1870.
Feb 23.

Regular Appeal No. 20 *of* 1867.

UMEDSANGJI .....*Appellant.*

THE COLLECTOR OF SURAT .....*Respondent.*

Todá Garás Hak—*Presumption arising from long-continued Payment—Government's Liability to pay* Todá Garás.

Held that, whatever may be the right of the Government as to the collection of *toda garas* from villagers, where it does collect *toda garas* it is bound to pay over the amount so collected to the original *garasia*, *or* his representatives if the *hak* is a perpetual one.

Where Government has paid a *toda garas hak* to a *garasia* for a long and uninterrupted period of time, the *onus* of proving that the *hak* is not perpetual lies upon Government.

THIS was a regular appeal from the decision of C. G Kemball, Judge of the district of Surat, in Original Suit No. 6 of 1866.

The original plaintiff, Bhárátsangji (whose heir the appellant is), instituted this suit to establish his right against the Collector of Surat to receive annually and for ever a *toda garas hak* of Rs. 61 from the village of Mahudi, in the Chikli parganá, payable from the Government Treasury, and purchased by his father at an auction-sale in execution of a decree, and also to recover arrears of payment for seven years, during which period the Collector had collected the *haks* from the ryots. The *toda garas hak* was purchased by the plaintiff's father in 1832, and it was entered in his name in that year, and the *hak* was paid to him from 1832 to 1865. From 1856 it was discontinued. On the 4th of July 1859 the Collector made an order restricting the plaintiff's right of enjoyment of the *hak* in question to the duration of his life.

The Collector answered that the continuance or discontinuance of *toda garas haks* rests entirely at the pleasure of Government. As it was found by Government that Udebhái who was the original *garasia* proprietor at the time the British rule commenced, and whose *hak* was purchased by the plaintiff's father, had died without issue, it was determined that when third parties owned and enjoyed portions of Udebhái's *hak*, which had lapsed to Government by his death without

issue, they should be continued to such persons for the duration of their lives; and this order of Government was communicated to the plaintiff, restricting his estate to his own life.

The District Judge of Surat laid down the following issues:—(I,) whether the plaintiff had any cause of action against the defendant; and (II), if he had a good cause of action, what was the extent of his claim; and, finding in favour of the defendant on the first issue, he rejected the plaintiff's claim.

The following extracts from the judgment of the District Judge show the reasons on which he grounded his decision:—

"This is a claim against the Collector of Surat in respect of a certain annual payment, called a *toda garas hak*, the continuance of which in its integrity the claimant asserts he has a right to demand from the Government. * * *

"*Toda garas*, as distinguished from the legally acquired and regularly descended *garas*, usually called *wanta*, is in fact a sum paid to a powerful neighbour or turbulent inhabitant of the village as the price of forbearance, protection, or assistance. The *hak* was neither more nor less than a species of black mail exacted by freebooters from the villages.

"These yearly payments were at first collected by the *garasias* direct from villages, and when necessary by force; after the commencement of British rule it became customary for them to obtain permission of some Government officer, and to give security that no violence should be resorted to before proceeding to levy the *hak;* and, lastly, they consented to forego their privilege of making the collections themselves, and receive the amount from the Treasury, and ever since 1811 they have received the payments from the Government Treasury.

"Now it has been laid down by some that by this last arrangement Government constituted themselves agents of, and rendered themselves liable to, the *garasias* for the amount they actually received from time to time from the villagers. * * *

1870.

Umedsangji v. The Collector of Surat.

"The point as to whether a positive obligation to continue the payments was undertaken by Government as a consequence of this arrangement can only be ascertained by determining the rights which the *garasias* had as against the villages. According as the villages were, or were not, at the time when the change in the mode of payment took place under a legal obligation to continue the contribution, will be the liability of Government. * * *

"The agreement of the villagers to pay the annual *hak* having been extracted by violence, the obligation which arose so had no legal validity. The *toda garas haks* had thus no legal origin, and the question now remains whether it was legalised by length of enjoyment. * * *

"It is true that in the judgment of the Judicial Committee of the Privy Council in *Sambhaldas's case* * their Lordships said that 'Assuming, however, that *toda garas haks* 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 recipients of an annual allowance out of land as of the possession of the land itself.' Long possession can itself, however, constitute no title. If it be undisturbed for a long time, it constitutes *prima facie* evidence sufficient to throw the burden of disproof on the party disputing it, but it in no case affords an irrebutable presumption of title. * * *

"*Toda garas haks* are not, moreover, payments out of land; they were originally a toll or tax levied upon the village community. Whether, looking to the existence of the tribute, or its nature and origin, length of enjoyment affords no presumption of title, and, not being a payment out of land, Reg. XVII. of 1827 has no application. Being in its origin a toll or black-mail levied upon the village communities by force, and its continued existence being referable also to force and fraud, enjoyment for length of time avails nothing. It could never have been good by grant, and it cannot be good by prescription. * * *

* 8 Moo. Ind. App. 1.

"The claim before me being both illegal in its inception, and incapable, from its very nature, of legalisation by any length of enjoyment, I am of opinion that Government could not become legally bound to admit it annually for ever, and that their revenue officers cannot be sued for its payment in a court of law."

The plaintiff appealed from this decision. When the appeal came on for hearing, on the 7th of September 1867, the Court (COUCH C.J., and NEWTON, J.) remanded the the case to the District Court with a direction to receive further evidence from both parties.

COUCH, C.J., on remanding the case, observed that the Court could not decide the case satisfactorily on the evidence befcre it, and that it would be necessary to have further evidence. The Court below decided the case on general principles, without refering to the particular circumstances of the case, which stated that Government had collected the *hak* from the villages down to the institution of the suit. It becomes, therefore necessary to see what was the arrangement between Government and the *Grasïa* when the former continued to collect the *hak* for the latter. The plaintiff is the alienee of a former holder of the hak; and the question is whether he has a right to enjoy it after the extinction of the male issue of the original proprietor. The issue of Udebhai had been extinct, and the Collector's order was based on this, that the *hak* had lapsed to Government on the extinction of such male issue of the original proprietor. Mr. White, the Advocate General, who appeared for the respondent, contended that the *onus* of proving that the estate was absolute lay on the plaintiff. The Court, however, thinks that the *onus* is on the respondent to show that the estate is not absolute, but is limited in the way contended for by Government. The Lower Court has not determined upon the validity of the Collector's order, and fixed the nature and extent of the right of the *garasias*, whether it was a right in perpetuity, or a right limited as contended for on the part of Government; on whom the *onus*, clearly lies to cut down the apparently absolute interest of the *garasias*

1870.
Umedsangji v. The Collector of Surat.

which is to be presumed from their length of hereditary enjoyment. It is essential that we should have evidence on this point, and we must, under Sec. 354 of the Civil Procedue Code, frame an issue to be sent below.

The following issue was accordingly framed and sent to the District Court :—

"Whether the right or interest of the original *garasias* in the *toda garas hak* was an absolute one to receive in it perpetuity, or was limited in duration to the existence of his direct male descendants."

The District Judge recorded the following finding on the above issue :—

"The plaintiff has put in no evidence on the issue sent down, and that adduced by the defendant merely tends to establish a custom of taking from the recipients security-bonds before the allowance was paid. This evidence does not directly touch the question sent down for trial. I must, therefore determine on whom the *onus* falls of proving the nature and extent of the interest of the *garasia*. And as I have decided that the claim against Government was not one that could be enforced in a court of law, I consider that it was for the plaintiff to show that the Government were compellable to pay the *hak* in perpetuity ; and, as he has failed to do this, I find that it was competent to the Government to continue the *hak* on any terms it might please to make."

The finding was returned on the 10th of June 1869.

The case came on this day for a second hearing before COUCH C.J., and GIBBS, J.

Nanabhai Haridas for the appellant.

Scoble, Acting Advocate General (with him *Dhirajlal Mathuradas*), for the respondent.

COUCH, C.J. :—The Court does not set aside the orders of the revenue authorities It declares that, notwithstanding these orders, this party is entitled to recover. We cannot declare the plaintiff to be entitled in perpetuity because if Government were to cease to collect the *giras* it might be that his remedy would not lie against the

Government, but against the villagers. Mr. White admitted at the previous hearing that the Government had collected the dues up to the date of the survey. The plaintiff is, in our opinion, entitled to recover up to that date arrears of the amount collected on his account by Government from the villages, whatever may be the extent of his interest. It is argued by the appellant that the *hak* is private property. In order to see whether it was a payment of such a nature that it should not be enforced against Government, we required further evidence when the case was last before us. The Advocate General, Mr. White, then stated that there were records and despatches of the Court of Directors bearing on the point. No such evidence, however, has been put in. And from the accounts it appears that the Government had been collecting the *haks* from the villages up to the year 1862. That being so, the character of the suit changes considerably, and the claim cannot be well resisted.

The broad question is thus no longer raised as to the power of Government to collect the *garas*, but the suit was whether, if Government have collected the *garas*, they were not liable to pay it over. It is simply a suit for the right to recover what had been collected. We asked the respondent to show that the *garasia's* interest was of a limited nature, and allowed the case to go down in order that this issue might be tried. The District Judge was not, however, informed of our ruling as to the *onus* of proof; this is not, however, of any moment, as the evidence given is not such as to enable us to decide in favour of Government. It may be that in another case further or better evidence may be given; and our decision in this case, being based on the evidence before us, must not at all be considered as binding in other cases. The reasons given by the District Judge in impeachment of the legal character of the allowance by reason of length of enjoyment are insufficient, and opposed to the express decision of the Privy Council in *Sambhulal's case*. We accordingly, declare that the plaintiff is entitled to recover all his arrears up to November 1862, notwithstanding the order of the 4th of July 1859. We award

1870.
Umedsangji v. The Collector of Surat.

arrears from Samvat 1912 to 1918 inclusive, and simple interest at nine per cent: per annum on each payment as it accrued due until the date of the decree, and interest on the whole sum at six per cent. till the day of payment. The respondent to bear all costs.

GIBBS, J.:—I concur. This cannot be strictly called a *toda garas* case, and should not be cited as a precedent on that subject. No decision has been come to as to the nature of the *hak*—whether it is black-mail, or rent of *wanta* lands, or what; the decision is simply based on the admission of the respondent that he has collected the *haks* which are the subject of the suit from the villages, and is ready to pay them to whomsoever the Court orders.

Decree reversed with costs.

NOTE.—Special Appeal No 21 of 1867 was decided on the same day on the same grounds.

Feb. 9.

Special Appeal No. 524 *of* 1869.

KISHORBHÁI GÁLLÁBHÁI and DESÁBHÁI GALLÁBHAI.....*Appellants.*

JORÁBHÁI DAJI and MULJI VENIDAS.....*Respondents.*

Registration—Mortgage—Subsequent Purchase—Priority—Notice.

Where, when Act XIX. of 1843 was in force, a purchaser bought land with notice of a prior unregistered mortgage which was referred to in the purchase deed, the purchaser agreeing to pay on the mortgage, *it was held* that the purchase took subject to the mortgage, notwithstanding its not being registered.

THIS was a special appeal from the decision of M. H. Scott, Acting Extra Assistant Judge at Ahmedabad, in appeal Suit No. 43 of 1869, affirming the decree of the Munsif of Umret.

Kishorbhai and Desabhai, the plaintiffs, sued to redeem a mortgaged field situated in the village of Od, in the Neriad taluka. They claimed as purchasers from the mortgagor of the defendants, under a registered deed of sale, dated the 25th of March 1864, in the following terms :—