

quently decided, the nomination of an hereditary substitute to his successors in the office is an act clearly beyond his competency. No appointment of a deputy made by any particular incumbent can have effect beyond the incumbent's life.

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The present action, therefore, was clearly not maintainable; and under this view it is not necessary that we should discuss the objections which have been taken to the District Judge's rejection of certain portions of the plaintiffs' evidence, as, if any errors in law have been thereby committed, they are immaterial.

Decree affirmed with costs.

Special Appeal No. 4041.

1865.
March 2.

The COLLECTOR OF SU'RAT *Appellant.*

The Heiresses of KU'AVARBA'I, deceased. *Respondents.*

Torá garás hak—Alienation—Act VII. of 1863, Bombay.

Held, in the absence of proof on the part of Government to the contrary, that there is nothing in the nature of a torá garás payment which makes it incapable of alienation; and that, without such proof, Government, receiving such sums, cannot withhold payment of them from the alienee of the person, to whom, but for the alienation, they would be paid.

Held, also, that a torá garás hak does not come within the meaning of the word "lands" as defined by Sec. XXXII. (B) of Act VII. of 1863, Bombay; and that a suit having reference to the recovery of sums due out of such hak, is not affected by Sec. XXVII. of that Act.

THIS was a special appeal from the decision of H. Hebbert, Judge of Súrat, reversing the decree of W. Sandwith, Assistant Judge.

Dhirájlal Mathurádás for the appellant..

Dádábhái Frámji and *Kivamuddin Miyánji* for the respondents.

The facts sufficiently appear in the judgment.

FORBES, J. :—Kúvarbái, the plaintiff in this suit, sued the Collector of Súrat for a torá garás hak, due, for the year A.D. 1855-56, from the public treasury, to the Rájá of Dharampúr,

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against whom she had obtained a decree, declaring her right to receive the proceeds of the said hak, in the capacity of a mortgagee.

The Collector denied that torá garás haks were alienable without the sanction of Government, or capable of being attached in satisfaction of a decree; and he further pleaded that it rested with Kúvarbái to show that they were alienable.

The Assistant Judge (W. Sandwith), who first tried the suit, decreed in favour of the Collector, on the ground that the sanction of Government was necessary to the alienation of a torá garás hak; and that Kúvarbái had not obtained such sanction.

This decree was reversed, on regular appeal, by the District Judge of Súrát (H. Hebbert), on the ground that it had been admitted that the sum claimed was due by the Collector to the Rájá of Dharampúr, at the time when Kúvarbái obtained her order for attachment of the hak, in execution of her decree; and that the Collector was, therefore, bound to pay the amount to the decree-holder.

A special appeal against this decision was admitted, on the 3rd of September 1858, on the ground that the decisions in S. A. Nos. 3553 and 2451, of the 16th of February 1857, were to the effect, that it is incumbent upon the plaintiff to prove that the Collector has no option in withholding payment, and that torá garás is alienable; and were, therefore, opposed to the Judge's decision in this case. On the 30th of March 1859, the following order was passed by the late Court of Šadr Dívání Adálat:—

“The first question involved in this appeal is, whether torá garás is alienable or not. It has already been decided, in *Sambhulál's Case*, by two Judges, that it is inalienable. This decision is, however, contrary to the recorded opinion of two of the Judges now on the bench; and, as that case has been appealed to Her Majesty in Council, the Court determine to await the decision of the Privy Council on that case. Should the Privy Council decide that torá garás is alien-

able, no other question will arise in this case. If, on the other hand, they decide that it is inalienable, the second question will then arise for decision : whether the garás having been collected, the Collector can refuse to pay it ; or whether, like a trustee or banker, he can be compelled to pay it to the order of the Court.”

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The case has since stood over until the receipt of the decision of the Privy Council in the case of *Sambhulál Girdharlál v. The Collector of Súrat* ; and it was subsequently postponed, by the consent of the parties, to allow of their coming to a compromise, which, however, it appears, could not be arranged.

It was decided in *Sambhulál's Case* that the burden lies on Government of proving that there is something in the nature of a torá garás payment, which makes it incapable of alienation ; and that, without such proof, Government, receiving such sums, is not entitled to say that it will not pay them to the alienee of the person, to whom, but for the alienation, they would be paid.

Consequently, no attempt has been made to argue the point on which the special appeal was admitted ; but the pleader for the special appellant has now raised another and distinct question : asserting that a torá garás hak is *land*, in the sense of the definition of Act VII. of 1863, Bom., Sec. 32, B ; and that this court has been deprived of jurisdiction in the matter, by Sec. 27 of the same Act. (a)

Without entering upon the question, whether the Legislative Council of Bombay have power to pass a law, which limits or takes away the jurisdiction of the High Court, in matters previously within its cognisance, upon which question we entertain great doubts, we are clearly of opinion that a torá garás payment does not come within the technical definition of “ lands ” given in Sec. 32 of the above-quoted Act, inasmuch as it is not a share of the revenue derivable by Government from the lands of a village.

(a) An Act for the Summary Settlement of claims to exemption from the payment of Government Land Revenue.

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Whatever may have been the origin of these torá garás payments, respecting which there has been a great variety of opinion, it seems certain that they formed no portion of the revenue realised by the British, or any previous government, from the occupants of lands ; but that they were sums paid by the village communities, and collected by the garásiás, by colour and on the strength of their own independent authority, and were wholly distinct from, and in addition to, the revenues due by the villagers to Government. The fact that, by an arrangement with the garásiás, the Government has agreed to satisfy their claims from the public treasury, on the condition of their abstaining from making a direct levy on the villagers, does not, in our judgment, alter the character of these payments, or transform them into a share of the Government revenue.

We further hold that the suits or appeals, in which the proceedings are stayed by Sec. 27 of the said Act, are those instituted under the provisions of Chapter 10 of Reg. XVII. of 1827 ; and, consequently, that the present suit, which does not relate to a claim to exemption from the payment of land revenue, is not one which would, on the assumption that the Act is law binding upon this court, be affected by that section.

TUCKER, J., concurred.

PER CURIAM :—The Court affirm the decree of the District Judge ; and allow further interest to the special respondent, Kúvarbái, on the amount awarded, at the rate of nine per cent. per annum, from the 30th of March 1858, the date of the Zillá Judge's decree, to the date of payment. All costs are to be borne by the special appellant, the Collector of Súrát.

Sambhulál Girdharlál v. The Collector of Súrát.—The following is a summary of this case, which is reported at length in 8 Moo. Ind. App. pp. 1—42.

The suit was instituted by Sambhulál, in the Court of the Assistant Judge of Súrát, on the 16th of October 1843, against the Collector of Súrát and also against Nasarvánji Pestanji. As against the Collector it prayed that the torá garás in question might be entered in the name of the appellant ; and that the Collector might be ordered to pay him the four years' arrears then due, amounting to Rs. 1,391-4-0. As against Nasarvánji

Pestnji it prayed that, if it should appear to the Court that Nasarvánji Pestnji had caused the torá garás to be improperly sold, he might be ordered to refund the purchase-money, with the profits for four years.

It was decided in the Zillá Court that the torá garás in question could not be enjoyed by any but garásiás ; and that no decree could be made either against the Collector or against Nasarvánji Pestnji.

It was then brought, on appeal, before the Sadr Adálat ; and, after various proceedings, the decree of the court below was reversed, and a decree pronounced in favour of the appellant, Sambhulál, against the Collector, by whom all costs were ordered to be paid.

In October 1851 the then Collector applied for a review, which, in the words of Lord Kingsdown, appears to have been granted as a matter of course, without argument or reasons assigned by the Court ; but nothing was done upon it till the month of April 1853. At this time all the Judges of the Court who had heard the case argued, had been changed. "It is impossible (observes His Lordship) to view, without jealousy, such a proceeding as this. The Government which appoints the Judges, and removes them at pleasure, had raised a question of great general importance, which had been decided against it. Two years elapse before any application is made to the court for a review of the judgment, and two more years elapse before the cause is brought on for re-hearing before a new set of Judges."

The decree of the Sadr Court of 1849 was reversed by order of the 20th of April 1853 ; and before the case came on again for hearing, an alteration was made in the law relating to special appeals, which, in the opinion of the Judges, left the consideration of both the questions raised, in the petition of review, open to them ; namely, first, that, according to the course of procedure then in force, the question of non-alienability of the torá garás was not properly open to the consideration of the Sadr Court, but had been conclusively settled by the judgment of the Zillá Court ; and secondly, that if such question was open, it had been erroneously decided.

On the 16th of February 1857, the Court pronounced the following decree :—

"The Court are of opinion, and decide, that torá garás is not alienable, and that, therefore, Sambhulál took nothing by his purchase ; and that his claim against the Collector must be thrown out ; that Nasarvánji Pestnji guaranteed nothing, and, therefore, Sambhulál cannot come upon him to reimburse the amount of his purchase-money ; and, therefore, that his claim against Nasarvánji Pestnji must also be rejected. The appeal is, therefore, dismissed, with all costs against the appellant."

Sambhulál then appealed to the Privy Council ; and, the case having been argued on the 13th, 16th, 19th, and 20th of July 1859, their Lordships' judgment was pronounced, on the 8th of February 1860, by the Right Honourable Lord KINGSDOWN, who, after stating the circumstances of the case in detail, proceeds as follows :—

Whatever may be the nature of the payments called torá garás, and the right of the Bombay Government to refuse to treat them in ordinary cases as the subject of sale or mortgage, like other species of property

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their Lordships cannot but entertain serious doubts whether it is consistent with justice to permit the Government to raise such a defence in this case, and as against the present appellant.

As we have observed in going through the proceedings, the Government had recognised the rights of inheritance and succession in this identical property; it had authorised its subjects to consider that property of this description was the subject of sale; and it had had full and distinct notice of all the proceedings which took place in this particular sale. The purchase-money was paid into court, and paid out to the creditor, and a conveyance of the property executed by the Judge of the court to the appellant: the Collector, that is, the Officer of the Government, standing by and acquiescing in the proceedings, with full knowledge of the objection to the sale, if any objection existed.

That, after all this had taken place, the Government should insist, and that the Court should decide, that the purchaser took nothing by his conveyance, and that he should not only lose all his purchase-money, but pay all the costs which had been incurred in his attempt to obtain redress, seems hardly consistent with ordinary notions of justice.

But, if there were not this objection to the defence, their Lordships are of opinion, that the onus lies upon the Government to prove that there is something in the nature of this payment which makes it incapable of alienation, and that the Government has failed to give such proof.

Of any evidence of the origin of the particular payment in question, there is no trace to be found in the case. The investigations into this subject, to which we have alluded, have led persons of great learning and ability to different conclusions. It is very probable that torá garás haks had not all the same origin. Assuming, however, that they all began in wrong and violence, still, that which had a vicious origin may, in course of time, have been legalised, since long enjoyment is itself a title, as well in favour of the recipient of an annual payment out of land, as of the possession of land itself.

The question here is, not whether the Government can be compelled to receive and hand over these sums, but, whether, actually receiving them, and having been in the receipt of them for very many years, it is entitled to say that it will not pay them to the alienee of the person, to whom, but for the alienation, they would be paid.

The creditor in this case has sold, and the appellant has purchased, such interest as the debtor had in the property sold. He will be, by the transfer, in no better situation than the debtor. If this payment be conditional on the good conduct of the garásiás generally, or subject to any other condition; and if any circumstance should occur which would justify the Government in withholding the payment from Bhármalsangji, they will equally justify the withholding it from the appellant.

Whatever this payment may be, it clearly is not in the present case, on the evidence before us, at all analogous to the pay of a military officer, to which it was attempted at the bar to liken it. It is not a personal payment in consideration of services to be personally performed. There is not the slightest trace of any services being claimable from Bhármalsangji; and the mode in which he acquired the property seems to show that this is not the nature of the payment. The defence here raised by

the Collector is not so much that the hak is incapable of alienation, as that it cannot be alienated except to garásiás; but we are quite unable to find in the evidence, or, indeed, in any other source of information to which we have had access, any distinct account of what is meant by the term "garásiás." They do not appear to be any distinct class or tribe. If the term be used to describe freebooters, or lawless people generally, it makes the defence a very singular one.

Upon the whole, their Lordships are of opinion that the Government has failed to establish its defence, even supposing such defence, under the circumstances, to be competent to it; and that the decree complained of must be reversed, and a decree pronounced in favour of the appellant, with all the costs to which he has been put in the course of these proceedings. With respect to Nasárvanji Pestanji the appellant must pay his costs, and have them over against the Collector.

A point is suggested in the appeal papers that the non-liability of this torá garás to alienation had been established by the decree of the Zillá Court, and that this decision was not, according to the Regulations, subject to review by the Sadr Court.

It is unnecessary to consider whether the order of the 20th of April 1853, could be sustained as the law of procedure then stood: for, however that may be, their Lordships are of opinion, that the subsequent Act of the Indian Legislature was rightly construed: and that the Court properly decided, at the last hearing, that the whole subject was open to their consideration.

The appellant in this case has been kept, for more than twenty years, out of the possession of the annual payment to which he became entitled, and has lost, during the whole of that time, the interest on his purchase-money. Their Lordships think that they should do justice but very imperfectly, if they were to award to him only the arrears of his annuity. The Government has been in the receipt of these sums, which belonged to the appellant. In 1842, the Government undertook to pay the money annually to the Adálat, if a suit were instituted; if this has been done, and the fund has been invested, the appellant will receive the amount. If the money has not been paid in (and we do not observe any allusion to such payment in the subsequent papers), we think that the appellant must receive simple interest, at the rate allowed by the court, on the arrears due when the suit was instituted, and on each subsequent payment as it accrued due.

Their Lordships will make report to Her Majesty in conformity with the opinion which they have expressed.—ED.

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