

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Government of Bombay v. Desai Kullianrai Hakoomutrai, from the High Court of Judicature at Bombay; delivered 20th April, 1872.*

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Present :

SIR JAMES W. COLVILLE.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THE question raised by this appeal was whether the Respondent has an hereditary right to receive out of the public revenues of the Presidency of Bombay an annual allowance of rupees 1,274 : 4 : 2, notwithstanding an order of the Government, dated the 28th November, 1861, which declared it to be a mere personal allowance, and as such resumable; and that it was to cease on the death of the then recipient—the Respondent's father.

The Respondent is Desai of the Pergunnah of Broach. His office, once important, is now a mere sinecure, its functions being exercised by other officers. But such as it is, it is admitted to be held by him, together with an Inam village enjoyed with it, by hereditary right. The allowance in question is, however, not a necessary incident to the office of Desai, nor is it held by the same title as the village. His case as to it is that upwards of a century ago the then native ruler of Guzerat conferred upon one of his ancestors, and predecessors in the office of Desai, as a reward for distinguished service, the grant of a Palkhi or Palanquin, together with the allowance in question, the latter being the sum fixed for the Palkhi expenses, and charged on the land revenues of the Pergunnah of Broach. He alleges that this grant was con-

firmed by the different dynasties who have since ruled in Guzerat, and finally by the British Government in 1808; and he insists that the allowance thus enjoyed is hereditary in his family, and now irrevocable by the Government.

The case made by the Government in answer to this claim, as stated at page 10 of the Record, is that the Palkhi right was not granted for Desaiship service; that it is not of the nature of an ordinary Inam; that it was granted to the original holder personally, and was liable to cease on his death; and that to allow, or not to allow, such a right depends on the pleasure of Government. The only issue settled in the cause was whether the right claimed was perpetual, or whether the Government was competent to make it cease whenever they pleased to do so.

The Zillah Judge, who tried the cause in the first instance, determined this issue in favour of Government, and dismissed the suit; his decision was reversed, and a Decree made in favour of the Respondent by a Division Bench of the High Court of Bombay; and the present Appeal is against that Decree.

The grounds of the Judgment of the High Court are thus summed up by Mr. Justice Tucker: "I consider, then, that the Plaintiff is entitled to succeed in this suit (1) because, in the absence of the original deed of conveyance or grant, the long enjoyment of 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) because the uninterrupted enjoyment of Plaintiff's grandfather and father, under the Order made by the Government of Bombay on the 7th February, 1808, which extended from that date to 1856, gave to the Plaintiff a statutory and indefeasible title.

Their Lordships propose to deal, in the first instance, with the second of these propositions; but, before doing so, they will shortly review the proceedings of the British Government with reference to the allowance claimed, because the effect of those proceedings has an important bearing upon both propositions.

The territory of which Broach forms part was

annexed, with the rest of Guzerat, to the Mogul Empire, by Akbar in 1572, and, from that time to 1685, was governed by a Nawab or Soubahdar. The sovereignty over it then passed to the Mah-rattas, and seems to have been exercised by the Guicowar until 1772. In that year Broach was taken by the British, and was held by the East India Company until 1783, when it was ceded to Scindia. That Mahratta power held it until 1803, when it finally became British territory, under one of the Treaties concluded with Dowlut Rao Scindia. The office of Desai appears to have been held by the Respondent's ancestors during all these changes of dynasty. His grandfather, Dowlutrai, was found in possession of it by the British in 1803; and it would appear from the Exhibits C. 42, C. 43, and C. 44 (pp. 39 to 41 of the Record), continued to receive the emoluments of office which he had previously received (including for some time the Palkhi allowance), but subject to the condition of submitting to the orders which the Government of Bombay might pass respecting any increase or reduction of them. On the 31st of May, 1807, the Revenue Commissioners at Broach made their Report to Governor Jonathan Duncan, upon several matters previously referred to them, which included the claims of the Desais in the territories in question. That document was not produced in the Court below, and the High Court has drawn various inferences, unfavourable to Government, from its non-production. It has, however, been brought before their Lordships in the Supplemental Record; and has been treated as part of the evidence in the cause.

One of the papers forming the Appendix to this Report, No. 51, is entitled "Statement of the Income assigned to the Desais of the Broach Pergunnah, as taken from separate statements given in by each under their respective signatures." From this it appears that what Dowlutrai claimed was an Inam village, under a grant to his ancestor, Khooshalrai, from the Guicowar, in A.H. 1140, corresponding with 1727-8; the Palkhi allowance in question; rights in certain Passaita land; and some other customary allowances or perquisites in money or in kind. The recommendations of the Commissioners in the body of



the Report were (par. 34) that the last-mentioned allowances and perquisites should be abolished or reduced; that the right of Desai Dowlutrai's family to the Inam village should be acknowledged; and that they should, for the present, be allowed to hold their Passaita land, subject to such arrangements as Government might think fit to adopt for restoring to the State all illegally alienated land.

Nothing was there expressly said about the Palkhi allowance; but it may be included in the general recommendation contained in these words:—"The amount of such of these (*i.e.*, those fees and emoluments), as Government may be of opinion they (the Desais), have a tolerably fair right to, from the length of time they may have enjoyed them, may be calculated, from the accompanying statement, Nos. 51 and 52, and a per-centage in proportion allowed to them on the Government Land Revenue, which should be made payable to them from the Collector's Office only, in lieu of all secret or avowed perquisites and emoluments whatever."

The action which the Government of Bombay took on this Report, is shown by the 16th paragraph of a letter dated 7th February, 1808, which is set forth at page 50 of the Record, in these words:—

"Proceeding next to the Desai's allowances, the vilage of Kallum, or (as written in the Sunnud), Kullub is confirmed by Government, as you recommend, as on the same grounds the Palanquin establishment with Sepoys, and Peon's allowance to Dowlutrai, from the beginning of the current Mergsaul, but without arrears, for the time the same has been suspended.

The article Sootchumra is to be resumed from him and the other Desais, on the like principle, as ordered in respect to Jee Baboo, and the article of Sadur, as applicable to all those Desai offices, is left to you to confirm or revoke, according to your sense of its justice and expediency."

We accordingly find that Dowlutrai, in his subsequent Kuboolyut, or acknowledgment of the 20th March, 1809 (C. 44, p. 50), whilst he admits the receipt of an order for the payment of the money appertaining to the customary allowance (*dustoor*) and Passaita land, and agrees to treat those allow-

ances as subject to the future orders of Government, ceases to make mention of the Palkhi allowance, obviously treating that as unconditionally confirmed to him.

That it was regularly paid to him up to the time of his death is shown by the revenue accounts of the Collector of Broach, which have been produced, in which, at least after April 1809, it is treated as one of the general charges on the revenue.

Dowlutrai died in 1828. He was succeeded in the office of Desai by his son Hakoomutrai, who thereupon applied for the Palkhi allowance to the Collector of Broach. It was paid to him by that officer without any fresh or distinct grant or order of the Government, the payment continuing as before to be entered in the Collectorate accounts as a general or permanent charge on the revenues of the district. This state of things went on without question until the year 1856. In that year the right of Hakoomutrai to this allowance was first questioned. —He was required to explain how he was in receipt of it, and made, on the 28th of December, 1856, the statement at p. 31 of the Record. No final order, however, seems to have been passed by Government on this matter until the 28th of November, 1861, when, on the Report of the Revenue Commissioners, dated the 3rd of October in that year, it was resolved as follows:—  
“The allowance is clearly a personal allowance, and should, as recommended by Mr. Peile, be transferred to the head of ‘Life Pensions.’ It should cease on the death of the present incumbent Hakoomutrai.”

Hakoomutrai died some time in 1863. The payment of the allowance then ceased, and in December 1864 the Respondent commenced this Suit to establish his hereditary right to it.

Their Lordships are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the Respondent had, under the provisions of the Bombay Regulations No. 5, of 1827, chap. I, sec. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this Palkhi allowance. They are by no means satisfied that the allowance, though payable out of the Government



revenue of a particular Pergunnah, can properly be said to be "immovable property," within the meaning of the Clause in question. It did not constitute a charge which could be enforced against the land, or, since 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dowlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury.

Nor, again, are their Lordships satisfied that there has in this case been such a possession or enjoyment of the allowance under a claim of hereditary right for thirty years without interruption, as would bring the right, if in the nature of immovable property, within the operation of the Regulation. The question between the Government and the Respondent is, whether the allowance was enjoyed by hereditary right, or by virtue of a grant for life, express or implied, to each successive taker. So long as Dowlutrai lived, his enjoyment of the allowance would be as consistent with the one contention as with the other.

A Jaghiredar for life cannot convert his life tenure into a perpetual tenure by living for more than thirty years. The period of thirty years, therefore, would only begin to run from 1828, when Hookumutrai began to receive the allowance without a fresh grant; and, as it may be assumed, under a claim of hereditary right. But it seems to their Lordships that the interruption to this enjoyment may fairly be taken to have begun in 1856.

The right of Hakoomatrai was then called in question; and there was the commencement of an investigation of his title which appears to have lasted until the final order of Government in November 1861. There was, on the part of Government, no admission, express or implied, of his hereditary right after 1856. And for these reasons they have come to the conclusion that the Regulation affords no bar to the trial of the question between the Government of Bombay and the Respondent upon its merits.

Again, both the learned judges of the High Court appear to have acted on a presumption that the title of the Respondent to an hereditary grant was founded,

not on the documents produced, but on some lost or missing sunnud which contained words of inheritance. In making this presumption they drew certain inferences against the Government and in favour of the Plaintiff from the non-production of the Report of the 31st of May, 1807. That document is, however, now before their Lordships; the Appeal has been argued as if it were part of the evidence in the Cause, and the inferences to be drawn from it must be drawn from its actual, and not from its supposed, contents.

Their Lordships will now consider what is the effect of the evidence in support of the Plaintiff's title.

The first trace of the allowance in question is to be found in the Perwannah C. annexed to No. 52, Supplementary Record, page 49, which, if not a grant, recites a grant by the Nuwab Hyder Joolee Khan to Khooshalrai Desai, in recompense of his extraordinary services as Desai, fixes the allowance for the sustentation of that dignity at 1,972 rupees (being 1,200 rupees for the Palkhi, and 772 rupees for the servants), and directs that sum to be paid to him annually. The only date on this document is "the 13th shaban, in the 9th year of the reign," a date which it would be difficult to fix. But as the grant purports to have been made by the Nawab, and there is no mention of the Guicowar, it may be presumed that this Perwannah was issued before 1685, when the actual sovereignty over the territories in which Pergunnah Broach is situated, passed into the hands of the Mahrattas.

This grant, however, whatever its nature, appears to have been afterwards superseded; for the earliest Mahratta document produced by the Respondent in support of his title (being C. 2, p. 3), and said to bear a date corresponding with 1753-54, is in favour of Bikaridas, the son of Kooshalrai, and imports the grant to him by the Guicowar of a Palkhi, with an allowance of only 1,100 rupees for keeping it up. This document, seems to have been intended to operate both as a sunnud or grant, and as a Perwannah or order addressed to the officers who were to pay the allowance; for it is stated that, across the Hindee Perwannah, to the officers, there is written a Memorandum in Persian to the effect, "a sunnud for a Palkhi in the name of



Bhikaridas Desai." Bhikaridas was succeeded by Jamiyatrai. Several Perwannahs issued by the Guicowar during the life of this Desai are produced, but none of them show how his receipt of the allowance began. Those of 1760-61 and 1762-63 refer to interruptions of his existing right, not to the commencement of it. That of 1772-73, at p. 7, contains proof of an augmentation of the previously existing allowance by the wages of seven Sepais thereby assigned to him. Jamiyatrai died in 1774-75, and thereupon the Guicowar of the day issued what is termed a "a consolatory letter," in the shape of a Perwannah, to the revenue officer at Broach, which contains this passage: "Jamiyatrai Desai is dead. Giving consolation to his son, Doulutrai Desai, in many ways, you are from time to time to get the business and affairs of the mehal transacted by his hands, as has been done; and you are to pay from time to time his Palkhi and Sebandi allowances as they now exist." The whole of this document, including the expression that "they" (Doulutrai and his ancestors) "had from ancient times belonged to the Sirkar," implies the existence of at least a customary right of succession to the allowance with the office of Desai from father to son, though perhaps a right capable of being interrupted or destroyed, like other rights under a despotic Government, by the will of the Sovereign.

This is the latest document issued by the Guicowar; and indeed the date as given in the Record is later than the taking of the city of Broach by the British. The authority however of the Guicowar may at that time have continued to exist in the surrounding district.

The next document is the Perwannah of Scindia issued on the application of Dowlutrai in April 1786. It recites the application of Dowlutrai which appears to have been in the nature of a claim by hereditary right, since it refers to the grant to his grandfather Bhikaridas as the foundation of his title, making no mention of any intermediate grant to his father Jamiyatrai. The allowance was then fixed by Scindia at rupees 1,352, and directed to be continued to Dowlutrai as Desai. And a further direction was given to take a copy of the document and to return the original (called a sunnud) to the Desai for his



use. This is the last of the native documents, Dowlutrai being still alive and in the enjoyment of the allowance when the territory of Broach was ceded to the British in 1803.

Reviewing these native documents their Lordships are unable to find any which import, by express words of inheritance, that the Palkhi privilege with its allowance was to be enjoyed from generation to generation by the original grantee and his heirs. And it is now clear that the Report of 1807 does not, as the Judges thought it might, disclose any evidence from which the existence of a sunnud in those terms may be inferred. Their Lordships are disposed to infer from the terms of Scindia's Perwannah, and the earliest of the Guicowar's Perwannahs, that there was no sunnud other than those documents importing the grant of the allowance to Bikharidas; and the confirmation of the allowance to Dowlutrai. On the other hand, the documents do not appear to support the Appellant's contention that the allowance was merely personal to each taker; and the subject of a separate grant to each in succession.

There is no trace of such a grant in favour of Jamiyatrai; when Dowlutrai succeeded to Jamiyatrai he was treated as succeeding to the allowance by the same title to which he succeeded to the Desaiship; the confirmation of Scindia is founded on an original grant to Bikharidas; and the whole tenor of the documents is in favour of the conclusion that, after the allowance was granted, it was treated and considered as part of the emoluments of the hereditary office of Desai.

Their Lordships are not disposed to treat the proceedings of the British Government in 1808 as amounting to a new and enlarged grant. Nor do they consider that the accounts, or the acts of the Government officers on the death of Dowlutrai, though they afford evidence that Government up to 1856, considered the allowance to be a permanent alienation of revenue in favour of this family, are conclusive against the Government's present claim of a right of resumption.

They think that the reasonable construction of the proceedings in 1807 and 1808 was that the Government of that day intended to confirm, and did confirm, the title of Dowlutrai, whatever it

might be, without enlargement, but also without diminution. But the inference which their Lordships draw from the Report and the letter of Government thereon is, that the Government of that day was dealing, and intended to deal, not with the mere rights and allowances of the individual Dowlutrai, but with the emoluments of the hereditary Desaiship held by his family. And it is on the special ground that, under the native rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808, by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the Decree under Appeal, and to dismiss this Appeal with costs.