

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice M. Melvill and
Mr. Justice F. D. Melvill.

1880
April 20.

APPANA (DEFENDANT), APPLICANT, v. NAGIA AND ANOTHER (PLAINTIFFS), OPPONENTS.*

Jurisdiction—Mofussil Small Cause Courts—Act XI of 1865, Section 6—Suit by vatandar mahars to recover “aya”—Immoveable property, what is.

A suit for *balute* or *aya* is a claim in respect of a *hak* belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and one in respect of immoveable and not moveable or personal property. A Mofussil Small Cause Court has no jurisdiction to entertain a suit for such a claim.

There is no difference, in principle, between the *haks* of hereditary officiating mahars of a village and the *haks* appendant to the hereditary office of a village joshi, or the office of an hereditary priest of a temple and its emoluments. The *haks* of the former are not personal property.

THIS was an application to the High Court, under their extraordinary jurisdiction, against the decision of A. M. Cantem, First Class Subordinate Judge at Belgaum, with the powers of a Small Cause Court Judge.

The plaintiffs sued to recover three-years' arrears of a *balute hak* or “*aya*” due from the defendant in respect of rice grown by him on his land in the village of Nandgad, in the district of Belgaum. They alleged that they were the hereditary *vatandar mahars* of the village, and entitled to the *hak* and the arrears claimed by them. The Subordinate Judge allowed the plaintiffs' claim, and gave them a decree for a portion of the arrears sued for.

The defendant appealed to the High Court.

The case first came before Melvill and Pinhey, JJ., who referred it to a Full Bench.

The question argued before the Full Bench was whether the suit was cognizable by a Court of Small Causes in the Mofussil.

Pandurang Balibhadra appeared for the applicant (defendant).

* Application under Extraordinary Jurisdiction, No. 135 of 1879.

V. M. Pandit, for the opponents (plaintiffs), relied upon *Hanmantrav v. Keru* (1) and *Naru Piru v. Naro Shidheshvar* (2), and contended that the plaintiffs' claim was one for personal property.

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The following is the judgment of the Full Bench delivered by

WESTROFF, C. J.—This application to the extraordinary jurisdiction of the High Court has been referred to a Full Bench by Melvill and Pinhey, JJ., to determine whether the Court of Small Causes at Belgaum has jurisdiction to entertain a suit brought by the plaintiffs, as *vatandar* mahars of the village of Nandgad, to recover *aya* (*balute hak*) from the defendant, three-years' arrears being alleged to be due from him to the plaintiffs in respect of rice grown by him in the Fasli years 1285, 1286 and 1287 on his land in the village. The learned Judges, who referred the case, doubted whether the decisions in *Hanmantrav v. Keru*(3) and *Naru v. Naro* (4) are sustainable.

The sixth section of Act XI of 1865 states that "the suits which shall be cognizable by Courts of Small Causes" (in the Mo'ussil) are "claims for money due on bond, or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise."

It has not been contended that the present claim is founded upon a contract, or is in the nature of rent, but it has been argued that it is one for personal property. The claim is for a *hak*, called in Marathi "*balute*" and in Kanarese "*aya*." H. H. Wilson in his Glossary, page 41, states that the Sanskrit word "*aya* signifies income or profits, and that the Karnatic or Tamil words *aya* or *ayam*, derived from the Sanskrit word, denote toll, tax, tribute, custom, measurement. In the Dakhne the portion of the crop formerly paid to the hereditary village officers and servants," Amongst those village officers or servants,

(1) Printed Judgments for 1875, p. 291. (3) Printed Judgments for 1875, p. 291.

(2) 3 I. L. R. 3 Bom., 23.

(4) I. L. R., 3 Bom. 23.

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Molesworth, Grant Duff, and Reeve include the mahar as gate-keeper (vasakar) or watchman, and place him amongst the twelve which include the joshi (joisa) or village astrologer. Wilson, Glossary, page 53, says that "in most instances the offices are hereditary, are capable of being mortgaged or sold, and are paid by recognized fees and perquisites, by allotments of corn at the time of harvest, or sometimes by small portions of land held rent-free, or at a low quit-rent." He gives a more detailed account of the hereditary village officers including the mahar and jyotishi (joshi, joisa, josi,) at pages 55, 242, 243, and 319. That the *bara balute* (twelve village officers including those just mentioned) held their offices and emoluments hereditarily, is mentioned in Mountstuart Elphinstone's Report on the Dakhin, Appendix, page 10.

In *Balvantrav v. Purshotum Shidheshvar* (1) it was, by a Full Bench, held that the *hak* appendant to the hereditary office of a village joshi is immoveable property. So, too, in *Krishnabhat v. Kapabhat* (2) the office of an hereditary priest of a temple and its emoluments were held to constitute immoveable property. We do not see any difference, in principle, between such *haks* and the *haks* of the hereditary officiating mahars of a village, and are unable to regard the latter as personal property.

Hanmantrav v. Keru (3) was not a claim by mahars in respect of their *haks*, but a claim for a payment called *rabta* (cash in lieu of service) from mahars by a Khote. The question of jurisdiction of a Court of Small Causes in that case was there very lightly touched in the judgment: so we cannot say upon what grounds precisely the Small Cause Court was held to have jurisdiction.

In *Naru Piru v. Naro Shidheshvar* (4) the suit was for *balute*, but the contention there was that such a suit was "one essentially relating to an interest in land", which it was held not to be, but "for a share in produce severed from the land." The argument against the jurisdiction of the Small Cause Court was put upon too narrow a basis. It should have been that the suit

(1) 9 Bom. H. C. Rep. 99.

(3) Printed Judgments for 1876, p. 291.

(2) 6 Bom. H. C. Rep. 137, A. C. J.

(4) I. L. R. 3 Bom. 28.

was not one for personal property, or founded upon contract. It appears to us that a suit for *balute* is a claim in respect of a *hak* belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and, therefore, one in respect of immovable, (*nibandha*), and not moveable or personal property.

For this reason we think that the question—"whether a Small Cause Court had jurisdiction in respect to the claim made in this suit"—referred to this Full Bench should be answered in the negative.

APPELLATE CIVIL.

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

SHIVRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* GENU AND HAN-MANTRAV SADASHIV (ORIGINAL DEFENDANTS), RESPONDENTS.*

1882
March 6.

Registration—Act XX of 1866, Section 50—Priority—Notice of prior unregistered mortgage—Possession—Right to redeem—Parties.

On the 24th September, 1869, G. mortgaged certain land to H. Subsequently, on the 14th June, 1870, he mortgaged the same land to P. Both the mortgages were for sums less than Rs. 100. The mortgage to H. was unregistered, but the subsequent mortgage to P. was registered. On the 21st June, 1873, in a suit to which P. was not a party, H. obtained a decree on his mortgage, and at the execution sale he himself became the purchaser, and was put into possession of the land under his certificate of sale. On the 21st September, 1874, P. assigned his mortgage to the plaintiff. The deed of assignment was not registered; neither P. nor his assignee, the plaintiff, ever had possession under the mortgage of 1870. The plaintiff brought this suit to obtain possession of the land. Both the lower Courts dismissed the plaintiff's claim. On special appeal to the High Court.

Held that if P., at the time of taking his registered mortgage in 1870, had notice of the prior unregistered mortgage to H., he had that which it is the object of the registration law to give, and, consequently, the non-registration of H.'s mortgage could not, under Act XX of 1866, avail either P. or the plaintiff, who claimed under him by an assignment executed subsequently to the decree in H.'s mortgage suit.

A subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he had notice.

* Special Appeal, No. 400 of 1876.