Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sumbhoololl Girdhurloll v. *the Collector of Surat and Nussurwanjee Pestonjee, from the Sudder Dewanny Adawlut of Bombay, delivered February* 8, 1860.

Present:

LORD KINGSDOWN.
DEAN OF THE ARCHES.
SIR EDWARD RYAN.

SIR LAWRENCE PEEL.

THIS is an Appeal from a Decree of the Sudder Dewanny Adawlut of Bombay, by which it has been decided that a certain annual payment called a Tora Garas Huk, is not by law capable of alienation, and that the purchaser of this interest at a judicial sale is not entitled either to have the sale enforced, or to have his purchase-money refunded to him by the individual who has received it.

The case is one, in many respects, of a remarkable character, and it appears to their Lordships to be advisable to state the circumstances in some detail.

Tora garas huks, whatever may have been their origin, are payments which, for many years before the period of the transactions which have given rise to the present suit, had been made by the Bombay Government through their Collectors in the different Zillahs of Guzerat. The names of the persons receiving such payments, with the amount to be paid to them, were entered in the books of the Collector, and the payments were made according to the entries in such books out of the moneys received by the Collectors.

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Amongst other such entries in the books of the Collector of Surat, was a sum of 347 rupees 13 annas, payable out of the Purgunnah of Orpad, and which in the year 1839 was payable, and had for some years been paid to a person named Bharmulsungjee. This annual sum is the subject of the present suit; Bharmulsungjee was also in the receipt of another tora garas, payable out of another Purgunnah within the same Collectorate, of 883 rupees. It appears that these two huks had previously belonged to a person named Koonsurwanjee; that he had died, leaving two widows named Kasooba and Omedba, who had succeeded to this property; that these ladies had adopted Bharmulsungjee as their son, and that thereupon these huks had been transferred into his name in the books of the Collector.

In the year 1839 a suit was instituted in the Court of the Sudder Ameen of Surat by the Respondent, Nusserwanjee against Bharmulsungjee, and against Kasooba and Omedba, in order to recover a debt due from these parties to the Respondent, and which debt was secured by a mortgage of the two sums of tora garas standing in the name of Bharmulsungjee.

Pending the proceedings in this suit, Nusserwanjee caused a sequestration to be laid on these tora garas huks in the office of the Collector of Surat, the nature and object of which could not but be known to the Collector.

On the 23rd July, 1839, Nusserwanjee obtained a decree in his suit for the sum of 12,745 rupees, with interest, against the mortgaged property and against the defendants personally. Regulation IV of 1827 of the Bombay Code of Procedure directs the mode in which the attachment and sale of any of the immoveable property of the debtor against whom a decree has been obtained are to be effected. It is thereby provided that on a petition for such sale the property shall be distinctly specified, with the probable value thereof; that the Court, on hearing the application, shall issue such order as may be requisite towards the enforcement of the decree; that whenever a sale takes place under a decree, it shall be by public auction, after public notice, by a proclamation in a specified form, intimating that the property will be sold on a day

named, unless the sale shall be objected to by another claimant, who, within fifteen days after the date of the proclamation, shall establish, to the satisfaction of the creditor, or of the Court, a right or interest in the property under attachment, or shall enter into an engagement to prosecute his claim within a limited time.

In order to recover the amount awarded to him by the Decree in the manner pointed out in this Regulation, Nusserwanjee on the 21st September, 1839, presented a petition to the Judge of the Zillah Court, and thereby, after stating the decree which he had obtained, and the sequestration which he had issued, he prayed that the Sheriff might be ordered to attach and sell the produce of the undermentioned tora garas belonging to the Defendant, according to the usual custom.

The tora garas (which included the particular sum now in dispute) was thus described :—

"The Defendants Kasooba and Omedba used to receive the produce of the tora garas huks, belonging to their husband Koowursungjee, payable from the Thannahs of the Pergunnah of Orpad and the Talooka of Koorsad. In the Sumvut year 1887, the said Defendants Kasooba and Omedba adopted the Defendant, Bharmulsungjee, as their son. From that day forward, the amount of the produce from the said Pergunnahs has been received by the Defendant Bharmulsungjee. The value thereof is about 11,000 rupees."

On the same day, the 21st September, an order was issued by Mr. Herbert, the Assistant Judge of the Court, to the Sheriff, directing him to proceed according to the usual practice, and to make a return in thirty-five days.

Under this order the tora garas in question was attached by the Sheriff; proclamations of sale were issued, and the sale was fixed for the 19th October.

Before, however, the day fixed for the sale, Bharmulsungjee presented a petition to the Court, praying that the sale might be delayed for six months, in order to give him an opportunity of satisfying the Plaintiff's demand, which he promised to do within six months.

The sale accordingly was stayed by an Order of the Court, till Nusserwanjee should have answered the petition. He objected to any further

delay, and on the 14th November, 1839, applied to the Court that the sale might be completed; that fresh proclamations might be issued, and that, as the property was likely to sell better at Surat than in the village in which it was situate, the sale might be made at Surat.

On the same day the Judge made an order directing the Sheriff to enter into an investigation of the proceedings which had already taken place in this matter, and to make a report, and to inquire whether there was any objection or not to selling the property in Surat. The Sheriff made his report, stating the proceedings which had already taken place, and that there appeared to be no objection to the sale being made in Surat.

On the 27th November, Mr. Elliott made an order upon this report, that the Sheriff should sell the tora garas of the Defendant in Surat, but that he should give notice of the sale of this tora garas to the inhabitants of the Zillah in which the tora garas was, as also to the inhabitants of the city of Surat, and should take care that no fraud or mistake was permitted to take place in the sale.

Proclamation was accordingly issued for sale of this tora garas in Surat, on the 24th December, 1839. The Proclamation required any person making any claim to this property to come in and object to the sale.

No objection was made, and on the 24th of December, 1839, the property was accordingly put up for sale, and the Appellant in this case was the highest bidder, and he became the purchaser of the tora garas now in dispute, for the sum of 3,430 rupees. He paid his purchase-money into Court, and the amount, after deducting the expenses, was paid to Nusserwanjee; and on the 23rd of January, 1840, Mr. Elliott, the Judge of the Court of Adawlut, executed a Bill of Sale of the tora garas to the Appellant. This instrument, after reciting the facts already stated, concluded in these words:—

"Now as you have paid that amount (3,430 rupees) into Government, you have become the owner of the Tora Garas Huk belonging to the above-mentioned Defendant Bharmulsungjee, and the right to receive the amount of the Tora Garas Huk from the thannah has been vested in you. Therefore the Defendant's right to the Tora Garas

Huk (347 rupees 13 annas) has been sold for 3,430 rupees by the Government Adawlut, through the medium of the Nazir, in conformity with the usual custom in sales by auction, in this manner, viz.: You may continue to take every year, according to the rules of the pergunnah, the amount of the aforesaid allowance of Tora Garas belonging to the above-mentioned Defendant Bharmulsungjee, from the thannah of Orpad. In so doing, there shall be no objection."

We have thought it desirable to go into this detail, because it shows very distinctly that the Bombay Government, through its officers, had abundant notice of what was taking place with respect to this sale, and had ample opportunity, if it meant to object to the alienability of property of this description, to interpose to prevent it; or, at all events, to give public notice that, as far as the Government was concerned, the validity of the sale would not be recognized.

But the Government did nothing of the sort; it made no objection to the attachment of the property which its officer was to pay; and it permitted the Respondent Nusserwanjee to sell, and the A pellant to purchase, and the one to pay, and the other to receive, the purchase-money, without giving the least intimation to either that any obstacle would be raised to the enjoyment by the purchaser of what he had bought.

The Appellant having thus completed his purchase, applied to the Collector of Surat to have his name substituted for that of Bharmulsungjee in the Collector's books, and to have the tora garas regularly paid to him accordingly. With this application the Collector seems at first to have been disposed to comply. He afterwards, however, declined to enter the Appellant's name in his book, and ordered that the name of Bharmulsungjee should be retained, but that the money should every year be paid to the Appellant.

The Appellant was not satisfied with this order; and on the 22nd July, 1840, presented a petition to the Court in which the sale had been made, in which he alleged that other tora garas huks had been sold by order of the Court, and that the names of the purchasers had been duly inscribed in the Collector's books; that all property sold through the instrumentality of the Adawlut is caused

to be given into the possession of the purchaser, through the assistance of the Adawlut, and he therefore prayed that the Judge would address a letter to the Principal Collector, directing him to erase the name of this Grasia from the Records, and to enter the tora garas in the Appellant's name in the Records, and to continue to pay him the amount of the tora garas every year, as mentioned in the bill of sale.

On the 27th July, 1840, the Judge made an order in which, after reciting that the Appellant was the owner of the huk, and that of this fact the Court had no doubt, he ordered the Sheriff to write a letter to the Principal Collector, directing that gentleman to enter the petitioner's name in the garas huk of Bharmulsung, which the Petitioner had purchased, and to continue to pay the amount of the huk to the Petitioner.

Such a letter was accordingly sent, and, thereupon, the Collector seems to have communicated with the Revenue Commissioner, and to have reported his opinion, either that the tora garas should be appropriated by the Government, and the purchase-money repaid, with interest, to the Appellant, or that his name should be entered in the Collector's books.

The matter, however, was referred to the Bombay Government, and the Appellant was informed that as soon as any decision was come to, a communication would be made to him. No communication having been made, the Appellant in 1842 again applied to the Revenue Commissioner praying that his name might be entered in the books of the Collector, or that, at all events, the three years' arrears then in the hands of the Collector might be paid to him in order that he might not suffer loss in interest and compound interest. The answer returned to him was that his name would not be entered, neither would the money be paid; but that if he instituted a suit in the Adawlut, the money would be sent there during the lifetime of the Grasia, and that if he had any claim he should file a suit.

The Appellant seems to have entertained a very natural reluctance to adopt a course attended with so much expense and delay, and the Revenue Commissioner having been soon after changed, he

attempted once more to obtain redress by a petition to the new Revenue Commissioner, but without any success.

On the 21st November, 1842, the Appellant presented his petition to the Judges of the Sudder Adawlut, stating the facts of the case, and praying either that the Collector might be ordered to enter the Appellant's name in his books, and to pay him the huk regularly, or that the purchase-money which he had paid into the Adawlut of Surat might be refunded to him with interest.

This case seems to have been several times under the consideration of the Court. At length on the 28th February, 1843, an order was made by which the petitioner was left to file a suit in the Civil side of the Court.

It was under these circumstances that the Appellant filed his plaint in the Court of the Assistant Judge of Surat on the 16th October, 1843. This suit was instituted against the Collector of Surat, and also against the Respondent Nusserwanjee. As against the Collector it prayed that the tora garas in question might be entered in the name of the Appellant, and that the Collector might be ordered to pay him the four years' arrears then due, amounting to 1,391 rupees 4 annas. As against Nusserwanjee it prayed that if it should appear to the Court that Nusserwanjee had caused the tora garas to be improperly sold, he might be ordered to refund the purchase-money with the profits for four years.

The Collector was authorized to defend the suit on the part of the Bombay Government, and he filed his answer on the 19th February, 1844. He did not dispute any of the facts stated by the Appellant in his plaint. The substance of his answer was, that Bharmulsungjee, to whom this Tora Garas Huk had belonged, was a Grasia; that, before the English Government took possession of the country, the Grasia people used to levy certain huks and necessaries from the villagers, as the price of their abstaining from plundering the villages; that, after the English Government took possession, an agreement was entered into with these people that they should receive this huk from the Government Treasury, and not from the villagers, in order that thereby the villagers should not suffer any oppression; that the custom

had always obtained to pay this huk to the Grasias only; that the Government had never agreed to pay this huk to outsiders; that if the payment were made to other persons than Grasias, the agreement would be broken, because if the Grasias got nothing to eat, they would begin to plunder; that Government would then suffer loss, and the villagers would suffer oppression. Then followed this sentence, which we confess ourselves unable to understand:

"The Government have settled the personal property of the Grasias, and if this property does not reach them, the claim of the Government to the same is going on."

With respect to the Appellant's allegation, that tora garas had been previously sold by the Courts without any objection, the answer stated, that if this had happened, it had happened without investigation, and that the right of the Government was not done away with, because it was agreed to pay this huk to the Grasias alone.

The Defendant Nusserwanjee put in an answer, insisting that his proceedings had been entirely regular, and that he was under no circumstances liable to any demand on the part of the Appellant. But the view which their Lordships take of this case makes it unnecessary for them to go into the particulars of his defence.

On the 14th September, 1844, the Appellant filed his replication, in which he insisted, that if the Government had any objection to make to this sale, the Collector might and ought to have interposed to stop it, and to remove the attachment which had been previously laid upon the property, and that he was bound to adopt this course by the effect of the Regulation under which the sale had been made, and of the Proclamation which had been issued in pursuance of it; that the tax of the huks of the Grasias and of the Moguls used to be levied from the villages in the same way as the Government revenue; that these huks were incorporated in the revenue, and that the tora was fixed by the Government; that many tora huks, and other huks, had been sold by the Government Adawlut, and by the Collector; and that the names of the purchasers had been entered by the late Collector in the Government Records, and the money for the same had been paid by the late Collectors, and was paid

by the Defendant, the then Collector, up to this day.

There does not appear to have been any rejoinder, and upon this state of the record the parties went into evidence.

The Appellant proved the several proceedings which had taken place previous to the institution of the suit which have already been detailed: he proved some instances, and one in the Pergunnah of Orpad, in which tora garas had been the subject of sale, and the purchaser had been put into possession of the property, and was then in posssesion; and he specified several other instances in which, as he stated, the same thing had been done with respect to tora garas, and other garas huks, and of which he alleged that entries had been made in the books of the Defendant, the Collector, and he required the production of these books, and summoned witnesses, who were Record-keepers in the office of the Collector, to attend and produce these documents.

It is with great regret that their Lordships are compelled to observe that on looking at the depositions of two of these gentlemen, at pages 49 and 52 of the Appendix, it appears that these documents were not produced, and that it is impossible to avoid the inference that they were purposely withheld by the Agents of the Government defending the suit on its behalf. It is, however, in the opinion of their Lordships, sufficiently established that up to the period of this sale these huks had been the subject of sale, and had been considered and treated by the Courts of Justice and by the Government, in this Collectorate at least, as liable to be dealt with like any other species of property.

That this had been done without investigation, as the Collector in his answer alleges, is certainly not the fact.

For many years before 1839, inquiries into this subject had been made by different officers of the Indian Government. The origin and character of these payments; the question whether the Government was bound to continue them, even to Grasias, or was at liberty to resume them at its pleasure; the expediency of exercising that right if it existed; the question whether the Grasia, if he had any right to receive them, enjoyed more than a life interest, and whether such interest as he had was

capable of alienation; whether the collection of these payments by the Government was voluntary on their part, and could be discontinued at pleasure, or whether they were charges on the revenue, which the Government receiving the revenue was bound to pay;—all these questions appear to have excited the attention of the Government, many of them as early as the year 1817, and to have been the subject of discussion and consideration for many years subsequently.

It further appears that in 1836, the liability of these huks to sale, under the process of the Court, had come under the consideration of Mr. Lumsden, then Acting Assistant-Judge at Broach, another Zillah in this Province; that he had consulted Mr. Sutherland, a very high authority, who was then or had been Assistant-Judge at Surat, and that he received from that gentleman the following answer, dated the 29th December, 1836:—

"Sir,—In regard to your letter of the 19th instant, I have the honour to inform you there are very few instances of the attachment and sale of tora garas, but there is no doubt when such description of property is possessed, a party having a decree against the property may attach and sell, in satisfaction thereof, tora garas in like manner as any other description of property.

"Tora garas, like every other description of garas, is wuttun, but is entirely unconnected with hereditary or other office, and is consequently distinct from the Regulations and Orders you have quoted. Tora garas is money-payment of a fixed nature on a village jampa, and being usually the most secure description of garas, would be, no doubt, of the highest value in the market."

The Collector put in evidence, on the part of the Government, the certificates which had been returned by various Collectors as to the practice in their Collectorates, and the opinions entertained by them of the nature of these garas huks; and two agreements, one entered into by Captain Robertson with the grasias of the pergunnah of Atroleea in the year 1818, and the other by Mr. Crawford with the thakoors of Dehejaun in the year 1825; but with respect to the origin of the particular tora garas in dispute, or of huks of the same description in the same pergunnah, no evidence was offered.

The proceedings which had taken place in some suits after the institution of the present, were also put in evidence.

The case came for hearing before two Judges of the Zillah Court in succession, who were both of opinion that the tora garas in question could not be enjoyed by any but grasias; and that no decree could be made, either against the Collector or against Nusserwanjee.

It was then brought by appeal before the Sudder Dewanny Adawlut of Bombay, and after various proceedings which their Lordships do not think it necessary to go through in detail, a decree was pronounced in the Sudder Court on the 19th December, 1849, by which the decree of the Court below was reversed, and a decree pronounced in favour of the Appellant against the Collector, by whom all costs were ordered to be paid.

In October 1851, the then Collector applied for a review of the decree: first, on the ground that according to the course of procedure then in force the question of the non-alienability of the tora garas was not properly open to the consideration of the Sudder Court, but had been conclusively settled by the judgment of the Zillah; and secondly, that if such question was open it had been erroneously decided.

This review appears to have been granted, as a matter of course, without argument or reasons assigned by the Court; but nothing was done upon it till the month of April 1853. At this time all the Judges of the Court who had heard the case argued, had been changed.

It is impossible to view, without jealousy, such a proceeding as this. The Government which appoints the Judges, and removes them at pleasure, had raised a question of great general importance, which had been decided against it. Two years elapse before any application is made to the Court for a review of the judgment, and two more years elapse before the cause is brought on for rehearing before a new set of Judges.

Upon the matter being brought before them, these gentlemen were of opinion that the only question open to the Court was, whether, assuming the tora garas not to be alienable, which they held to have been concluded by the Decree of the Zillah

Court, any demand could be made against Nusserwanjee to refund the purchase-money. The decision of the Sudder Court of 1849 was reversed by Order of the 20th April, 1853, and the case was returned to the full Court to decide the last point.

Before, however, the cause came on again for hearing, an alteration was made in the law of Special Appeals by an Act of the Indian Legislative Council, which, in the opinion of the Judges, left the consideration of both questions open to them, and accordingly both questions were argued; and on the 16th February, 1857, the Court pronounced the following Decree:—

"The Court are of opinion, and decide that tora garas is not alienable, and that, therefore, Sumbhoolal took nothing by his purchase; and that his claim against the Collector must be thrown out; that Nusserwanjee Pestonjee guaranteed nothing, and, therefore, Sumbhoolall cannot come upon him to be reimbursed the amount of his purchase-money, and, therefore, that his claim against Nusserwanjee must also be rejected. The appeal is, therefore, dismissed, with all costs on Appellant."

The propriety of this Decree we have now to consider.

Whatever may be the nature of the payments called tora garas, and the right of the Bombay Government to refuse to treat them in ordinary cases as the subject of sale or mortgage, like other species of property, their Lordships cannot but entertain serious doubts whether it is consistent with justice to permit the Government to raise such a defence in this case, and as against the present Appellant.

As we have observed in going through the proceedings, the Government had recognized the rights of inheritance and succession in this identical property; it had authorized its subjects to consider that property of this description was the subject of sale; and it had had full and distinct notice of all the proceedings which took place in this particular sale. The purchase-money was paid into Court, and paid out to the creditor, and a conveyance of the property executed by the Judge of the Court to the Appellant; the Collector, that is, the officer of the Government, standing by and acquiescing in the proceedings, with full knowledge of the objection to the sale, if any objection existed.

That, after all this had taken place, the Government should insist, and that the Court should decide, that the purchaser took nothing by his conveyance, and that he should not only lose all his purchase money, but pay all the costs which had been incurred in his attempt to obtain redress, seems hardly consistent with ordinary notions of justice.

But if there were not this objection to the defence, their Lordships are of opinion that the onus lies upon the Government to prove that there is something in the nature of this payment which makes it incapable of alienation, and that the Government has failed to give such proof.

Of any evidence of the origin of the particular payment in question, there is no trace to be found in the case. The investigations into this subject to which we have alluded, have led persons of great learning and ability to different conclusions. It is very probable that tora garas huks had not all the same origin. Assuming, however, that they all began in wrong and violence, still, that which had a vicious origin may, in course of time, have been legalized, since long enjoyment is itself a title, as well in favour of the recipient of an annual payment out of land, as of the possession of land itself.

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 be paid.

The creditor in this case has sold, and the Appellant has purchased, such interest as the debtor had in the property sold. He will be, by the transfer, in no better situation than the debtor. If this payment be conditional on the good conduct of the grasias generally, or subject to any other condition; and if any circumstances should occur which would justify the Government in withholding the payment from Bharmulsungjee, they will equally justify the withholding it from the Appellant.

Whatever this payment may be, it clearly is not in the present case, on the evidence before us, at all analogous to the pay of a military officer, to which it was attempted at the bar to liken it. It is not a personal payment in consideration of services

to be personally performed. There is not the slightest trace of any services being claimable from Bharmulsungjee, and the mode in which he acquired the property seems to show that this is not the nature of the payment. The defence here raised by the Collector is not so much that the huk is incapable of alienation, as that it cannot be alienated except to grasias; but we are quite unable to find in the evidence, or, indeed, in any other source of information to which we have had access, any distinct account of what is meant by the term "grasias." They do not appear to be any distinct class or tribe. If the term be used to describe freebooters, or lawless people generally, it makes the defence a very singular one.

Upon the whole, their Lordships are of opinion that the Government has failed to establish its defence, even supposing such defence, under the circumstances, to be competent to it, and that the Decree complained of must be reversed, and a Decree pronounced in favour of the Appellant, with all the costs to which he has been put in the course of these proceedings.

With respect to Nusserwanjee, the Appellant must pay his costs, and have them over against the Collector.

A point is suggested in the Appeal Papers that the non-liability of this tora garas to alienation had been established by the Decree of the Zillah Court, and that this decision was not, according to the Regulations, subject to review by the Sudder.

It is unnecessary to consider whether the order of the 20th April, 1853, could be sustained as the law of procedure then stood, for however that may be, their Lordships are of opinion that the subsequent Act of the Indian Legislature was rightly construed, and that the Court properly decided at the last hearing that the whole subject was open to their consideration.

The Appellant in this case has been kept for more than twenty years out of the possession of the annual payment to which he became entitled, and has lost, during the whole of that time, the interest on his purchase-money. Their Lordships think that they should do justice but very imperfectly if they were to award to him only the arrears of his annuity. The Government has been in the receipt of these sums, which belonged to the Appellant. In 1842

the Government undertook to pay the money annually to the Adawlut, if a suit were instituted; if this has been done, and the fund has been invested, the Appellant will receive the amount If the money has not been paid in (and we do not observe any allusion to such payment in the subsequent papers), we think that the Appellant must receive simple interest at the rate allowed by the Court on the arrears due when the suit was instituted, and on each subsequent payment as it accrued due.

Their Lordships will make a Report to Her Majesty in conformity with the opinion which they have expressed.