nowhere recognizes grants of land exempt from revenue, but the power of creating dependent talooks or granting leases at any rent is fully accorded (see section 6, Regulation XLIV of 1793, and Regulations V and XVIII of 1812)." In that case those learned Judges drew no distinction between rent and revenue, but they have clearly announced what the law is as regards the power of the zamindar to lease away in perpetuity at any rent. In opposition to the ruling of those Judges (who did not see the distinction between rent and revenue) on the power of the zamindar to grant rent-free, Mr. Dick held as follows: "I concur with the Principal Sudder Ameen that the grant is not resumable by the heirs of the grantor, and that section 10, Regulation XIX of 1793, does not apply to the case. The law could not intend to declare that the party who had made the grant could at pleasure resume it whether given for a valuable consideration or not, or intend to entitle the heirs of such grantor to resume. This would he authorizing such persons to repudiate their own acts and the acts of their ancestors. Grants of the nature in question, quoad the grantors and their heirs, affect not the public revenue. They affect merely their own rental. The grantor continues himself to pay the revenue, and if he do not, the estate is sold, and then the grants become null and void. The law (Section 10, Regulation XIX of 1793) was enacted to prevent alienations prejudicial to the security of the public revenue, not to enable proprietors and their heirs (whose ancestors" acts are theirs) to profit by their own wrong. The proprietors and their "successors," who are authorized to resume at pleasure, are not those who made the grants, or their hereditary

successors. An auction purchaser can annul giants and alienations. This the law declares. All bona fide alienations are binding on those who made them and on their heirs. This justice requires, and our precedents have decided."

66. Considering that there is no express law declaring a grant of land free of rent payable to the zamindar null and void, I hold the grant valid. I support the proprietary right in the soil. I prevent the grantor and his heirs annulling a bona fide deed made for valuable considerations, and I in no way interfere with the revenue payable to Government, or the right of an auction purchaser to acquire a title free of all encumbrances on the land. On these grounds, I also hold the grant in the present case binding on the plaintiff.

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(1) Regulation XIX of 1793, section 10.-- "All grants for holding land exempt from the payment of revenue, whether exceeding or under 100 bighas, that have been made since the 1st December 1790, or that may hereafter he made, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil or the rents of it. And every person who now possesses or may succeed to the proprietary right in any estate, or dependent talook, or who now holds, or may hereafter hold, any estate or dependent talook in farm of Government, or of the proprietor, or any other person, and any other person appointed to make the collections from any estate or talook held khas, is authorised and required to collect the rents from such lands at the rates of the pergunna, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or talook in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any officer of Government: nor shall any such proprietor, farmer, or dependent talookdar, be liable to an increase of assessment on account of such grants which he may resume and annul, during the term of the enjoyments that he may be under for the payment of the revenue of such estate or talook when the grant may be so resumed and annulled. The managers of the estates of disqualified proprietors, and of joint undivided estates, are authorised and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this section."

(2) Regulation XIV of 1793, section 6, enacts:-- "Nothing contained in this Regulation shall be construed to prohibit any zamindar, independent talookdar, or other actual proprietor of land, selling, giving, or otherwise disposing of any part of his lands as a dependent talook"; and section 8:-- "Nor to prohibit actual proprietors of laud granting, without the sanction of Government or its officers, to any person, not being a British subject or European, a lease or patta for ground for any term of years, or in perpetuity, for the erection of dwelling-houses, or buildings, for carrying on manufactures, or for gardens, or other purposes, and for offices for such houses or buildings."

(3) A. Dick, W.B. Jackson, and J.A.F. Hawkins.

(4)The Judges were A. Dick, Sir R. Barlow, B.J. Colvin.

(5) 10 Moore"s I.A., 123. See the report, p. 143, line 16, from the words "upon the "argument" down to the words equitable limitations," p. 147, line 2.