Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Maharana Futtehsangji Jaswantsangji v. *Dessai Kullianraiji Hekoomutraiji, from the High Court of Judicature at Bombay; delivered 4th December,* 1873.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THE suit which has given rise to this Appeal was brought by the Appellant in January 1865, against the Respondent, to establish the right of the former to a Toda Giras Hak upon the Inam village of the latter, and to recover the arrears due in respect of that hak, for the seven years preceding the commencement of the suit. The annual amount alleged to be payable by the Respondent to the Appellant is 501 rupees; though it may be questionable on the evidence whether this sum is the gross amount of the hak, or the net balance after deducting certain small payments and allowances to other persons which are entered in the accounts.

The Respondent admitted, as his father in other proceedings had admitted, the existence of the hak, and that it had been paid by the inamdars of the village up to the Samvat year 1914 (corresponding with 1857-58); but contended that his father had then properly exercised a right to put an end to it; and, further, that the present suit was barred by the law of limitation.

The issues settled are at page 20 of the Record;

but the only one which is to be considered on this Appeal is, whether the claim is within the appropriate period of limitation or not. Of the remaining issues, one, which is no longer treated as material, was disposed of in the Appellant's favour, and the others have not been tried.

The substantial question considered in the Court below was, whether the suit, being one for the recovery of an "interest in immovable property," fell within the 12th, or was to be governed by the 16th, clause of the 1st section of Act XIV of 1859. In the former case, the period of limitation would be twelve years, and the suit would be brought in time; in the latter case, the period of limitation would be only six years, and the suit would be barred.

The determination of this question involves the consideration of the nature of a Toda Giras Hak. A good deal of learning on this subject is to be found in the case of the Collector of Surat *v.* Pestonjee Rutonjee, 2, Morris's Cases in the Sudder Dewanny Adawlut, of Bombay (for 1855), p 291, and in the case of Sumbhoolall Girdhurlall *v.* the Collector of Surat, 8, Moore's, I. A., p. 1, to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the Grasias from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; that as such they 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. And since the decision of the before-mentioned case in the 8th vol. of Moore, it cannot be questioned that the Toda Giras Haks of the former class constitute a recognized species of property capable of alienation, and of seizure and sale under an execution. How far that decision may govern the rights of an Inamdar, and some of the questions raised by the untried issues in this suit, their Lordships abstain from considering. For

the purpose of determining the question of limitation, it must be assumed that the claim of the Appellant, if not barred, has a legal foundation.

The question to which period of limitation these claims are subject has been the subject of several decisions in the Bombay Courts.

The earliest of these, being the case of the Collector of Surat *v.* Tejoobawa Bhugwansungji, which is set out at p. 67 of the Record, does not materially affect the present question. When that suit was commenced, Act XIV of 1859 had not come into operation; and under the law then in force (the Bombay Regulation V of 1827) the claim was subject only to the twelve years' rule of limitation, whether a Toda Giras Hak was in the nature of movable, or of immovable property. It is true that the High Court, in delivering its judgment, intimated an opinion that, whatever might have been the original nature of that Toda Giras payment, its conversion into an annual payment out of the Government Treasury, not secured or chargeable on any particular lands, had deprived it of the character of immovable property, if it ever possessed that character. But it is obvious that this dictum has no application to a Toda Giras Hak payable by an Inamdar, in respect of which there has been no such conversion. The case of Furushram Nurbheram *v.* Syud Hossein Wullud which is set out at pp. 69 and 72 of the Record, is, however, in point. There the question arose between the purchaser of the Grasia's interest in a Toda Giras Hak at an execution sale, and an Inamdar; and the law of limitation to be applied was Act XIV of 1859. The Judge of Broach there held (and his decision was affirmed on appeal by the High Court) that the claim was clearly for a money payment, and that the case must be decided by the 16th clause of the 1st section of the Statute.

The authority of this last case has been recognized, and its ruling adopted by each of the three Judgments now under appeal.

The other decisions of the High Court of Bombay which have been cited, are all distinguishable from the present.

That of the Collector of Surat *v.* the Heiresses of Kirvabai, 2 Bombay High Court Reports, 239,

seems to their Lordships to have no bearing upon the question before them. The only questions raised in it were whether a Toda Giras Hak was alienable, and whether, by reason of its falling within the definition of "land" contained in a particular statute (which it did not), the Court was deprived of jurisdiction. In the case of Baratsangji *v.* Navanidaraya, 1 Bombay High Court Reports, 186, as in that set forth at p. 67 of the Record, the law of limitation to be applied was the Bombay Regulation V of 1827; and what the Court actually decided was, that the right to the desaigiri allowance claimed would be barred, unless the Plaintiff could establish the receipt of a payment on account of it within twelve years. The Court, no doubt, described the allowance claimed as "in the nature of one charged upon, or payable out of land." But whether it were so or not was not a point in issue. Again, in Raiji Manor's case, reported in 6 Bombay High Court Reports, p. 56, the Court, in ruling that the claim was barred by the six years' limitation, distinguished it from the last-mentioned case on the ground that it was a claim for a pagdi allowance, which was a mere money payment out of a desaigiri allowance, and not like the latter in any sense an interest in land. The same distinction may exist between a pagdi allowance and a Toda Giras Hak.

The case of Krishnabhat Hiraganji, reported in 6 Bombay High Court Reports, p. 137, and that of Purshotam Sidheshvar, reported in 9 Bombay High Court Reports, p. 99, both relate to hereditary offices and not to haks, and cannot, therefore, be regarded as directly in point, although the principles which they lay down for the construction of Act XIV of 1859 are important, and will have to be considered hereafter. It is, however, to be remarked that, in the latter case, Chief Justice Westropp, at the close of his able and elaborate judgment, expressed a strong doubt of the soundness of the decisions which had ruled that claims for Toda Giras Haks were subject to the six years' rule of limitation. This being the state of the authorities at Bombay, their Lordships cannot think that there has been that long and consistent course of decisions which affords grounds for treating the question under consideration as

concluded by authority, even in the Courts of India.

It has, however, been strongly urged on the part of the Respondent that this Appeal is to be determined by the authority of their Lordships' recent decision in the case of Desai Kullianrai Hakoomutrai (the present Respondent) and the Government of Bombay, 14 Moore's I. A., p. 551. Their Lordships cannot accede to this argument.

In the case so relied upon the question of limitation did not arise. It is, however, true that, in deciding it, the High Court of Bombay had held that the Respondent had acquired a title, by positive prescription, to the Hak which he claimed by force of the 1st section of the Bombay Regulation V of 1827; and that their Lordships, though they upheld the Decree in favour of the Respondent on other grounds, intimated that they were not satisfied either that the particular Hak could properly be said to be "immovable property" within the meaning of the Regulation, or that there had been such an enjoyment of it for thirty years without interruption, as would bring the right, if in the nature of immovable property, within the operation of the Regulation. This was the expression of a doubt rather than a positive decision. Moreover, the Hak then claimed differed widely from that which is the subject of the present suit. It was a money allowance for the sustentation of a palanquin, which had been granted by the then Native Power to an ancestor of the Respondent, not as a necessary incident to the office of Desai, but as a reward for meritorious service, and was made payable by the native collector out of the general revenues of the pergunnah of Broach received by him. As such it resembled the annuity granted by King Charles the Second out of the Barbadoes duties, which in the case of the Earl of Stafford *v.* Buckley, 2 Ves. Senr. p. 170, Lord Hardwicke held to be "a mere personal annuity, having no relation to lands and tenements, or partaking of the nature of a rent by any means." But however that may be, their Lordships cannot treat the decision in the palki case as an authority on the present question,

which they will now proceed to consider upon its merits.

The learned Counsel for the Appellants have argued, on the authority of the above-mentioned cases of Krishnabhat Hiraganji and Purshotam Sidheshva, and particularly of the latter, that the construction of the Statute of Limitation must, in this particular case, be determined by the light of the Hindoo Law.

According to the Report of the latter case in 9 B. H. C. R., the Respondents had sued to recover from the Appellants the amount of fees due to the holder of the hereditary office of village Joshi (or astrologer) for five years. This statement their Lordships conceive must be taken to import that the right to hold the office was matter of contest between the parties; since it can hardly have been held that, because the hereditary office was in contemplation of the Hindoo law, of the nature of immovable property, fees recoverable by the admitted holder of the office from persons whose horoscope he might have cast, fell within the same category. The case was referred to a Full Bench, partly in consequence of some difference of opinion between the two Judges who composed the Division Bench, and partly on account of a supposed inconsistency between the two decisions already cited from the 6th vol. of the B. H. C. Reports, which, nevertheless, seem to their Lordships capable of standing together. The Judgment of the Full Bench was given by Chief Justice Westropp. It fully upheld the decision in Krishnabhat *v.* Kapabhat, and affirmed the correctness of the rule there laid down for the interpretation of Act XIV of 1859, sec. 1, clause 12. The rule is shortly this, viz., that, inasmuch as the term "immovable property" is not defined by the Act, it must, when the question concerns the rights of Hindoos, be taken to include whatever the Hindoo law classes as immovable, although not such in the ordinary acceptation of the word. To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immovable property, or of an interest in immovable property; and if its nature and quality can be only determined

by Hindoo law and usage, the Hindoo law may properly be invoked for that purpose. Thus, in the two cases on which the Appellant relies, Hindoo texts were legitimately used to show that, in the contemplation of Hindoo law, hereditary offices in a Hindoo community, incapable of being held by any person not a Hindoo, were in the nature of immovables. And those decisions receive additional support from the 1st section of the Bombay Regulation V of 1827, which expressly declares hereditary offices to be immovables, an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV of 1859, and to stand unrepealed in the Presidency of Bombay.

The learned Counsel for the Appellant have, however, insisted on the authority of these decisions that a Toda Giras Hak must be held to be an interest in immovable property, because, according to Hindoo law it would be "Nibandha." Their Lordships, in dealing with this argument, prefer to use the Sanscrit word, inasmuch as they do not think that "corrody" is a very happy translation of it; "corrody" being a word of medieval origin, properly signifying a peculiar right, viz., the grant by the royal or other founder of an abbey of certain allowances out of the revenues of the abbey in favour of a dependent or servant. (See Ducange, *in verbo*: Fitzherbert "*De naturâ Brevium*," p. 229, writ "de corrodio habendo.")

Whether a Toda Giras Hak be "Nibandha" within the strict sense of that term is, in their Lordships' opinion, a question not free from doubt. The original text of Yajnyawalcya, which is the foundation of all the other authorities cited by Chief Justice Westropp, implies that the subject rendered by the word corrody in 2 Colebrooke's Digest, Placitum xxxiv, is something created by Royal grant. This, too, is included in Professor Wilson's definition of "Nibandha." That the word in the subsequent glosses on Yajnyawalcya's text is used in a wider sense may be due to the want of precision, for which Hindoo commentators are remarkable. It is, however, unnecessary to consider this point, because their Lordships are of opinion that the question whether a Toda Giras Hak is an interest in immovable property within

the meaning of Act XIV of 1859 is one which ought not to be determined by Hindoo Law. It appears from the authorities cited in the case (reported in the second vol. of Morris's Reports) that the Grasias were sometimes Mahometans, and therefore that the Hak may in its inception have been held by a Mahometan. It is certain that, as these Haks now exist, they may pass to, and be held and enjoyed by Mahometans, Parsees, or Christians; and their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. The period of limitation within which the claim is barred must be fixed and uniform by whomsoever that claim is preferred or resisted.

The determination, therefore, of the present question depends, in their Lordships' opinion, upon the general construction to be given to the terms "immovable property" and "interest in immovable property" as used by the Indian Legislature. Their Lordships cannot think that the former term is identical with "lands or houses." They conceive that the word "immovable" was used as something less technical than "real," and that the term "immovable property" comprehends certainly all that would be real property according to English law, and possibly more. In some foreign systems of law in which the technical division of property is into movables and immovables, as, *e.g.*, the Civil Code of France, many things which the law of England would class as "incorporeal hereditaments" fall within the latter category.

Now, what is disclosed on the Record touching the nature of this Hak?

The Plaint claims it as "leviable upon the village Mouzah Kalam." The fair inference from the written statements of the Respondent is, that the Hak existed and was regularly paid by his father, as Inamdar, up to the year 1857-58. The question raised by these statements as to the right of the Respondent and his father to discontinue the payments is one to be determined, not upon the issue of limitation, but on the trial of the other issues settled in the cause. The evidence taken in the suit shows that the answer of Hukomutrai (the

Respondent's father) to a question addressed to him in 1856 by a native official, to the effect, whether there was any Toda Giras paid for the Maharana of Amud *on account of the village of Kalam*, was, "There are payable Broach 501 rupees for the Toda of the said Rana; that the same Hukomutrai described the money paid by him on account of this Hak, in his deposition of the 6th of November, 1861, as "the money on account of Toda Giras leviable upon my Inam village of Kalam," and, in his deposition of the 4th of April, 1862, as "the annual amount of Toda Giras of my village of Mouzah Kalam;" and further, that the payments made were made out of the revenues of the village, and were so entered in the village accounts.

Taking this as the fair result of the evidence, and considering what has been ruled touching Toda Giras Haks in the case in the 8th Moore's Indian Appeals, and other decided cases, their Lordships are of opinion that, whatever may have been the origin of the Hak, it must be assumed to be now a right to receive an annual payment which has a legal foundation, and of which the enjoyment is hereditary; and that the liability to make the payment is not personal to the Respondent, but one which attaches to the Inamdar into whosoever hands the village may pass; or, in other words, that the Hak is payable by the Inamdar *virtute tenuræ*. This being so their Lordships have come to the conclusion that the interest of the Hak-dar does possess the qualities both of immobility, and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the character of a freehold interest in or issuing out of real property (see 1 Cruise's Digest, p. 47, Plac. 10); that upon the general principles of construction applicable to an Indian Statute it must be held to be "an interest in immovable property" within the meaning of Act XIV of 1859; and, accordingly, that the suit, having been brought within twelve years after the date of the last payment, can be maintained.

This being their Lordship's conclusion on the first and principal question argued, it is unnecessary for them to consider the second, viz.:— Whether, upon the principles enunciated and

enforced in such cases as The Dean and Chapter of Ely *v.* Cash, 15 M. and W.; Grant *v.* Ellis, 9 M. and W.; and Owen *v.* De Beauvoir, 16 M. and W., and 5 Exch., it ought to be held that, inasmuch as Act XIV of 1859 contains no express words to bar the right as well as the remedy, that statute can have any effect on the Appellant's claim, except that of preventing him from recovering more than the arrears for the six years next preceding the institution of the suit. Their Lordships abstain from the consideration of this question the more willingly because it was never raised in the Courts below; because the pleadings in the suit, which is brought to establish the right as well as to recover the arrears, assumes that the whole claim is subject to the law of limitation; because there seems to be a considerable body of Indian authorities which support that assumption; and because the limitation applicable to claims to establish rights will, at no distant date, have to be determined by the more carefully-drawn Statute of Limitation of 1871, which is soon to supersede that of 1859.

On this appeal their Lordships will humbly advise Her Majesty to reverse the decrees under appeal; to declare that the Appellant's suit is not barred by the Statute of Limitations, but was brought within time; and to remand the cause for trial on its merits. Their Lordships think that the Appellant ought to have the costs of this appeal. The costs incurred in India by reason of the trial of the second issue should be dealt with by the Bombay High Court in the usual way on the final determination of the cause; the Appellant receiving back the costs (if any) which he may have paid under any of the decrees reversed.

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