

clearly points to distinction between pensions and all other grants. It follows that, in our opinion, the word, "pension" in s. 11 is used in its ordinary and well-known sense, viz., that of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits, or as compensation to dethroned, princes, their families, and dependants. It seems to us impossible to bring a *tora-garas hak* within this meaning of the word "pension;" and, indeed, if we are right in our conclusion, that the word "pension" denotes something different from "a grant of money or land revenue," it follows that, as we have already, in the cases referred to, held that a *tora-garas hak* comes within the definition of a grant of money or land revenue, we could not now consistently hold that it comes within the meaning of the word "pension."

[437] We may observe that the term "grant of money or of land revenue" appears to be borrowed from the Madras Reg. IV of 1831, which is one of the statutes repealed by the Pensions Act. In that regulation the term is made to include pensions; and, read in combination with Act XXIII of 1838, the regulation exempts from attachment for debt not only pensions, but also other allowances, some of which would, perhaps, fall within the definition of a grant of money or land revenue in the Pensions Act, as well as within the same term in Reg. IV of 1831. But in passing the Pensions Act the Legislature seem to have thought it desirable that exemption from attachment for debt should be confined to pensions, properly so called, and should not be extended to other grants of money or land revenue. And it does not appear to us difficult to understand why the State should have thought it right to secure the pensions of its old servants and of dethroned princes, but should not have cared to protect from attachment grants made to families of freebooters as compensation for the loss of their blackmail.

Our answer to the question referred to us, will be that a *tora garas hak* is not exempted from attachment under a decree of a Civil Court. The Secretary of State for India must pay the costs of this reference.

4 B. 437.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp Kt., Chief Justice and Mr. Justice M. Melvill.

MAHARAVAL MOHANSANGJI JEYSANJI (Plaintiff) v. THE GOVERNMENT OF BOMBAY (Defendant).* [10th October, 1877.]

A suit against Government upon an alleged agreement by Government to pay moneys from its treasury in lieu of *tora-garas haks*, falls within the prohibition in s. 4 of Act XXIII of 1871, to Civil Courts to entertain any suit relating to any grant of money made by the British Government, whatever may have been the consideration for such grant, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted.

Cessation of the collection of *tora-garas* by Government.

Quere.—Whether Government bound itself to act perpetually as agent of the *garasias* in the collection of *tora-garas*?

Quere.—Whether the Civil Courts would compel the specific performance of such an agreement?

[Affirmed, 5 B. 408 = 8 I.A. 77 = 4 Sar. P.C.J. 280; R., 4 B. 432 (436).]

*(Regular Appeal, No. 10 of 1877.)

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10th October, 1877. WESTROPP, C.J.—The District Judge of Surat having held that by the Indian Pensions Act (XXIII of 1871) he was [438] deprived of jurisdiction to entertain this suit against Government for *tora-garas*, the plaintiff Mohansangji has appealed to this Court.

The plaintiff states as follows :—“ In the villages of pargana Anklesvar, in the Collectorate of Broach, in the Surat District, there are lands belonging to the *vantas* of my ancestors (meaning *vanta* lands which belonged to my ancestors). Likewise there has continued (to us) from ancient times the yearly cash *hak* (right) of *tora-garas* as (our) private property. The same having descended as an inheritance from the original owner of the family, came down to be shared by the lines (families) of three sons. These (*i.e.*, the members of each of the (said three) lines used to collect (levy) separately (the) *tora-garas*, of their respective shares from the villages (mentioned above). Some time after the introduction of the English Government, the Government made an arrangement (*bandobast*) to pay (moneys) from the Government treasury in lieu of the *tora-garas haks* which the *garasias* used to collect (levy) directly from the village.” The plaintiff then proceeded to state that up to its date the payments of *tora-garas* continued to be regularly made by Government to two out of the three branches of the family of the original proprietor, but that the last payment made to the third branch, was made to its representative, Jeysangji, who died on the 5th December, 1865, having first adopted the plaintiff as his son and heir. The plaintiff alleged that the *vanta* lands and other property of Jeysangji had come into his (the plaintiff's) possession, but the Collector of Broach stopped the payment of Jeysangji's share of the *tora-garas* ever since his death, and that, on the 16th of July, 1873, Government, by a resolution of that date, refused to recognize the plaintiff as adopted son of Jeysangji, and, as Jeysangji had not left a widow, resumed his share of the *tora-garas*. The plaintiff next alleged in the plaint that, assuming that he was not the adopted son of Jeysangji, he nevertheless was now his heir, inasmuch as his natural father, Chandarsangji, was the next heir as cousin of Jeysangji, whom he survived until Samvat 1929 (A. D. 1873 74), when he died, leaving the plaintiff, who, if not then adopted son and as such, heir of Jeysangji, was his heir as son of Chandarsangji. The plaint claimed for the plaintiff (as Jeysangji's share of the *tora-garas hak*) Rs. 2 694 per annum thenceforward, and ten years' arrears thereof, with interest. He alleged the cause of action to have accrued on the 16th July, 1873, the date of the Government resolution resuming the *tora-garas*. The plaint was presented on the 27th February, 1876, *i.e.*, about eleven years after the last payment made to Jeysangji, and there is nothing to show that since the death of Jeysangji, in 1865, either Chandarsangji or the plaintiff took any legal proceedings to recover the *tora-garas*, from Government until the filing of the present plaint.

The written statement, filed in defence, pleaded—1st, that Act XXIII of 1871, prevented the Civil Court from having jurisdiction to hear the suit. Secondly, that, this *tora-garas hak* having originated in wrong and violence, a suit for it would not lie.

It will be observed that the plaint does not aver that Government undertook to collect *tora-garas*, or had collected it, but simply asserted that, after [439] the introduction of the English Government, that Government made an arrangement (*bandobast*), *i.e.*, an agreement to pay moneys from

the Government treasury in lieu of the *torā-garas haks*, which the garasias used to levy directly from the villages. This statement of the nature of the claim against and liability of Government, appears to coincide exactly with the language of Her Majesty's Privy Council in *Maharana Futtehsangji v. Desai Kallanrayaji* (1), where it is said that the *torā garas* annual payments "were recognized by the British Government which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by inam villages to fall on the inamdar." Similarly, in *The Collector of Surat v. The Heiresses of Kuverbai* (2), Forbes, J., said: "By an arrangement with the garasias, 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." If, then, this description of the nature of the liability of Government, given by Her Majesty's Privy Council and Mr. Justice Forbes and put forth by the plaintiff himself in his plaint, be correct, he would seem to us to fall within the prohibition, contained in s. 4 of the Indian Pensions Act (XXIII of 1871), to Civil Courts, to entertain any suit relating to any grant of money made by the British Government, whatever may have been the consideration for such grant, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted—enlarged as the term "grant of money" is by the third section, which brings within the scope of that term "anything payable on the part of Government in respect of any right," &c. That word "right," although it may well be limited to claims *ejusdem generis* with the objects of the Act, would appear to us to include a *hak* or periodical payment by Government in respect of such an arrangement as that alleged by the plaintiff to have been substituted for the levy, by garasias, on their own account, of blackmail from villagers. This was the view taken in *Parbhudas Rayaji v. Motiram Kalyandas* (3), and, as we think, correctly taken, and we are of opinion that the same view holds good here, if the plaintiff's claims has been rightly set forth in his plaint. As there set forth, what he seeks as of right, is an annual payment from the Government treasury, which annual payment he substantially treats as the purchase-money or consideration for the abstinence, by his ancestors, himself and his successors, from the levy of *torā-garas* in the villages of Anklesvar. There is between the present case and that of *Vasudev Sadasiv Modak v. The Collector of Ratnagiri* (4) this distinction, *viz.*, that the inception of the *deshmukh's* right to his percentage on the revenue collected by him was legal; whereas *torā-garas* having generally been blackmail, can scarcely, whatsoever it may have since become, be regarded as of lawful origin; but, Her Majesty's Privy Council having first given their opinion in the *Ratnagiri* case upon the *deshmukh's* claim as it stood in its inception, and upon the *sanad*, proceeded, in the latter part of the judgment, to view that case independently of the origin of the claim and of the *sanad*, and state their opinion to be that the plaintiff *Modak* had put forward his claim in such a manner as to show that what was payable to him by the British Government [440] was so "in respect of a right, privilege, perquisite, or office within the meaning of s. 3 of the Indian Pensions Act, and to negative a statement in his plaint to the effect that, since 1842, the British Government

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(1) 1 I. A. 34 (47) = 10 B.H.C.R. 281.

(2) 2 B.H.C.R. 299 (242).

(3) 1 B. 203.

(4) 4 I. A. 119.

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had received the desmukh's allowances, as something distinct from revenue, from the raiyats on his behalf and as his agent under circumstances which would make them liable to him as for money had and received," and, accordingly, their Lordships affirmed the decision of the High Court, which held the case to fall within the third section of the Indian Pensions Act, and, therefore, not within the jurisdiction of a Civil Court. In the present case, the plaintiff has put his case so as to bring it within the fourth section of that enactment, and has not encumbered his plaint with any allegation as to the agency of Government.

The learned counsel for the plaintiff, however, endeavouring to take this case out of the scope of the term "a grant of money," as defined or described in the Indian Pensions Act, contended, at the hearing of the appeal before us, that Government merely filled the position of agent to collect *tora-garas* from the villagers on behalf of the plaintiff, and assumed that position for the purpose of recovering that blackmail, or whatsoever else it may be, in an orderly and peaceable manner, and preventing the riotous and violent mode of levy by the garasias themselves which had preceded the intervention of Government. Assuming that argument to be historically true, it presents a case quite different from that stated in the plaint, which contains no allegation of agency on the part of Government. The plaint neither avers that Government ever promised to collect *tora-garas* on behalf of the plaintiff, or asserted that it would collect it on his own behalf; nor does it aver that Government has hitherto collected *tora-garas* from the villagers, or that any moneys of that nature have since the death of Jeysangji, in 1865, as heir to whom the plaintiff claims, been received by Government from the villagers on behalf of and to the use of the plaintiff. It was not very clear, in the argument on behalf of the plaintiff, whether the agency contended for, was a perpetual agency, or an agency determinable at the pleasure of either party, or of Government alone, on reasonable notice. But whichever species of agency it be, if agency at all, it is manifest that, if the plaintiff seriously intended to rely upon such a case, it was incumbent on him to have amended—in fact, re framed—his plaint. An application for liberty so to do, ought to have been made to the District Judge. The plaintiff had, from the written statement in defence filed by the Collector on behalf of Government timely notice that, at the hearing before the District Judge, the Indian Pensions Act would be relied on as a bar to the maintenance of this suit in a Civil Court; so there cannot have been any surprise in the matter. It does not appear that, even when the District Judge announced his opinion that the case came within the prohibition contained in the Indian Pensions Act, the plaintiff made any application for leave to amend. Even here, on appeal, the amendment of the plaint was rather suggested than formally applied for. Looking, however, at what was said as intended to amount to an application, we could not perceive any good ground for allowing an indulgence of that nature to the plaintiff at so advanced a stage of the litigation. Ten years have elapsed since the death of Jeysangji, who, of his branch of the family, was the last recipient of the Government commutation for *tora-garas*. If the [441] plaintiffs' claim be regarded as a *hak* or other immoveable property, it may not be barred by the law of limitation (see Act IX of 1871, sch. II, art. 131, 132, 145, and L. R. 1 Ind. App. 34; S. C. 10 Bom. H. C. Rep. 281). But if it be a *hak* it would seem to come within the Indian Pensions Act. If the true nature of the claim be a contract for a perpetual agency, and we were asked to permit the plaint to be converted into a suit

for a specific performance of such a contract, we not only doubt that a suit for its specific performance would lie (Fry on Specific Performance, pp. 22, 245; *Fitzpatrick v. Nolan* (1), but we doubt that any such contract could be proved. So far as we can perceive, it has not been alleged in any of the *tora-garas* cases hitherto, decided, that Government was bound perpetually to act as agent for collection of *tora-garas*. In *The Collector of Surat v. Pestanji Butanji* (2), where the history of *tora-garas* was examined very fully by Mr. W. E. Frere, then Zilla Judge of Surat, who had considerable experience in Gujarat, he seems to have thought that Government could only be liable when it had collected the *garas*; and the case of *Sambhulal Girdharlal v. The Collector of Surat* (3) does not seem to go beyond that. Lord Kingsdown there said: "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 have been paid." Agencies, alleged to be undeterminable, have been discontinued by the Courts: *Rhodes v. Forward* (4), *Kavasji Nanabai v. Lalbha Vallabhai* (5), *Shaw v. Lawless* (6). To a suit for specific performance the period of limitation would be three years from the denial of the right; Act IX of 1871, sch. II, art. 113. Again, if the suit be converted into an action for the recovery of damages for misconduct as an agent in ceasing to make the collection of *tora-garas*, the period of limitation would be three years from the time when the neglect or misconduct occurs (Act IX of 1871, sch. II, art. 91). Lastly, if the suit were transformed into an action for money had and received to the use of the plaintiff, it is manifest from an exhibit put in evidence by the Advocate-General on behalf of Government, with the consent of counsel for the plaintiff, that such an action must fail, inasmuch as Government has, since the introduction of the survey into Gujarat, declined to collect *tora-garas* from the villages.

In *Sambhulal Girdharlal's* case it was established to the satisfaction of Her Majesty's Privy Council that the *tora-garas* had been collected by, and was in the hands of, Government. In *Umedsangji v. The Collector of Surat* (7) the High Court limited its decree against the Collector to the *tora-garas* admitted to have been collected by Government, *i.e.*, up to 1862 the date of the survey; and Couch, C.J., said: "We cannot declare the plaintiff to be entitled in perpetuity, because, if Government were to cease to collect the *garas*, it might be that his remedy would not lie against the Government, but against the villagers." We have not any doubt that, in the case before [442] us, the plaint was filed in its present form without any averment that Government had collected the *tora-garas* sued for, because it is notorious that Government has long since ceased to collect *tora-garas* in Gujarat, and that, although payments are made out of the Government treasury to many of the ancient recipients of *tora-garas*, there is not, since the new revenue survey, any assessment in respect of *tora-garas* in Government villages made upon the villagers or their lands, and, accordingly, no collection made by Government in that respect. The exhibit to which we have referred as put in by consent, contains extracts (paragraphs 17 to 19 inclusive) from a resolution, No. 4309, dated 27th November, 1862, of the Government of Bombay, and is as follows:—

(1) 1 Ir. Chan. Rep. 671.
 (3) 8 M.I.A. 1 (40).
 (6) 5 Cl. & F. 129.

(2) 2 Morris S.D.A. Rep. 291.
 (4) L.R. 2 App. 256.
 (7) 7 B.H.C.R. A.C.J. 50.

(5) 3 I.A. 200.

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" 17. Government did not initiate these payments, but found them, on obtaining possession of the country, generated by the disorder of the previous rule. The holders were treated with unexampled indulgence; but the peace of the country called for the policy then adopted, and faith should now be kept with their descendants, although they are no longer dangerous to the State. This the Governor in Council is prepared in the strictest sense to do; but he cannot allow that a tax, at first so irregularly imposed on the community, should now be extorted, by the aid of legal proceedings, from the public purse by others than those in whose favour the original arrangements were made, or that Government should be compelled to continue its good offices between the *garasias* and the village communities in a manner to which it never pledged itself. It should, therefore, be publicly declared in every taluka, as the revenue survey settlement is introduced, that the new rules of assessment do not include any such collections, and that Government will, in future, not aid or take part in the collection of *garas*.

" 18. In thus placing the *garasias* in the same position with respect to the village communities which they originally held, the Governor in Council cannot allow them to resort to other than legal means to enforce their claims; and if any village communities decline to accede to the *garasias'* demands, the latter must resort to the Civil Courts. At the same time the Governor in Council is not unwilling to make some sacrifice of revenue in order to relieve the *garasias* from the necessity of resorting to law, and he is prepared, whenever the *garasia* may be willing to receive from Government his present income, instead of collecting it direct from the villagers, to continue that income to him under such reasonable rules and restrictions as may seem fit to Government to impose.

" 19. The conditions, on which this arrangement will be entered into, are that the *garasia* shall consent to abandon, for the future his claims against the village communities, and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who receives the *garas* from the British treasury. The *garas*, or any portion of it, may further be continued to the lineal male issue of a brother of the first British recipient in any case in which, on inquiry, the Revenue Commissioner may find that hardship would be felt by the discontinuance of the *garas*. If, in any case, however the allowance has been enjoyed on condition of service, that condition will not be abandoned, although it is not expected that such service can now be taken with advantage to the public."

[443] For the reasons which we have above assigned, we think it doubtful whether we should confer any benefit upon the plaintiff by granting to him permission to amend his plaint. Whether, however, those reasons deserve much weight or not, we are of opinion that we ought not to grant to him any such permission, he not having made any application for leave to amend in the Court of first instance, although he had timely warning, before the hearing of the cause there, that the Indian Pensions Act would be pleaded as excluding the jurisdiction of that Court.

We affirm the decree, and direct the parties, respectively, to bear their own costs of this appeal.