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Nov. 9.

Special Appeal No. 16 of 1871.

THE COLLECTOR OF SU'RAT.....*Appellant.*
DA'JI JOGI *et al.*.....*Respondents.*

Chirdá Haks—*Prescription—Acquisitive Prescription—Limitation—Continued Voluntary Payments—Reg. V. of 1827, Sec. 1.*

A prescriptive right to have a yearly payment made by Government to a private individual cannot be acquired by reason of a continued series of voluntary payments made to him by Government extending over a period of more than thirty years.

Thus where Government paid a yearly sum of Rs. 32-4-6 to a *Chirdá Hakkár*, by whom no services in return were rendered, from the year 1818 to 1860, and then discontinued such payment to the heir of the last holder, it was held that such yearly payments gave the *hakkár* no prescriptive rights against Government.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Súrat, reversing the decree of the Assistant Judge at that station.

The plaintiffs sued to establish their right to a *chirdá hak* of Rs. 32-4-6 per annum, which they alleged their family had received from 1818 to 1860, when, their brother Shankar Jogi dying, the Government, on the recommendation of their officer on special duty, ordered its discontinuance.

The Collector, the defendant, answered that *chirdá hak* was a service *hak*; that the service was no longer required, and that the Government was, therefore, justified in discontinuing the *hak*.

The Assistant Judge allowed the Collector's objection, and gave a decree in his favour, which was upheld in appeal, on the ground that the plaintiffs had no right of action against Government in respect of the *hak*.

This decree was reversed in special appeal by the High Court, which remanded the cause for trial on the merits.

On the hearing of the appeal the District Judge settled the following issues:—

L. Is there any legal obligation on Government, irrespective of the length of time during which this *hak* has been paid by it, to continue the payment in perpetuity, or as long as it continues to pay the *todá girás hak*?

II. Does the fact of this payment having been made, as is admitted, from 1818 to 1860, create a prescriptive right, as against Government, to the continuance of such payment?

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On the first issue the District Judge found in the negative. He was of opinion that when the agreement was made by the Government with the *girásíás* to pay them their *girás* from the Government Treasury in consideration of their resigning their right of levying it directly, Government did not stipulate for the payment of the *chirdá haks*, and they were, therefore, not bound to continue it any longer.

On the second issue Mr. Newnham found for the *chirdá haktárs*. He said: "The rights of the latter were secured to them by the *chits*, or *sanads*, 70, 71, and 72, and these were grants by the *girásíás* in perpetuity on condition of performing the service of collection. These have never been formally cancelled, and no mention appears to have been made of them when the *girásíás* agreed that their dues should be collected by the Government and paid to them from the Treasury; they (the *chirdá haktárs*) would seem to have been left to make their own terms with the Government. The *girásíás* had created an incumbrance on their estate of the *todá girás* dues, in the shape of the right of collection, and of receiving commission for the same, by *sanads* which have not been revoked, and when the Government received those dues into its hands, as trustees for them, it must be held to have so taken them with the incumbrance created by the *girásíás*."

And finding further that the plaintiffs derived their right from the family of Rájsang, whose sons were declared life-grantees, he made a decree giving them also an estate to that extent.

The special appeal was heard by GIBBS and WEST, JJ.

Dhirajlál Mathurádás (Government Pleader), for the appellant:—There being no obligation to pay the *hak* to the *haktárs*, each yearly payment made by Government to them was purely voluntary. The repetition of a voluntary payment, even though it be for a period of more than thirty years, does not create a prescriptive right to have such

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payment continued for ever. The origin of the payment being ascertained, no presumption can be raised from long enjoyment. A *chirdá hak* is in the nature of moveable property : no payment has been made in respect of it since 1860, and the plaintiff's claim is, therefore, barred.

Nánábhái Haridás, for the respondents :—The payment was not voluntary, and was not even alleged to be so by the defendants in their written statement. A payment of a *todá girás hak* for a long period raises a presumption of permanence. The same rule should be applied to *chirdá haks*. It was held in *Umedsangji v. The Collector of Súrat* (a) that where Government has paid a *todá girás hak* to a *girásiá* for a long and uninterrupted period of time, the *onus* of proving that the *hak* is not perpetual lies upon Government. The payment to the holders of *chirdá haks* for such a length of time as sixty years implies that it was received and paid as of right. The Collector has admitted that the *girás hak* in this case has been continued for the life of its present recipients, and the *chirdá hakdárs* cannot be deprived of their rights for that period at any rate. The nature of the arrangement between the *girásiá* and the Government has not been shown ; but, whatever it was, it cannot affect the *chirdá hakdárs*, who were not parties to it.

Dhirajlál Mathurádás, in reply :—The decision in *Umedsangji v. The Collector of Súrat* does not apply. The Government was a trustee for the *girásiás*. There is no agreement here from which a trust arises. The payment was purely voluntary.

The judgment of the Court was delivered by

WEST, J. :—The facts established in this case, and the historical records available for reference, are too meagre to enable the court to come to a completely satisfactory decision as to the legal position and rights of *chirdá hakdárs* in Gujarrát before the introduction of British rule in that province. This much only appears certain, that the *chirdádárs* were employed by the *girásiás*—whose own claims are of such

(a) 7 Bom. H. C. Rep., A. C. J. 50.

ambiguous origin—to collect their dues from the villages over which their right or their power extended. On the establishment of the British Government the direct collection of the *girás haks* was disallowed. The Government itself undertook the collection of the impost where it was recognised, and paid over the proceeds, in some cases under agreement, in others without it, to the *girásiás* whose title it admitted.

The collection of *girás haks* by the claimants themselves and their retainers having ceased, the duty of the *chirdádárs* ceased with it; but the Government continued the payment to the latter of an amount equal to that of their previously accustomed percentage for many years. The payments in the present case appear to have been made from 1818 to 1860. It is admitted at the same time that no agreement was ever entered into between the Government and the plaintiffs by which the former bound itself to continue the payments to the latter in perpetuity, or for any definite period. The contention of the plaintiffs is that each single payment during forty-one or forty-two years constituted, in the absence of explanation, a fresh admission of the plaintiffs' legal right to the *haks* in question; and thus a prescriptive title has been established by a continued enjoyment extending beyond a period of thirty years. For the defendant it is answered that no acknowledgment of right is to be deduced from a bare payment; that no prescriptive title has grown up from a succession of acts each of which was purely voluntary; and that no legal right to the payment, as against the Government, having been made out by evidence, the claim ought to be rejected.

The District Judge's view was that the *girásiás*, by their dealings with the *chirdádárs*, had created for the latter a vested interest in their share or percentage of the *girás haks*, and that the Government, having itself undertaken the collection of these *haks*, was bound to pay the share due to the *chirdádárs* out of its collections. The rights, however, of the *chirdádárs*, if rights they really were, could not be affected by any agreement or arrangement between third parties. If they had a vested interest in the *haks* the

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property, subject to that interest, of the *girásíás*, that interest remained just the same after the agreement by which the Government and the *girásíás* came to terms as before. What they say is that they were entitled to levy the *haks* and deduct a percentage. This right, if it subsisted, they might have insisted on, notwithstanding the new arrangement. If it was denied, they might have established it at law. If it was admitted, they might have made it the basis of an actual contract. But it cannot be said that by the mere payment any right, much less the right alleged by the plaintiffs, has been admitted, further than as to the payments actually made. It cannot be said of an individual payment without more that it involves an admission of any right beyond that to the payment itself. To make it evidence of a further right, it must be taken with other extrinsic circumstances constituting, by logical inference or by some rule of law, proof of the right asserted.

This brings us to the question of prescriptive title set up in this case. The Government made annual payments to the plaintiffs for more than thirty years. The enjoyment thus long continued in the plaintiffs constituted, it is urged, a prescriptive title binding the Government to the continuance of the payment for all time to come, or, at any rate, for the period during which the *girás* payments shall be continued on which the *chirdá hak* was originally a charge. The latter part of this argument hardly needs separate consideration. The plaintiff relying on the mere repetition of the payments as itself constituting a valid title, and those payments, by the admission of the defendant, not being referable to any temporarily existing right now expired or extinguished, the claim to them, if good at all, is good in perpetuity. If the payment unexplained of sums of money annually for more than thirty years can create a right to them which did not exist at the inception of the practice, that right has here been created by the acts of the Government.

The plaintiffs, in support of the right, point to Reg. V., Sec. 1, of 1827. What that enactment says is that "when-

ever lands, houses, hereditary offices, or other immoveable property have been held" for more than "thirty years by any person as proprietor.....such possession shall be received as proof of a sufficient right of property in the same." It is not necessary now to consider whether the Regulation was meant to afford legislative recognition to any doctrine of acquisitive prescription—was anything more, in fact, than a simple Limitation Act, making lapse of time an answer to claims, but not a foundation for claims. The words we have quoted do not extend to the particular case before us. Here there has not, in any intelligible sense, been possession of anything whatever, nor has there been an actual and active performance and enjoyment of the functions and emoluments of an hereditary office as such. We have, for the purposes of the present inquiry, to deal with the bare fact of payments—on no acknowledged right and not connected with the performance of any duties—continued for more than thirty years. If on this basis a prescriptive title can be built up, it must be simply by analogy to the rule prescribed by the Regulation, not by any possibility of comprehending the case within its positive terms.

Von Savigny, in the course of his profound investigation of the theory of prescription, shows that the idea of prescription as a direct source of rights—that is, of acquisitive prescription—is quite foreign to the Civil Law, from which it has been evolved by the fallacious generalisations of modern commentators. Its true sense, as he demonstrates, was as an exception or means of defence independent of the original merits of the case. A most dangerous consequence of the false doctrine, he shows, is that, taken in its full extent, it includes all cases of the exercise or non-exercise of a right, even those in which the positive law ascribes no particular effect to the mere lapse of time. That rights in general can be created, independently of express rules, by the mere lapse of time, he proves to be an idea resting on no sound principle, and, as an instance of the false conclusions to which it leads, he gives the case of payment of interest on a supposed obligation for thirty years being taken as affording a prescriptive basis for the obligation itself.

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The English law of prescription is neatly summarised in Shelford's Real Property Statutes, p. 25 *et seq.* From this it will be seen that prescription in that law signifies an individual right, or rather the source of an individual right in immemorial usage, which right attaches to the person or to the estate. From such immemorial usage a presumption arises of a grant once made upon which it was founded. A title to lands or other corporeal substances cannot be made by prescription. On account of the formalities essential, especially those formerly essential, to a valid transfer in the case of such property, "more certain evidence may be had," and *supersedes the mere usage which is the only mode of enjoying an incorporeal hereditament.* Thus "prescription by immemorial usage," it is said, "can in general only be for incorporeal hereditaments which may be created by grant," as distinguished from corporeal property, in which livery of seisin and retention of possession are possible.

The immemorial usage necessary to ground a title by prescription could, however, be satisfactorily proved in only a few of those cases in which it had actually subsisted. Perceiving this, and moved by an instinctive sympathy in favour of long possession, "the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, as presumptive evidence that the right has subsisted time out of mind, and consequently, unless its origin could be proved, a sufficient foundation for establishing a *prescriptive right.*" But the principle prevailing as amongst private persons was always qualified as regards the Crown by the maxim "*Nullum tempus occurrit regi.*" This Lord Hobart calls especially "the King's plea:" because, although it is but reasonable that private persons should lose the rights which they have long disused, it would not be just that the King (and through him the public) should suffer in the same way through the negligence or corruption of public officers whose duties and interests may tend in *contrary directions.* By some Acts of Parliament the Crown's powers of recovery are expressly limited like those of private persons, but where this is not

the case the prerogative is not touched by mere general words. Thus where even an actual enjoyment of an incorporeal hereditament had been continued for centuries as of right, the holder helping himself to that to which he was, or was supposed to be, entitled, the Crown, according to the English Common Law, could still step in, and, as would be said in this country, "resume the *hak*" or "*indm*," unless a grant could be produced or proved, which grant, if in derogation of public right, must have been made on good consideration, as of the concession of a right of passage as a ground for a grant of tolls.

An incorporeal hereditament is defined as a "right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exerciseable within the same." This definition is not expressed with scientific accuracy, but what it points to is evidently the exercise of rights over property recognised in its bulk as owned by another. It cannot be said that the receipt of money paid on no claim or acknowledgment of a right over any particular corporeal property falls within this notion. Such a payment then is of the nature of a simple annuity, perhaps a purely optional allowance, paid from year to year. On such a bare payment or series of payments traced definitely to its origin forty years back, it is clear that a prescriptive title to payment for ever, or even for one year more, cannot be built up, according to the English law.

As to the Hindú law on this subject not much need be said, as it was not relied upon in argument on either side. That law appears not to dwell on the distinction between possession and the exercise of rights unconnected with possession. The lapse of *Smártakála*, or the period to which the memory of man extends measured by three generations, reckoned equal to a hundred or to sixty years (Stokes's Hindu Law Books, p. 31; Colebrooke, Dig., Bk. V., T. 395), appears to give an absolute title to one in possession or in enjoyment of a right, but though three descents cast furnish *primá facie* evidence of title to the thing possessed, yet this is not at all an indisputable presumption. Nilkantha, in the

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Vyavahāra Mayūkha (Ch. II., Sec. II., 1), says approvingly : "Narada declares the imperfection of (right in) the thing contested when supported by enjoyment only: 'He who simply pleads possession but no title, in consequence of proving such false possession is to be considered a thief.'" Here there was not possession of anything, nor enjoyment, on an acknowledged claim of right : no ground, therefore, for the establishment, as against the Government, of a right to payment in future.

From whatever direction, therefore, we approach this question, no title by mere prescription appears to have been made out. It may be a subject for some regret that the Government should, by continuing the payments for so long a period, have encouraged the notion, which was almost certain to spring up, that they were made in performance of a legal duty, not of mere grace ; but the mere fact of payment to a man of that to which he is not entitled is never in itself an injury, so as to afford him a just ground of complaint when the payment afterwards ceases. It is only as raising in certain cases a presumption of the existence of a right, of which other evidence, through the lapse of time, is not forthcoming, that the frequent repetition of acts such as payments, when unexplained, becomes in effect, though incidentally, the foundation of rights. Here there is no room for such a presumption : the title, if there be one, may be traced back as well as the payment ; and we must reverse the decree of the District Court, with costs throughout on the respondent.

Decree reversed.