CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY

Regular Appeal No. 16 of 1867.

1867.
Dec. 18.

DESA'I KALYA'NRA'YA HÚKAMATRA'YA.....*Appellant.*
THE GOVERNMENT OF BOMBAY .....*Respondent.*

Long Enjoyment—Legal Presumption—Prescriptive Title—Pálkhi Hak—*Reg. V. of* 1827, *Sec.* 1.

Where the plaintiff's ancestors had enjoyed an allowance during four successive generations for a period extending over more than a century, the legal presumption, in the absence of the original grant, is that such grant was hereditary.

The allowance having been continued by the British Government to the plaintiff's grandfather for the same reasons for which a village (admitted to be held on hereditary tenure) had been continued, and having been paid to the plaintiff's grandfather up to his decease, and afterwards, as a matter of course, to the plaintiff's father, it was held that the enjoyment of the plaintiff's grandfather and father was proprietary enjoyment, and, as this enjoyment had continued uninterruptedly for more than thirty years, that, under Reg. V. of 1827, Sec. 1, a statutory and indefeasible title to the allowance had been acquired.

THIS was an appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Original Suit No. 19 of 1866.

The facts of the case fully appear from the following judgment recorded by the District Judge :—

"This action is brought against the Government to establish the plaintiff's right to the continuance of a certain allowance, called a *Pálkhi hak*, which had been regularly enjoyed by the plaintiff's ancestors, but which was stopped

1867.

DESAI KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

by the orders of the Government on the death of his (the plaintiff's) father.

"The defendants reply that the action is not maintainable, as the *hak* was not granted for service; that it was granted for the lifetime of the original grantee, and was liable to resumption on his death; and that, as the grant of such allowances emanates from Government, it is competent to them to continue or withhold payment at discretion.

"The issue for consideration is, whether it was competent to the Government to discontinue the allowance, which is now claimed in perpetuity.

"The plaintiff avers that his ancestors have, for hundreds of years under late governments, and down to the time of the death of his father, Hukamatrái Daulatrái, which occurred on the 8th of January 1863, under the British Government, received a palanquin allowance amounting annually to Rs. 1,352 Broach currency, or in Queen's coin Rs. 1,274-4-2, which was hereditary.

"The Government deny that the allowance was hereditary.

"I propose, therefore, to consider, first, the character of the grant, and secondly, the nature of the right by which the plaintiff founds his claim to a continuance of it in perpetuity.

"The plaintiff is a Desái of Broach, and as such enjoys undisturbed possession to the present day of a grant of land as jághir, to which was added, expressly for the expenses of keeping up a palanquin, the allowance now in dispute.

"Though now the duties of the Desáis are *nil*, I find, from the Bombay Revenue Selections printed by order of the Court of Directors in 1826, that they were in older times hereditary officers presiding over praganás in which the villages were divided,—in fact the whole country was so completely in the hands of the Desáis, who considered their possession so permanent, that each family partitioned its pragana amongst its members, like the Pátíls of a *bágdár* village. Every Desái managed the village of his own *bág*

as he pleased, and in general they displaced the old Pátíls, and carried on even the interior management of each village by means of their own agents. The Desái was thus the perfect master of the village, without any one to check him.' By degrees these Desáis were reduced from the position of masters of the district to that of mere ministerial officers, and the extent of their duties as such became greatly diminished. The Honorable Mountstuart Elphinstone, President of the Council, writing in 1821, even then remarked that 'the authority of the Desái has long since been destroyed,' the British Government itself mainly contributing to this end by introducing the Kámávisdár in the place of the Desáis, though the latter were still recognised. As an introduction to the discussion of the question at issue, I will here give, as briefly as possible, the history of *saranjáms* or *jághirs*, *i. e.*, grants of a purely personal character made to state officers, civil and military. These grants were of two kinds, one for the performance of certain allotted duties, and the other for the maintenance of the dignity of the officer. It is not shown when the grant in this particular case was first made, but the plaintiff asserts without contradiction that it has been enjoyed for hundreds of years. As, therefore, the *subá* of Gujarát was annexed to the Mogal empire, if it did not owe its origin to the Mogals, I think I cannot go for the required information to a better source than to the minute of Sir John (or, as he was then, Mr.) Shore, recorded on the 2nd of April 1788, from which, where it bears on this subject, I purpose to make certain extracts.

"After remarking that as traces only of the ancient forms of the Mogal constitution were in existence when the company acquired 'possession of the dewánny,' it was not surprising that the English should have adopted erroneous ideas on the subject, and have confirmed abuses which they found to exist, and that to no subject was this reflection more applicable than to that of jághirs, Mr. Shore says: 'A Jághir is property, an appendage to a dignity called munsub, which it is, therefore, necessary to explain. In the Mogal empire there are no hereditary dignities. The rank of the

1867.

DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

nobles was conferred by special appointment from the Emperor for life only, and revocable at his pleasure, and it was estimated by the number of horse which they were supposed to command. This command was denominated 'munsub,' and a Jághir was an appendage to it. The mode of granting munsubs and Jághirs was first reduced to a regular system in the reign of Akbár, during which 66 Munsubdárs were raised to this dignity by the Emperor himself, or by him at the recommendation of the Nazims of Bengal, Kabul, and the Deccan. When the power of the Emperor declined, the Nazims of the distant Soubahs, who were originally allowed only to recommend munsubs, usurped the privilege of granting Jághirs, both conditional and unconditional. This act was so avowedly derogatory to the authority of the Emperor, that an evasion (in the manner of preparing the sanad for the Jághir) was practised to conceal it. From the preceding explanation, a Jághir may be defined to be an assignment in land or money for the support of a certain dignity, and for the troops annexed thereto. It was either conditional or unconditional. The former implied that it was granted for the expenses of a particular office or station, the latter that it was independent of any office or station, being appropriated for the maintenance of a dignity, a suitable number of attendants and the troops annexed to it. In the latter case it was granted for life, or until the Emperor should please to resume the dignity or diminish it. In the former case it existed whilst the possessor continued in office only, and upon his removal or dismission devolved, either in whole or in part, upon his successor,' and in laying down the circumstances to be considered in deciding on the resumption of certain Jághirs, Mr. Shore remarks 'that many persons have succeeded to them by virtue of inheritance, in direct violation of the constitution of the Empire,—such has been the lenity or want of information of the British Government.'

"I would here further note the following historical facts, for which I am largely indebted to the 'Rás málá' of the late Mr. Kinloch Forbes. After Gujarát was conquered and an-

nexed by the great Akbár in A.D. 1572, his enlightened *diván* Torán Mal was deputed to effect a revenue settlement, and during his visit he conferred the dignity of *munsub* on certain of the chiefs. The power of the Mogals continued undisturbed until the beginning of the 18th century, when the Maráthás began to make incursions into, and exact tribute from, Gujarát. In 1730 Damáji Gáikváḍ was appointed to command under the *senápati* of the Maráthá empire, and was ennobled by the title of Samshir Bahádar. After his death his nephew Piláji succeeded him, and on Piláji's assassination (since which time Barodá has continued in the hands of the Gáikváḍ family) he was succeeded by his son Dámáji. Dámáji used to levy all the usual Maráthá dues in Gujarát, and possessed considerable resources, and in 1751 the Peshvá, who had got him in his power, bound him down to the payment of a large sum of money, and exacted a bond for an equal partition, both of the districts then held by the Gáikváḍ family and of all future conquests. Ahmedábád, the only place remaining to the Mogals, was taken by Dámáji in concert with the Peshvá's brother Raghunáthráv, in 1758; not very long after this Dámáji died, and was succeeded by one of his sons, Fatesing. The English then came on the scene, and took Broach from its Nawáb in 1772; they ceded it to Mahádáji Sinde by the treaty of 1783, and with him it remained till 1803, when, Mahádáji engaging in war with the British Government, it was taken from him on the 29th of August. Fatesing Gáikváḍ died in 1789, was followed by his brother Govindráv, who also dying, September 1800, was succeeded by his son A'nandráv Gáikváḍ.

"I have deemed it necessary to glance thus cursorily at a brief portion of the history of Gujarát, as the plaintiff has put in certain documents, which he styles sanads, relating to the allowance which he now claims, the earliest purporting to have been issued by the great Damáji Gáikváḍ in 1754, and the last by the Sinde Sarkár in 1786. I will refer to these documents hereafter.

"The witnesses produced by the plaintiff speak mainly

1867.

DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

to the facts of a palanquin having been maintained in the plaintiff's family, and of his ancestors having regularly received a palanquin allowance, but these are virtually conceded on the part of the defence, so that I need not dwell on this evidence.

"For the defence there are two principal witnesses, the Daftardár of the Collector of Súrat, and the Judge of the Court of Small Causes at Ahmedábád, who were both formerly employed on the Inám Commission. These witnesses concur in thinking that the allowance under consideration was not hereditary, and apparently draw in this respect a distinction between service jahágirs and personal jahágirs, Mr. Gopálráv further saying that, if on the face of the sanad a *hak* is not hereditary, it must be regarded as personal, by which I understand him to mean a life-grant. They both manifestly use the word 'personal' to distinguish the allowance from a service grant, which they seem to think is of necessity 'watan,' *i.e.*, enjoyable for ever. Possibly their conclusion on this question is derived from the distinction which Government itself has permitted in dealing with the question of jahágirs, but that jahágirs of all kinds were essentially grants to the person, or life-grants, I think their history sufficiently shows, borne out as it is, generally, by the recorded opinions of such authorities as the Honorable Mountstuart Elphinstone, the Honorable Mr. Warden, and Captain Cowper. See the correspondence by the Inám Commission on the Dakhan saranjáms (Bombay Government Records, No. XXXI., New Series).

"Mr. Warden thus expressed himself:—'A saranjám was of two kinds, one, called a Frouj Saranjám, was a grant of land from the sovereign to a noble, to enable him to support a contingent of troops, with which he was bound to take the field with his lord paramount; the other, called a Jat saranjám, was a distinct grant to the same noble to maintain due state and dignity as a feudal chieftain. Both grants were personal, and held on life tenure only. While, then, an inám was a gift to the poor for his maintenance, a saranjám was an assignment to a noble for his dignity; while

the inám was a gift for ever, the saranjám was an assignment resumable at pleasure, and never continued for a longer period than the life of the grantee; while the title of an inámdár was upheld by his title-deeds, the only title of a saranjámdár was the favour of his sovereign, and it is, therefore, as great a misapplication of terms to talk of an hereditary saranjámdár as it is to talk of an hereditary pension.'

"Captain Cowper, in replying to this, pointed out an omission on the part of Mr. Warden, which must have been inadvertent, of a third and important description of saranjám, that granted to civil ministers and others of the non-military classes. He also asserted that Mr. Warden was wrong in stating that saranjáms were never hereditary, naming in support of his assertion two such instances, and remarking that Mr. Elphinstone had spoken of the existence of hereditary saranjáms when explaining to the Court of Directors in 1838 some of the general principles upon which he had in 1819 recommended to the Governor General that the Dakhan saranjám should be continued. Mr. Elphinstone thus wrote:—'The maintenance of many of the Chiefs in their possession was certainly suggested, as supposed by the Governor General, for the purpose of avoiding popular discontent, and preventing the too rapid fall of great families, but in other cases it rested in the belief that the holders were entitled of right to their possession. Where a jahágir was by the original grant made hereditary in the family of the grantee, there could be no doubt of the right of the descendant; but where there was no such grant (as was the case with almost all the jahágirs) the right rested on different grounds, arising from the tenure of jahágirs (or saranjáms, as they are called by the Maráthás).'

"A jahágir made hereditary by original grant is shown by the correspondence to have been of exceedingly rare occurrence, and the proposition, which Mr. Elphinstone made, or is supposed to have made, in respect of the Government, declaring certain jahágirs to be thenceforth hereditary, in his letter of the 25th of October 1819, was not con-

1867.

DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

curred in; the Government of India remarking thus: 'With reference to those grants, which it is proposed to make hereditary, the Governor General in Council doubts the policy of making any grants hereditary which may justly be put on the footing of life grants. By keeping them as life grants, Government is by no means excluded from the power of renewing them, if it should be found expedient to do so, and every renewal will be a fresh act of grace, conferred on the individual receiving it: but by now declaring these grants to be hereditary, Government would be precluded from both resuming its rights, when it might be necessary to do so, and from conferring favours on the descendants of the present grantees, and would thus be deprived of a probable source of future improvement in revenue, and every other branch of civil administration, as well as of the means of winning attachment by personal obligation.'

"To this the Government of Bombay, of which Mr. Elphinstone was then at the head, replied, on the 11th of May following, thus:—'Independent of the considerations which determined the original amount of the grants, and appear to the Governor in Council to be still in force, almost the whole of those grants have now been issued, and the individuals have been told that they will enjoy them for life. No grant of any description has been declared hereditary; the distinction in the list of jahágirs transmitted to the Supreme Government, into hereditary and for life, being intended as a suggestion for the future regulation of the Government, but having in no instance been communicated to the party concerned. The Governor in Council is of opinion that the grants marked hereditary should be continued to the heirs of the present occupants: but he entirely concurs with His Excellency the Most Noble the Governor General in Council in respect to the expediency of renewing the grant on the death of each incumbent. Government will indeed be at liberty to exercise its discretion in granting or withholding the renewal on such occasions, except in the case of what is termed Pádsháí grants, which the Governor in Council conceives ought in all cases to be renewed: and

of the more ancient grants, by the Rájás of Sátárá, which should be treated with similar attention.'

"The Pádsháí grants I take to mean those of the Mogal emperors, and the holders of these and the more ancient Sátárá grants the British Government were pleased to declare entitled of right to an hereditary tenure not (in general) by express grant, but by length of possession; though in doing so they drew a marked distinction between grants to civil ministers and others of the non-military classes, and those to the military chiefs, Mr. Elphinstone thus speaking in paragraph 33 of his despatch No. 78 of the 18th June 1818, 'With respect to the old military jahágirdárs, I would by no means recommend the resumption of their lands on the death of the individual; those of civil officers, or new jahágirdárs, may more properly be lessened or entirely resumed.'

"Why a distinction was drawn between a service or conditional jahágir and the personal or unconditional jahágir it is not now my business to inquire: which grants should, and which grants should not, be declared hereditary, was purely a question for the consideration of the State; it is sufficient for me to note here that all jahágirs were, strictly speaking, personal, *i. e.*, held on life tenure only; and that unconditional jahágirs especially have always been treated by the paramount power as life-grants, each renewal being a fresh act of grace, unless the sanads relating to them contained distinct words of inheritance.

"I will now consider briefly the documentary evidence which the plaintiff has put in, which consists of an extract (paragraphs 1 and 16) from Mr. Secretary Goodwin's letter of the 7th of February 1808, to the Revenue Commissioner at Broach, sanctioning the continuance to Daulatrái of the palanquin establishment, with sepoys' and peons' allowance 'from the beginning of the current *Mrug sál*;' eight orders from different Gáikváds, and one from Sínde Sarkár to Mámlatdárs for payment of the *pálkhi* allowance to Desáis Bhikáridás Jamiyatrái and Daulatrái, and the Queen's pro-

1867.

DESA'I KALYA'NRA'YA HUKAMAT-BA'YA v. GOVT. OF BOMBAY.

clamation to her Indian subjects at the close of the mutiny. The plaintiff argues upon these that the grant was hereditary, as shown by the use of the word 'sudámat' in the sanad issued by Dámáji Gáikvád in 1761, and in that of the Sinde Sarkár dated 1786; that the Government of Bombay, by its orders of the 7th of February 1808, confirmed this grant to his grandfather Daulatrái; and that Her Majesty's proclamation proves the illegality of now attempting to interfere with it. But I am of opinion that what the plaintiff designates 'sanads' are nothing more than orders for the punctual payment of the allowance to the individuals named therein respectively. I gather this from the general tenour of the documents, and from the fact that the 2nd, 3rd, and 4th (in the first of which appears the word 'sudámat') were all issued in 1761, 1762, and 1768 respectively, by the same Gáikvád Dámáji, in favour of the individual Desái Jamiyatrái. As regards the word 'sudámat,' on which so much stress is laid, and which, as I have said, occurs in the document of 1761 and a second time in one of 1786, I find, upon the evidence of Mr. Gopálráv, a Maráthi scholar of great repute, that it conveys no meaning of hereditary tenure, or continuance in perpetuity, but means simply 'without objection,' 'without molestation.' The recurrence of the words in several of the orders, 'you' (speaking to the Mámlatdárs) 'are not to require a fresh order each year,' fully bears out this view.

"I am of opinion, therefore, that the plaintiff has failed to establish that the grant was hereditary prior to the accession of the British rule, and that, as to what followed after the year 1803, there is no evidence that the Bombay Government, either directly or by implication, ever consented to regard it as such. On the contrary, the correspondence of the Government at those early times shows beyond a doubt that this was one of the allowances which they intended uniformly to consider life-grants, to be resumed at pleasure.

"Whether or no the Government ought to have regard to the length of time the allowance has been enjoyed, is a question of State, and, as such, quite beyond the Court's consider-

ation, but it is clear that, from the fact of its having been continued as an act of grace, the long enjoyment of itself gives the plaintiff no title.

"The conclusion I come to is, that there is no right residing in the plaintiff which he can enforce in a court of law; and I, therefore, throw out the claim, with costs on the plaintiff."

The appeal was argued before TUCKER and GIBBS, JJ.

Pigot (with him *Nánábhái Haridás*) for the appellant.

White (with him *Dhirajlál Mathurádás*, Government Pleader) for the respondent.

TUCKER, J.:—The plaintiff in this suit, Desái Kalyánráya Hukamatráya, has brought this action against the Government of Bombay, to enforce the continuance of the payment of an annual allowance of Rs. 1,274-4-2, styled a *pálkhi* allowance, which, he stated, had been granted hereditarily to his ancestors by former Native governments, and had been continued by the British Government up to the death of his father, on the 8th of January 1863. He, therefore, prayed for a declaration of his right to the allowance in future, and for arrears from the date of cessation of payment.

The defence was that the allowance had not been granted hereditarily or for service. That it was a personal allowance to the original grantee, which had been continued to the grantee's successors individually, as a matter of indulgence, and not of right; and that the Government were not bound to continue the allowance after the death of the last holder.

The District Judge of Súrat, C. G. Kemball, who tried the original suit, was of opinion that the plaintiff had failed to establish that the allowance had been granted hereditarily, or that he could demand its continuance as a matter of right; and he, therefore, decreed for the defendant with costs.

In appeal, Mr. Pigot, for the appellant (plaintiff), has contended, that it is shown by the authorities cited by the District Judge, and by the evidence of the witnesses produced by the Government, that allowances of this character were in

1867.

DESA'I KALYA'NRA'YA HUKAMATRA'YA v. GOVT. OF BOMBAY.

some instances granted hereditarily; that the original grant is not forthcoming, as the so-called "sanads," which have been recorded, are not grants or deeds addressed to any of the plaintiff's ancestors, but are orders to the district authorities for the payment of the allowance to the successors of the original grantee, and that there are words in some of these orders which show that the allowance was continued to the several successors of the original grantee as of right; that from this long enjoyment by the several heirs of the first holder, the Judge should have presumed that the original grant was hereditary, as nothing had been brought forward to rebut this presumption; that, further, it was clear that the British Government treated this grant as hereditary in 1808, as the *pálkhi* allowance was then continued to the plaintiff's grandfather, Daulatrái, in the same manner as the inám village of Kalam and the Desái's other allowances, which are not disputed to be held on hereditary tenure, and the said allowance was continued to the plaintiff's father, Hukamatrái, on Daulatrái's death, without further inquiry or order, and this uninterrupted enjoyment by the plaintiff's grandfather and father from 1808 to 1863 would alone, under Reg. V. of 1827, Sec. 1, give the plaintiff a prescriptive title.

Mr. White, for the Bombay Government, has argued, on the other hand, that the "sanads," which have been produced, are the only grants which have been ever made, and that they show that the allowance was simply personal, and had never been conveyed to any of the holders and their heirs; that the subject-matter of the grant forbids the supposition of its being anything but personal, and that no presumption could be founded upon the long enjoyment of the plaintiff's ancestors, as the origin of the title is shown, and the continuance of the allowance to the several successors of the original grantee was a matter of grace and favour, and not of right.

I am unable to concur in the conclusion at which the learned District Judge has arrived, which appears to me to be opposed to the weight of the evidence recorded. He

seems to have considered that the allowance, which admittedly has been enjoyed by the plaintiff's ancestors for four generations, was appurtenant to a jahágir of which, to use his own words, "plaintiff enjoys undisturbed possession to the present day," but that it was granted for the maintenance of the dignity of an office, and that consequently, in accordance with the opinions expressed in the published reports of several eminent Indian statesmen, which he recites in his judgment, it could not have been in its origin more than a personal or life grant; and on this ground alone he would seem to have rejected the claim. I think this was not a proper way of dealing with a claim like the present one. The opinions of Indian statesmen so learned and distinguished as the late Lord Teignmouth and the Honorable Mountstuart Elphinstone, with respect to the practice and policy of the Mogal emperors, and of other Native sovereigns, who ruled in Hindustán prior to the establishment of the British empire in India, though entitled to great respect, are of no judicial authority, and, in a court of justice, should not have been allowed to prevail against the positive evidence of facts, and the legal presumptions which arise upon these facts.

In addition, it may be observed that the reports, from which the District Judge has made extracts, admit the existence of many exceptions to the theory that all jahágirs, or grants of land, or money, for the maintenance of an office, or for the support of the rank and dignity of privileged persons, were for the life of the original grantee only. As might have been inferred *à priori*, the acts of despotic and arbitrary governments with respect to such grants were not uniform. To this fact, the records of this court and the reports of the High Courts in each of the Presidencies, and of the Courts of the Ṣadr Diváni Adálat to which they succeeded, bear abundant testimony, and it has frequently been declared from this bench, with respect to jahágirs and other analogous grants, that no general rule can be laid down regarding them, and that the rights of persons to whom such grants have been made, and of their heirs and

1867.

DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

representatives, must be determined in each particular case by the language of the deed by which the grant was conferred, or, in the absence of any such deed, by the surrounding circumstances.

What, then, are the facts and circumstances established in this suit?

The first fact which stands forth prominently, is that, under the rule of the Maraṭhás, allowances identical with the one of which the plaintiff claims the continuance, were granted hereditarily to officers in the position of the plaintiff's ancestors. This is proved by the defendant's witness, Mr. Gopálráv Hari Deshmukh, the present Judge of the Small Cause Court at Ahmedábád, who, being himself an hereditary district officer, admits that he is the recipient of a *pálkhi* allowance conferred upon his ancestor hereditarily by a sanad from one of the Peshvás. He states that he does not remember another instance of an hereditary *pálkhi* allowance; but the fact which he admits is sufficient to destroy the inference drawn by the District Judge, namely, that the nature of the allowance precluded the supposition that it could have been granted hereditarily. It is to be regretted that this witness was not examined more particularly, and called upon to produce the sanad to his ancestor, as it would have shown the manner in which hereditary grants were made by the Maráṭhás, and the terms used in the deeds by which such grants were conferred.

The second fact, which is demonstrated by the documentary evidence, is that no deed, which can properly be treated as an original grant from a Native sovereign to the plaintiff's ancestor, has been produced. The papers (exhibits 3 to 11) filed by the plaintiff, though styled "sanads," are clearly not deeds or conveyances by the several Gáikvád princes, under whose names and seals they were respectively issued, to any ancestors of the plaintiff. They are simply orders from these chieftains to the then existing district officers and their successors, reciting the complaints and demands of the plaintiff's ancestors, and directing the continuance of the payments which had hitherto been made to them in their

capacity of district hereditary officers. It may be that it was not the ordinary practice of Maráṭha rulers when making grants of land, or of money, to execute formal deeds, or writings to the grantees, and that the orders issued to the district authorities, reciting the grants which had been made, were, in accordance with the usage of those days, the sole memorials of the gifts, or concessions, to which they referred; but the defendant has produced no evidence to prove the existence of any custom of this character, and in the absence of such testimony, a court of justice would not be justified in treating these so-called sanads as the original deeds by which the allowance was conferred upon the plaintiff's ancestors, or in holding, as there are no words in these papers which specifically declare that the allowance is to be continued hereditarily, that such was not the character of the original grant. These papers, which are acknowledged to be both genuine and authentic, clearly prove that the *pálkhi* allowance was paid by order of Dámáji. Gáikváḍ, so far back as A.D. 1754, to Bhikáridás, the father of Jamiyatrái, plaintiff's great-grandfather, and that, on the death of Bhikáridás, it was continued to his son Jamiyatrái, and, after the decease of the latter, to Jamiyatrái's son Daulatrái, by different orders from Dámáji, Fatesing, and Govindráv Gáikváḍs, and that, after the conquest of the Broach praganá by the English in A. D. 1772, and its cession to Mahádáji Sinde in A. D. 1783, it was continued in A. D. 1786, by an order of Sindia's government. In the orders made by Dámáji Gáikváḍ in A. D. 1761 in favour of Jamiyatrái (exhibit No. 4), and by Govindráv Gáikváḍ in A. D. 1745, on the death of Jamiyatrái (exhibit No. 10), there are expressions from which it may be inferred that the continuance of the payment was directed as a matter of right, as well as a matter of favour. The allowance is referred to as the property, not of the deceased holder, but of his successor, and it is ordered to be continued "sudámat," which under one interpretation means "as of old," and under another "without molestation." In exhibit No. 6, an order made by Dámáji Gáikváḍ in A. D. 1768 in favour of Jamiyatrái, the allowance is described as "the amount of *pálkhi* expenses, which has been entered as an

1867.
DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

allowance to Desái Jamiyatrái Bhikáridás, of the praganá as aforesaid, since the ancient time of wealth (prosperity), the same and the inám village Desái Dar Dastur, Gumastá, in the aforesaid praganá, are to be respected, and, by causing the same to be paid, you are to maintain dignity." In the order of Mahádáji Sinde in A.D. 1786 in favour of Daulatrái (exhibit No. 11), it is set forth that the said Daulatrái had represented that the allowance had been conferred and continued by Dámáji Gáikvád, and had been further continued through the intermediate administration of the English, and it is further directed that the allowance should be continued in consideration of previous enjoyment. There are words in the order which indicate that Daulatrái's claim was allowed as much on account of ancient enjoyment as out of kindness or for reasons of public policy, and it appears to me to be a fair construction of this document, to say that the demand of the applicant was complied with on considerations both of justice and of expediency.

We next come to the dealings of the British Government with the plaintiff's grandfather after the second conquest, in A.D. 1803, of the territory out of the revenues of which this allowance has been paid. An extract from a letter has been put in by the defendant, dated the 7th of February 1808, from R. T. Goodwin, Esq., Secretary to the Government of Bombay, to Messrs. Guy, Lennox, Prendergast, and William Steadman, members of a Revenue Commission at Broach (exhibit No. 84), in which it is stated as follows :—

"Paragraph 1. In view of the period now at hand for the formation of the current year's Jammábandy, I am directed to furnish you with the following remarks and instructions on the subject of your very valuable and satisfactory report of the 31st of May last."

"Paragraph 16. Proceeding next to the Desáis' allowances, the village of Kalam, or (as written in the sanad) Kalleb, is confirmed by Government, as you recommend, as is, *on the same grounds*, the palanquin establishment, with sepoys' and peons' allowance to Daulatrái from the beginning of the

current *Mrug sál*, but without arrears for the time the same have been suspended."

From this document it is clear that the *pálkhi* allowance was continued to Daulatrái on the same grounds as the inám estate in the village of Kalam or Kalab, to which the plaintiff has succeeded as heir to his father, and his right to which is not disputed by Government. The exact grounds on which this concession was made are not apparent, as the defendant has omitted to produce the report of the Revenue Commission, in whose reasons for the perpetuation of the payment the Government of the day declared their acquiescence. The withholdal of this document, which is not alleged to have been lost or destroyed, and the production of which was applied for by the plaintiff, has not been satisfactorily explained; and the omission to produce it is a very significant fact, from which it may justly be inferred that the real ground for the continuance both of the village and of the annuity was that the plaintiff's grandfather was held to have established an hereditary right to each of these items of property. This view is further confirmed by the action of the revenue authorities on the death of Daulatrái in A. D. 1828. At that time no investigation appears to have been made, and the payment of the allowance was continued to the plaintiff's father, Hukamatrái, without interruption up to the date of Hukamatrái's death on the 8th of January 1863. No doubt as to Hukamatrái's right would seem to have been raised till 1856, when an inquiry was instituted by the Inám Commission, and on the report of the officers of that commission, two of whom have been examined in this suit, the Government decided, under date the 8th of November 1861, that the allowance should cease on the death of Hukamatrái. At that date, however, the deceased Hukamatrái had, under Reg. V. of 1827, Sec. 1, acquired a prescriptive right to the allowance, as he had enjoyed it as a proprietor for upwards of thirty years. There is no pretence for saying that it was continued to him after his father's decease as a matter of favour. It was paid to him as a matter of course, in consequence of his supposed right

1867.

DESA'I KALYA'NRA'YA HUKAMATRA'YA v. GOVT. OF BOMBAY.

as successor to his father, and it was too late, after the payment had been made for more than thirty years, for the Government to attempt to place any limit on its continuance to Hukamatrái or his heirs. It has been contended that the fact that Hukamatrái's right was questioned in 1856, and made the subject of investigation, was sufficient to prevent his acquisition of a prescriptive title. In this view I am unable to acquiesce, as there was apparently no stoppage of the payment of the allowance, or any intimation that the Government denied the plaintiff's proprietary right, till 1861, by which time the possession required for the perfection of a prescriptive title had been completed; but, even if it be conceded that the enjoyment as of right was interrupted by the inquisition which was commenced in 1856, yet, on that date the title of Hukamatrái was beyond dispute, as the uninterrupted enjoyment of himself and his father since 1808 had then exceeded thirty years. That the enjoyment of Daulatrái was of a proprietary character is, I think, shown by the terms of Mr. Goodwin's letter, as the allowance is continued for the same reason as the village, and if there be any doubt on this point, by reason of any imperfection or incompleteness in the terms of the order, it must be determined in favour of the plaintiff, in consequence of the failure of Government to produce a document which would have thrown a full light upon the transaction in A.D. 1808.

In a contention between the representatives of the ruling power in a state and an individual citizen, the keeping back of any document which may exist in the public archives, and which is calculated to explain, or make clear, the former action of Government in relation to any matter on which the parties may be at issue, is a practice which cannot be too strongly reprehended.

I consider, then, that the plaintiff is entitled to succeed in this suit—

1*st*—Because, in the absence of the original deed of conveyance or grant, the long enjoyment of the plaintiff's ancestors during four generations successively, and for a period of more than a century, creates a legitimate presumption that

the allowance was conferred on the original grantee and his heirs; and

2*ndly*—Because the uninterrupted enjoyment of the plaintiff's grandfather and father, under the order made by the Government of Bombay on the 7th of February 1808, which extended from that date to the commencement of 1856, gave to the plaintiff a statutory and indefeasible title.

On these grounds I would reverse the decree of the District Judge, and declare the plaintiff entitled to the allowance mentioned in the plaint from the date therein set forth, and also to the arrears claimed in the said plaint, with interest, and I would further direct that the defendant pay all costs of the suit both in this court and in the court below.

The learned counsel for the defendant has urged very strongly that it is in the public interest that the Government should resist claims which, if admitted, would create a permanent and perpetual charge on the revenues of India, and in this view I concur to the extent that such claims should not be allowed without strict and careful scrutiny.

But, in the present instance, it would be carrying the doctrine too far to hold that a regard for the general good justified the disturbance, in A.D. 1861, of a settlement, apparently equitable, which had been made in A.D. 1808 after deliberate investigation, and had since then been acted upon uninterruptedly for forty-eight years.

GIBBS, J.:—The facts of the case having been fully set out by my learned colleague, Mr. Justice Tucker, it is not necessary for me to note them otherwise than in my finding on the merits of the case.

There are two points which arise, and on which I think it right for us to record judgment: (1) whether the plaintiff has established his claim; and (2) whether there is not a prescriptive title made out, which, under Reg. V. of 1827, Sec. 1, will give the plaintiff his claim against the Government irrespective of the facts. I will commence with the former, as, should this case go in appeal to the Privy Council, a

1867.

DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

finding on facts may possibly prevent the necessity of a remand. With this view I will first examine the documents filed in the case.

The grant in dispute appears to have been made by Dámáji Gáikvád to Bhikáridás, the ancestor of the plaintiff in the direct line, in 1754 (exhibit No. 3); the next document (exhibit No. 4), dated 1761, is by the same Gáikvád in favour of Jamiyatrái, the son of Bhikáridás; No. 5, dated 1761-62, is also by the same Gáikvád in favour of Jamiyatrái; exhibit No. 6, dated 1767-68, is similar to exhibit 5, but contains allusion to the inám village as well as the *pálkhi* allowance. The next exhibit (No. 7) is by Dámáji Gáikvád's son and successor, Fatesing, dated 1772, in favour of Jamiyatrái.

The above documents allude to the *pálkhi* allowance, but exhibits Nos. 8 and 9 relate to the grant of several *shibandis* or peons, granted apparently by Fatesing Gáikvád in exhibit 8, and continued by his son Govindráv Gáikvád in exhibit No. 9. Exhibit No. 10, dated 1774, after narrating the fact of Jamiyatrái's death, directs the payment of the *pálkhi* and *shibandi* allowance to his son Daulatrái.

The nature of one and all of the above documents is the same. They are not in themselves sanads or grants by the ruler to his subject and servant, but they are orders from the ruler addressed to his local revenue officers for the payment of certain allowances which, by the wording of exhibit No. 7, may be fairly supposed to have formed the subject of a formal grant or sanad, and they show an uninterrupted payment of these allowances to three generations, viz., Bhikáridás, his son Jamiyatrái, and his grandson Dáulatrái.

Exhibit No. 11 is of a different nature. Wars and disturbances had caused a change of dynasty, and Mahádáji Sinde had become, by cession of the British Government, ruler of this part of Gujarát. On application by Daulatrái, this Chief directed the revenue officers of the Broach praganá that the payment of the *pálkhi* and other allowances, which had been granted to his grandfather, should be continued to Daulatrái.

There are no more documents produced until after August 1803, when the British again captured and obtained possession of Broach. Exhibit No. 60 is the first paper in any way connected with the British Government, and this would appear to be an acknowledgment by Daulatrái of having received the *pálkhi* and other allowances. The next exhibit, to which I shall refer, is No. 84, which is an extract from a letter addressed by the Secretary to the Government to the Revenue Commissioners, and is dated 7th February 1808, in which is recorded the confirmation by the Government of the payment of the palanquin establishment and sepoys and other allowances, on the same grounds as those on which, to the same Desái, the village of Kalam had been confirmed.

This Desái Daulatrái is said to have died in 1808, and his son Hukamatrái succeeded, and he, up to his death in January 1863, received the same allowances without, as is shown by the Collector Mr. Oliphant's Report (exhibit No. 88), the Government making any separate order:—in other words, it was evidently continued as a matter of right.

An examination of all these documents shows clearly to my mind that the *pálkhi* allowance was received by father and son through three generations, from 1754 to 1863, and the sepoys and peons from 1773 to the same date, and further that from the date of the confirmation by the British Government in 1808, both were received by two generations, without any interference on the part of the Government, extending over a period of about fifty-five years.

I would now notice that portion of exhibit No. 84 in which allusion is made to the village granted in inám to this family. From an appeal * lately before this court, it appeared that the village in question was conferred on Daulatrái and his heirs in perpetuity; construing, therefore, the 16th paragraph of Secretary Mr. Goodwin's letter by this light, it would appear that in 1808 the palanquin and *shibandi* allowance was also conferred on a similar tenure, the words being, "the village of Kalam is confirmed by Government

* S. A. No. 567 of 1867, 4 Bom. H. C. Rep., A.C.J. 189.

1867.

DESA'I KALYA'NRA'YA HUKAMAT-RA'YA v. GOVT. OF BOMBAY.

as you recommend, and so is, on the same grounds, the palanquin establishment, with sepoys and peon allowance."

Some argument took place at the bar on the nature of these exhibits, and it was suggested that they did not prove the nature of the grant, and that we could not, therefore, decide that the allowance was one made in perpetuity. But I think that the case, as allowed by Mr. White, must be determined on the construction of the documents, and the admitted acts of the parties; and having most carefully considered both these points, I can come to no other conclusion but that there is strong evidence that a sanad had been granted, while the acts of the British Government in 1808 and in 1828 clearly indicate that they considered it an hereditary grant.

It may be said that the absence of the original sanad is not accounted for; but I think in justice that a change of government on three occasions, and the disturbed state of the country, which is a matter of history, would alone suffice to explain this absence; but I may also add that I am the less concerned on this point from the conduct of Government in refusing to produce the papers on which their decision in 1808 was based, and on which my learned brother has commented.

I have not alluded to Mr. Gopálráv Hari's deposition, No. 58, for it is after all nothing more than a rather boastful statement that he believes he alone is the possessor of a sanad for an hereditary *pálkhi* allowance,—a statement of no value as evidence, save in showing that such a thing may possibly exist otherwise than among that witness's muniments.

The more I examine the case, the more certain I feel that the plaintiff has a good case on the merits, and I, therefore, find that he has proved his claim.

On the second point I find that there was an uninterrupted enjoyment of this allowance for more than fifty-five years between the date of the confirmation of Government in 1808 and the death of Hukamatrái in 1863, without any

re-grant by Government, but, on the other hand, by a continuation of the grant as of right to Hukamatrái on his father's death; and I am, therefore, unable to arrive at any other conclusion than that Hukamatrái, and in consequence the present plaintiff, has acquired a prescriptive title under Reg. V. of 1827, Sec. 1: and even if this were not the case, I think, as I have above shown, that the plaintiff would be entitled to a decree in his favour on the merits.

1867.
DESA'I KALYA'NRA'YA HUKAMATRA'YA v. GOVT. OF BOMBAY.

Under these circumstances I would reverse the District Judge's decree, and award in favour of the plaintiff as claimed, with all costs on the respondent, the Government.

Decree reversed.

Special Appeal No. 21 *of* 1868.

1868.
April 21.

THE COLLECTOR of KHEDA'..... *Appellant.*

HARISHANKAR TIKAM *et al*..... *Respondents.*

Temple Allowance—Prescription—Presumed Hereditary Grant—Reg. V. of 1827, *Sec.* 1.

Where a charitable grant in connection with a temple was proved to have been enjoyed by the incumbent, and those under whom he held in regular succession for more than thirty years:

It was held that the grantee had acquired a right of property in it under Reg. V. of 1827, Sec. 1. By *Warden*, J., independently of the origin or nature of the grant. By *Gibbs*, J., in the absence of it being shown to have been a personal grant, and by the conduct of Government in paying it to several generations in succession.

THIS was a Special Appeal from the decision of F. D. Melvill, Acting Judge of the District of Ahmedábád, in Appeal Suit No. 126 of 1865, reversing the decree of A. Bosanquet, Senior Assistant Judge at Khedá.

The plaintiffs brought the suit against the Collector of Khedá to recover their share in a temple allowance.

The Collector answered that the allowance was a charitable, and not an hereditary, grant.

The Senior Assistant Judge called on the plaintiffs to prove that the grant to them was of an hereditary nature;