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heir. Mr. Birdwood was similarly informed by the Government pleaders of Surat and Broach.

Looking to the preference generally, though not invariably, shown in Gujarat to the Mayukha, where it differs from the Mitakshara, to the fact testified by Mr. Colebrooke that the majority of eminent Hindu writers give the preference to the father over the mother, and to the information supplied by Mr. Birdwood, this Court is of opinion that the safest course will be to hold in this case that the father inherits from his son in priority to the mother, and, therefore, this Court concurs with the Subordinate Judge, who has made this reference, in ruling that the deceased alleged debtor, Gabad Bahdhar, is rightly represented on the record in this suit by his father Bahdhar Dala.

Our late colleague, Mr. Justice F. D. Melvill, we are aware, held the same opinion in this case as that at which we have arrived.

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## APPELLATE CIVIL.

## FULL BENCH.

*Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Bayley, and Mr. Justice Kemball.*

*April* 17.

THE COLLECTOR OF THANA (ORIGINAL DEFENDANT), APPELLANT, *v.* HARI SITARAM AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Limitation—Act XIV of* 1859, *Section* 1, *Clauses* 12 *and* 16—*Grant by a Hindu sovereign to a Hindu temple—Hindu law to be applied to determine questions of limitation—Nibandha—What is immoveable property—Antastha Sadilvar—Kherij Jamabandi Parbhare Paiki—Religious penalty for resumption.*

The Peishwa, by a *sanad* dated 1790, granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance of Rs. 350 out of the "*Antastha Sadilvar*†" and three khandis of rice out of the "*Kherij Jamabandi Parbhare*", ‡ to be levied from certain mahals and forts mentioned in the *sanad*. The allowances were paid till the death of the plaintiff's father on the 26th,

* Appeal No. 1 of 1881 under the Letters Patent of 1865.

† "Antastha Sadilvar" means extra assessment levied to meet local charges analogous to the present local cess fund.

‡ "Kerij Jamabandi Parbhare" means extra assessment in kind upon land over the regular land assessment collected by local officers and paid by them direct.

December, 1859, when the Collector of Thana stopped them. On the 23rd December, 1870, the plaintiffs sued to establish their right to the grant to recover six years' arrears of the allowances. The defendant pleaded that the suit was barred by the law of limitation. The question for consideration was whether the suit was governed by clause 12 or clause 16 of section 1 of the Limitation Act XIV of 1859.

*Held* by a Full Bench that the grant made by the *sanad* was "*nibandha*", and that the subject-matter of the suit was immoveable property, or an interest in immoveable property within the meaning of the Limitation Act XIV of 1859, section 1, clause 12.

*Held*, also, that the Hindu law might be properly resorted to for the purpose of determining whether the subject-matter of the suit was immoveable property, (*i. e., nibandha*) within the meaning of the Limitation Act XIV of 1859, section 1, clause 12.

Assuming that it was incorrect to apply Hindu law to ascertain the nature of the grant in question, nevertheless *held* that the grant was an interest in immoveable property within the meaning of the Limitation Act XIV of 1859, section 1, clause 12. The grant savoured throughout of locality, and was undoubtedly irresumable, inalienable and perpetual. The Indian Legislature did not intend to exclude such property from section 1, clause 12 of the Act.

The Indian Legislature, which passed the Limitation Act XIV of 1859, has not given any explanation or definition in the Act of the phrase 'immoveable property', but has left suitors to their former ideas on the subject. Under these circumstances it would be a hardship upon them to construe the Act inconsistently with such ideas, inasmuch as they were furnished with no guide which could have led them to suppose that "immoveable property" according to Act XIV of 1859 meant anything less than what they had previously known as such. And that the Indian Legislature were not disposed to be very harsh, is shown by its subsequent more fully developed legislation, on the subject of limitation, which to *haks* and other periodical payments assigns the twelve years' limit.

*Held*, further, that the grant was irresumable, inalienable and perpetual. It was not a grant from the revenues of the State at large or even of the zilla, but was made up of certain small special grants charged upon the *Antastha Sadilvar* produced by certain special localities in the zilla. Thus the grant was essentially localized, and whatever there might have been of contingency or variability in the levy or application of the *Antastha Sadilvar* previously to the making of the grant, such contingency or variability ceased to the extent of the grant from the moment of its being made to a Hindu temple.

The religious penalty for the resumption of a royal grant made for Hindu religious purposes is sometimes expressed in the grant and sometimes omitted from it. But its omission does not in any wise derogate from the durability of the grant. The Hindu law implies the religious penalty for resumption, albeit not expressed in the *sanad*.

A pension or other periodical payment or allowance granted in permanence is *nibandha*, whether secured on land or not.

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*Quære*—Whether a private individual as well as a royal personage may create a *nibandha*.

A Hindu religious endowment cannot be sold or permanently alienated though its income may be temporarily pledged for necessary purposes, such as the repair, &c., &c., of the temple.

THIS was an appeal under section 15 of the Letters Patent of 1865 against the decree of the High Court in Second Appeal, No. 12 of 1879, reported in I. L. R., 5 Bom., 322.

The decree of the High Court having been made in accordance with the decision of the senior Judge (Sir Charles Sargent), the Collector of Thana appealed against it.

*Jardin* (with him *Pandurang Balibhadra*) for the appellant.—The suit, not having been brought within six years from the date of the cause of action, is barred under clause 16 of section 1 of Act XIV of 1859. The allowance claimed by the plaintiffs in this suit is not *nibandh* or immoveable property according to Hindu law. The question whether the subject-matter of the suit is or is not immoveable property as regards the law of limitation out not to be determined by a reference to Hindu law. The *sanad* did not confer a grant in perpetuity. The allowance granted by it was not a charge upon land.

The Hon. Rao Saheb *V. N. Mandlik* for the respondents.

The following is the judgment of the Full Bench, delivered by

WESTROPP, C.J.—The plaint, having been presented on the 23rd December, 1870, is unaffected by Act XXIII of 1871. The only question before us is whether the suit is barred by the law of limitation in force at its commencement, viz., Act XIV of 1859. If the case fall within the 12th clause of section 1 of that Act, *i. e.*, if the suit be for the recovery of "immoveable property or of any interest in immoveable property," it is not barred, inasmuch as twelve years since the alleged cause of action had not elapsed before the presentation of the plaint. In order, therefore, to determine the question whether the suit is barred, we must consider whether the subject-matter in dispute is immoveable property within the meaning of Act XIV of 1859, section 1, clause 12.

The plaint states the suit to be brought to recover "an allowance", granted to the ancestor of the plaintiffs by the Government of the Peishwa by a *sanad*, dated A. D. 1790-1791, for the *naivedya* (offerings), &c., *nandadipa* (constantly burning lamp), &c., for the temple of Shri Vyankatesh at the town of Mahim in the zilla of Thana, which allowance was annually paid until the 26th December, 1859, being the time of the death of the plaintiff's grandfather, Govind Ramchandra, when the defendant, the Collector of Thana, ceased to pay it. Although the plaint merely describes the subject of the suit as an allowance, yet as the *sanad*, whereby the allowance was granted, is referred to in the plaint, and alleged to have been destroyed by fire, but is proved by a copy of it registered by Government, and such copy has been produced from the Daftar of the Peishwa at Poona, and its genuineness is unquestioned, we must, having regard to the wonted laxity of Mofussil pleading, deem the *sanad* to be incorporated in the plaint, and as showing the true nature of the subject-matter of the suit; otherwise justice could not be done in the case.

The Courts below differed on the question whether the subject-matter of the suit is immoveable property within the meaning of Act XIV of 1859. So, too, here Sir C. Sargent and Mr. Justice Melvill in the appeal from Mr. Coghlan's decision to the High Court differed on the same point. Against the decree then made, in conformity with the opinion of Sir C. Sargent, affirming the order of the District Judge in favour of the plaintiffs, the defendant has appealed under clause 15 of the Letters Patent of 1865 to the present Bench of three Judges. The case was argued before us on the 14th and 16th of September last.

The *sanad* was granted by the Sarsubha of the Konkan, an officer of the Peishwa, and who, it is admitted, had plenary authority on behalf of his sovereign to make such a grant. It is as follows :—

"The 15th Moon (day) of the month of Rabilakhar. Whereas the Jamadar of the aforesaid province came to the Huzur seat at Poona, on behalf of the Sansthan of Shri Vyankatesh at Kasba Mahim in the province aforesaid, and represented to the Sarsubha as follows :—'Though the said seat of

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the deity is very jagrit (active) no allowance was [granted] to it for *naivedya* (offerings) and *nandadipa* (a light kept before an idol night and day), &c., from the *Svarajya* (own Government). Consequently, last year, *i.e.*, in the Sur year [eleven hundred and] ninety (1790 A.D.) an allowance was granted from the revenue of the different mahals (districts) and killas (forts), but the said allowance does not meet the expenditure, and, therefore, an increased allowance should be granted.' Therefore, [the Huzur] considering [the said prayer] and thinking that the Sansthan is big, that there is a large expenditure, and that the welfare of the Kingdom will be furthered by maintaining the Sansthan, granted an allowance, the whole of which is as follows :—

The allowance which was granted in the last year, that is, in the Sur year eleven hundred and ninety (1790 A.D.), is as follows :—

| From the different Mahals. | | From the different Forts. | |
|---|---|---|---|
| Rs. 15 | Pargana Sayawan. | Rs. 10 | Janjira Vasai. |
| ,, 10 | Taluka Kaman. | ,, 7 | Subha Armar. |
| ,, 15 | Taluka Agashi. | ,, 9 | Janjira Arnala. |
| ,, 8 | Taluka Agar Vasai. | ,, 1 | Kota (fort) Kelve. |
| 5 | Taluka aforesaid. | ,, 1 | Kota Mahim. |
| 3 | Bhaida Thal. | ,, 2 | Kota Sirgav. |
| — | | ,, 4 | Kota Tarapur. |
| 8 | | ,, 2 | Dharm. |
| ,, 2 | Tarf Manekpura. | ,, 1 | Kota Umbargaon. |
| ,, 15 | Pargana Sanjan. | ,, 3 | Killa (hill fort) Indragad. |
| ,, 10 | Peta Nevre. | ,, 4 | Killa Arjungad. |
| ,, 20 | Peta Khanad Pavadi. | ,, 1 | Killa Gambhirgad. |
| ,, 2 | Peta Bahare. | ,, 1 | Killa Shengav. |
| ,, 4 | Gambhirgad. | ,, 1 | Killa Balalgad. |
| ,, 8 | Kalai. | ,, 1 | Killa Asava. |
| ,, 5 | Peta Manare. | — | |
| ,, 2 | Peta Wade. | 48 | |
| — | | | |
| 116 | | | |

Jakadi (customs) to be levied in the different mahals at the following places :—

| | | The Dativere ferry beyond the creek. | |
|---|---|---|---|
| Rs. 4 | Kasba Mahim. | Rs. 10 | Khanked Pawade. |
| ,, 2 | Manora. | ,, 1½ | Bahare. |
| ,, 3 | Tarapur. | ,, 6 | Gambhirgad, including Reimnagar. |
| ,, 3 | Dahanu. | — | |
| ,, 2½ | Sanjan. | 34 | |
| | | Rs. 198 | |

The allowance granted from the current year :—

| Cash Rupees. | | Grain, *i. e.*, Bhat, to be collected directly Kaili Khandis. | |
|---|---|---|---|
| Rs. 112 | Peta Mahim. | | |
| 60½ | Sajya Mahim. | 1½ | Sajya Mahim. |
| 31½ | Sajya Kelve. | ½ | Sajya Kelve. |
| 20 | Sajya Shirgav. | ½ | Sajya Shirgav. |
| | | ½ | Tarf Chinchni. |
| 112 | | | |
| 25 | Peta Tarapur. | 3 | |
| 10 | Taraf Chinchni. | Grain 3 Kaili Khandis of Bhat directly (parbhara). | |
| 5 | Peta Dahanu. | | |
| 152 | | | |
| Cash Rupees. | | | |
| 350 | | | |

Thus an allowance, consisting of Rs. (350) three hundred and *fifty* and grain (*i. e.*) bhat 3 kaili khandis, is granted and this *sanad* is given. Therefore, three hundred and fifty rupees in cash out of the *Antastha Sadilvar* [private contingent charges paid by extra assessment] and three khandis of bhat out of the extra *Jamabandi* which (is to be levied) directly, should be sent to the Shri from year to year. Do not ask for a new *sanad* every year; copy of this *patra* (order) should be taken and the original should be returned to the *Savasthan* as a muniment of title. To this effect there is one *sanad* addressed to the present and future Kamavisdars."

The concluding passage which I have just read is an ordinary formal indication that the grant is made in perpetuity. The omission of the religious penalty which is sometimes expressed in and sometimes omitted from such grante, does not in any wise derogate from the durability of the grant. The Hindu law implies the religious penalty for resumption albeit not expressed in the *sanad*; 2 Dig., bk. ii. ch. iv, tit. iii, xxxv, xxxvii, xxxviii, xxxix, xl. So far as our experience extends, we know not of any such thing as a temporary royal grant for Hindu religious purposes, and no instance has been given of any such grant, or of a resumption by the Peishwa's Government of a grant for religious purposes. No act on the part of a Hindu prince or sovereign would have been deemed more disgraceful than a resumption of such grant.

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The next circumstance to be noticed in the *sanad* (and we attach much importance to it) is that the grant thereby made is not a grant from the revenues at large of the state or even of the zilla, but is made up of certain small special grants charged upon the *Antastha Sadilvar* produced by certain special localities in the zilla, such localities being mahals (1) (districts) and killas (2) (forts). Thus the grant was essentially localised, and whatever there may have been of contingency or variability in the levy or application of the *Antastha Sadilvar* previously to the making of the grant, such contingency or variability ceased to the extent of the grant from the moment of its being made to a Hindu temple, such grant being permanent, irresumable and substantially inalienable. We say "substantially inalienable", because a Hindu religious endowment cannot be sold, or permanently alienated, though its income may be temporarily pledged for necessary purposes, such as the repair, &c., of the temple: *Prosunno Kumari Debya* v. *Galabchand Babu* (3); *Narayan* v. *Chintaman*(4), where many of the cases as to the inalienability of Hindu religious endowments (*Devasthan* or *Sevasthan*) or Mahomedan religious endowments (wakf) are collected. So far as the *Antastha Sadilvar* in respect of the killas (forts) consisted of a percentage on the pay of soldiers, it must be remembered that it is not chargeable on the pay of the soldiers of the grantor generally, but upon such soldiers as were from time to time stationed in the particular forts mentioned in the *sanad*, and in respect of their occupation of the same. So, too, as to as much of the *Antastha Sadilvar* as is leviable in respect of marriages in the mahals mentioned in the *sanad*. With reference to such of the *Antastha Sadilvar* as is, by the *sanad*, chargeable on the mahals, the learned Assistant Judge, Mr. Batty, who has written a most elaborate judgment in this case, says that the witness, No. 86, described it as "a half-anna cess, corresponding, in the way it was levied, to our local fund cess". Commenting upon that remark the Assistant Judge continues thus: "It was in fact a charge of one half-anna on each rupee of land revenue paid in cash. The one-anna cess levied on the revenue is not regarded

(1) Wils. Gloss., 318.

(2) *Ibid.* 289.

(3) L. R., 2 Ind. App., 145, 151.

(4) Ind. L. R., 5 Bom. 393, 396.

as a charge upon the land, as, under the survey system, a guarantee was given that no additional levy should be made on the land, and the half-anna cess by analogy would appear to be a distinct levy, and not a charge upon the land itself, and the charge on such a levy is too remote to be regarded as a charge upon land." As to these remarks, the first observation to be made is that any guarantee (short of legislation) given either expressly or by implication by the British Government to the ryots cannot supersede the prior grant by the Peishwa's Government by *sanad* to the temple, and that it seems to us purely artificial reasoning to argue that what is undoubtedly an extra assessment on the mahals is not a charge upon them or that a grant of a part of such charge to a Hindu temple, which grant is perpetual, irresumable and inalienable, is not also *pro tanto* a charge upon the mahals. We also think it quite impossible to maintain that the three kaili khandis of rice (bhat) are not chargeable upon the four places named in that behalf in the *sanad*.

So far as the doctrine laid down by Her Majesty's Privy Council in the *Toda Garas* case, *Maharana Fattehsangji Jaswatsangji* v. *Desai Kalianraiji Hukmatraiji*(1) in relation to Act XIV of 1859 affords a guide to us in such circumstances as we have to deal with in the present case we are bound to follow it. We understand their Lordships to have approved of the decisions of the Bombay High Court in *Krishnabhat* v. *Kapabhat*(2) and *Balvantrav* v. *Purshotum*(3), and to have been of opinion that the Hindu law texts were rightly there resorted to with a view to ascertain whether the hereditary office of a joshi, the right to which was there in dispute, was immoveable property. Speaking of the rule deducible from those joshi cases their Lordships said:—

"The rule is shortly this, viz., that, inasmuch as the term 'immoveable property', is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not

(1) L. R. I Ind. App., 34; S. C. 10 Bom. H. C. Rep., 281; and see 4 Bom. H. C. Rep., 189, A. C. J.

(2) 6 Bom. H. C. Rep. (A. C. J.) 137. (3) 9 Bom. H. C. Rep., 99.

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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 immoveable property, or of an interest in immoveable property; and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community, incapable of being held by any person not a Hindu, were in the nature of immoveables"(1).

The *sanad* in the present case is a grant by a Hindu sovereign to a Hindu temple, which is periodically (*i.e.*, annually) payable in perpetuity, is irresumable and inalienable. It cannot be held by any person except the Hindu managers of that temple—the grantees. Under such circumstances we think that the just quoted passage in their Lordships' judgment justifies us in looking to the Hindu law to ascertain whether or not the grant is immoveable property. It may be said that there might be a grant to a Mahomedan mosque or masjid, and it has been asked whether such a grant should be tried by a different rule in order to ascertain whether section 1, clause 12 of Act XIV of 1859 would be applicable to it. So it may be said that there may be a hereditary office held by Mahomedans, and no doubt there may be—take the notable instance of the hereditary village butcher or Mulana in Hindu villages, who ordinarily is a Mahomedan(2).

But that possibility did not prevent Her Majesty's Privy Council from considering that, with respect to the immoveability of a Hindu hereditary village office, Hindu texts were properly resorted to. We are accordingly of opinion that the Hindu law may properly be resorted to for the purpose of determining whether the subject-matter of the present suit—a grant by a Hindu sovereign to a Hindu temple—which can only be held by the managers of that temple, is immoveable property, *i.e.*,

(1) L. R., 1 Ind. App. 50, 51.

(2) See Grant Duff's History of the Mahrattas Vol. I., pp. 26—27. Note and Wilson's Glossary. Tit *Baluti*, p. 53.

*nibandha*, within the meaning of Act XIV of 1859, section 1, clause 12. The following texts, as we think, show beyond doubt that such a grant is what has been badly translated "a corrody", viz, *nibandha*.

At Volume II of Colebrooke's translation of Jagannath's Digest (first edition), p. 162, pl. XXXIV, is the following passage:—

"Yajnyavalkya:—Let a king, having given land or assigned a corrody, cause his gift to be written for the information of good princes who will succeed him, 2. Either on prepared silk, or on a plate of copper, sealed above with his own signet. Having described his ancestors and himself, 3. The quantity of the gift, *with the penalty of resumption*,* and set his own hand to it, and specified the time, let him render his donation firm."

Thus we see that Yajnyavalkya classes together land and a corrody, and directs that the donation of either should be "firm." The commentator on pl. XXXV says (*Ibid.*, p. 163):

"In the Dipacalica a corrody is thus explained: the gift of a future thing by a previous agreement in this form 'I will give a hundred *suvernas* every month of *kartiki*" or 'out of this mine, or this village, I will annually give a hundred *suvernas*' or 'I will monthly give one *suverna*'." The property over which the father has full dominion is mentioned in Volume III, at p. 31, pl. xc, xci; and next at page 34 the property over which his sons have equal dominion with him. Placitum xcii is:*

* NOTE.—These words "with the penalty of resumption" appear, as we learn from our learned friend and able Sanskrit scholar Mr. K. T. Telang, who has more than once afforded to us valuable aid as to Sanskrit texts, to be taken from an incorrect reading of Yajnyavalkya's text. Mr. Telang says of this text: "The translation seems to be based upon different readings than those found in the Bombay edition of the Mitakshara; commenting on stanza 317, Vijnyanesvara defines *nibandha* thus: so many *rubakas* (a coin current in ancient times) out of a particular fund, so many leaves out of a plantation of arecas." Subsequently Mr. Telang continues thus: "Instead of the quantity of the gift with the penalty of the resumption" it should be the quantity of what is accepted and the description of the boundaries of what is given. On this Vijnyanesvara writes as follows:—"What is accepted means the thing which is the subject of acceptance, that is *nibandha*, its quantity of *rubakas*, &c. What is given means the subject of the gift, that is, a field and so forth, its boundaries and those by which it is severed from other fields, &c,, such as a river or other limit—a description of its quantity in *nivartanas*, &c. It should be remarked that these stanzas

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"Yajnyavalkya:—Over land acquired by the grandfather, over a corrody out of mines or the like, settled on him and his heirs by the king, and over slaves employed in his husbandry, (or over gold and the like, for the word '*dravya*' is expounded variously,) the father and the son, when the grandfather dies, have equal dominion"; and the commentator says: "a 'corrody,' a fixed pension receivable out of mines or the like, and settled on him and his heirs by the king or other benefactor."

Placitum xciii is: "Brhaspati:—Of property acquired by the grandfather, whether moveable or immoveable, equal shares are ordained for the father and the son." The commentator considers 'moveable' as here signifying anything not immoveable, as gold or the like. In expounding the text of Yajnyavalkya (xcii) the Retnacara has this gloss: 'that which is fixed or made fast (*nibadhyate*) is a corrody (*nibandha*), fixed pension receivable out of mines or the like.' 'Equal dominion': in this case no greater share is allotted to one than to another; nor can the father give away such property at his pleasure." Here again we have, in these pl. xcii and xciii and in the commentary, corrodies classed with land. In the same volume (3) of the Digest in the comment on pl. ceclxv at page 376 the Gloss. of Retnacara is again referred to as follows:—"Thus the Ratnacara: 'A corrody;' a pension which is assigned (*nibadhyate*) by the king, on a mine or the like, (that is, a pension which is fixed as it were by words, or which is made irrevocable,) is a corrody (*nibandha*); the suffix bears the passive sense. Or the same inflexion may bear a neuter sense; thus, 'ten certain things shall be received by you from this mine for such a space of time,' and so forth. In like manner, the rights of Brahmanas, who attend at funerals and similar privileges, must be considered as corrodies. The immunities of a Brahman, who burns dead bodies, and other similar rites, are in a manner fixed in perpetuity: but there is this difference, that he receives his dues as the reward of his trouble." The commentator in the same volume at page 39

are part of the stanzas on Yajnyavalkya relating to the duties of kings." Further on Mr. Telang adds that in the new Sanskrit Dictionary now in course of publication at Calcutta by Professor Taranath Tarkarvachespati, "*nibandha* is rendered to mean a thing which is promised to be given at a specified time." Professor Wilson in his Glossary describes *nibandha* as immoveable property.

says: " In the text of Vyasa likewise (xciv), the terms 'a house or land' comprehend a corrody, and slaves as well as immoveable property"; and further commenting on another text of Vyasa at page 189 of the 2nd Volume says: " ' All subjects are dependent' ; land or the like given by subjects, with the king's consent, is a valid gift ; so if a corrody be granted by a wealthy man, the gift of it, with his assent, is valid."

In the Vyavahara Mayukha, ch. ii, sec. 1, pl. 6, occurs the following passage :—" Yajnavalkya and Brhaspati illustrate the three kinds of royal edicts, before alluded to : ' Let a king, having given land or assigned fixed property, cause his gift to be written, for the information of good princes who will succeed him, either on prepared silk, or on a plate of copper, sealed above with his own signet.' 'Having described his ancestors and himself, and stating the quantity of the gift, with the measure of the acquisition (1), and the divisions, and set his own hand to it, and specified the time, let him render his donation firm.' *Fixed property,* a corrody in mines or the like, given by the king or others, having the probable gains fixed. That which is received, is an *acquisition,* whether land or any other thing. *Its measure,* stating it to be so much. That which is given, is a *gift,* whether a house or any other thing. Its *divisions* are the boundaries. *Stating,* reciting. Moreover : ' If the king, pleased with the service or bravery of any one, bestow on him a district or other [portion of land,] by a written deed, that is, a writing of favour.' ' When the king, after going through the plaint, answer, proofs and decision, in a cause, issues a written [decree] to the gaining party, that is called a writing of victory.' " In Rao Saheb Vishvanath Narayan Mandlik's " Hindu Law or Mayukha, Yajnavalkya" at page 19, the same passage is rendered thus :—"Yajnavalkya and Brhaspati explain the three kinds of royal writings before mentioned (Yajnavalkya, ch. i, vv. 317, 318, 319, 320) : 'Having given land or a corrody, let the king execute a writing of the gift [317] for the information of future blessed kings. On a piece of cloth or a copper-plate marked above with his seal [318], the king, having written down the names of himself and of his ancestors, and the dimensions of the gift and a description of its boundaries (2), [319], should issue a permanent grant bearing date,

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and his signature made by his own hand' [320]. *Nibandha* (corrody), what is given by the king, &c., out of the produce of a mine and the like. *Pratigrahah* [is] that which is received as a gift, such as land, &c. *Parimanam* [means] its dimensions. *Danam* or gift [is] that which is given, such as a house, &c. *Chheda* [means] *boundaries* or its limits. *Upavarnanam* (its description) [means] the mention of its boundaries, &c. [So as to identify it.]

"Likewise [Brhaspati]:—When a king pleased with the services, valour, and the like of any one, grants land, &c., by a writing, that writing is called *prasadalikhita* (a writing of favour). When, after the decision of a suit by [investigation into the] proofs of both parties, the king gives a writing to the successful party, it is called a *jayapatra* (a writing of success, or a decree)"

In the Daya-Bhaga, ch. ii, pl. 13, there is this passage :—

"A 'corrody' signifies what is fixed by a promise in this form : 'I will give that in every month of Kartiki.' There is a note of Mr. Colebrooke on this passage, which runs thus : [A corrody.] The author explains corrody (*nibandha*) as signifying anything which has been promised, deliverable annually, or monthly, or at any other fixed periods. Srikrishna."

In the Viramitrodaya, ch. ii, part i, sec. 13, (at page 66 of Golapchandra Sarkar's Translation) *nibandha* is described in the following passage as settled income :—" 'The ownership of father and son is, indeed, similar in acquisitions of the grandfather, whether land, any settled income, or moveables.' And the meaning of this text is this: 'land' signifies rice-field and the like ; 'any settled income' is what is given by reason of written grants by kings to the following effect : ' To such and such a person, so many betel-leaves or the like shall be given from such and such a plantation of betel-leaves or orchard of betel-nuts.' " See also as to *nibandha* being immoveable property the quotation from Sir T. Strange's Hindu law and the opinions of Colebrooke and Ellis mentioned in *Balwantrav* v. *Purshotam Sideshvar*.

Mr. Telang informs us that "the earliest use of the word 'nibandha' in any sense kindred to its sense in law is to be found in two of the Nasik inscriptions. In the transactions of the

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

International Congress of Orientalists held in London in 1874, the inscriptions in which the word occurs are given, pp. 324, 331. Professor Bhandarkar has this note on the word, p. 326; 'This word (*nibandha*) originally signifies any piece of composition. It is then applied to a piece of composition issuing from a king. Hence the legal word *nibandha*, which signifies any hereditary office conveyed by a royal charter.' Of the inscriptions one (No. 25 at p. 324) records a grant of land, the other inscription records the dedication of one of the Nasik caves to mendicants, and the deposit with certain guilds of a certain sum of money to be applied in the supply of garments, &c., in each rainy season to the mendicants who may reside in the cave. These inscriptions appear to belong to the second and fourth centuries after Christ."

The Hindu authorities, which we have quoted, seem to show that a pension or other periodical payment or allowance granted in permanence is *nibandha*, whether secured on land or not. Some of them favour the supposition that a private individual as well as a royal personage may create a *nibandha*. Whether that view is sustainable is a question on which we do not intend to give any opinion, such being unnecessary, inasmuch as the present grant is from the Peishwa's Government, which it is admitted had full power to make it. We are unanimous in holding that the grant made by the sanad here is *nibandha*, and that, for the reasons already given, we are bound to regard it as immoveable property or an interest in immoveable property within the scope of Act XVI, 1859, section 1, clause 12.

We are, we think, bound to notice a further passage in the judgment of the Privy Council in the *toda garas* case (*Maharana Fattehsangji* v. *Desai Kalianraiji*(1) (already mentioned. Their Lordships say :—

"It is, however, unnecessary to consider this point, because their Lordships are of opinion that the question whether a *toda garas hak* is an interest in immoveable property within the meaning of Act XIV of 1859 is one which ought not to be determined by Hindu law. It appears from the authorities cited in the case (reported in the 2nd Vol. of Morris's Reports) that the Grassias were sometimes Mahomedans, and, therefore, that the

(1) L. R. 1 Ind, Ap., at pp. 51 and 52.

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*hak* may, in its inception, have been held by a Mahomedan. It is certain that, as these *haks* now exist, they may pass to, and be held and enjoyed by Mahomedans, Parsis, 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."

Their Lordships eventually in that case, and independently of Hindu law, held *toda garas* to be immoveable property within section 1, clause 12 of Act XIV of 1859, being of opinion that the inamdar, there sued, was liable to pay *toda garas virtute tenuræ* in respect of the village whence the *toda garas* was claimed. Their Lordships did not say whether *toda garas* claimable from villagers directly would or would not be immoveable property within the Act—nor did they however show a disposition to give any very stringent construction to the Act. That they were not so disposed may, we think, be inferred from their decision in that case. Looking to the fact that the Indian Legislature, which passed Act XIV of 1859, has not given any explanation or definition in that Act as to the scope of the phrase "immoveable property", but left suitors to their former ideas on that subject, it would be very hard upon them to draw the line very tightly, for they had no guide furnished to them which could have led them to suppose that "immoveable property" according to the Act meant anything less than what they had previously known as such. And that the Indian Legislature was not disposed to be very harsh, is shown by its subsequent more fully developed legislation on the subject of limitation which to *haks* and other periodical payments assigns the twelve years' limit. Assuming that we are in error in conceiving ourselves to be at liberty to apply, as we have done, Hindu law to the present grant, we are of opinion, nevertheless, that it is an interest in immoveable property within Act XIV of 1859, section 1, clause 12. This our remarks in the first portion of this judgment upon the sanad were intended to show. The grant seems to us to savour throughout of locality, and it undoubtedly is irresumable, inalienable and perpetual.

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Hence we think that the Indian Legislature did not intend to exclude such property from section 1, clause 12 of the Act. The opposite opinion expressed by some of the other tribunals which have dealt with this case renders us diffident in taking this view; but of this we are certain that no Hindu would have supposed the grant to be other than immoveable property. We affirm the order of Sir Charles Sargent with costs.

*Order affirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice Pinhey.*

1880
*April* 24.

SHANTAPA (ORIGINAL DEFENDANT), APPELLANT, *v.* BALAPA (ORIGINAL PLAINTIFF), RESPONDENT.*

*Mortgage—Prior and puisne mortgagee —Purchase by prior mortgagee of equity of redemption at a court sale—Evidence of intention to keep mortgage alive.*

Where a prior mortgagee purchased the equity of redemption at a court sale, *held*, following the Full Bench ruling in *Mulchand Khuber* v. *Lallu Trikam* (1), that in a contest between himself and a puisne mortgagee he was entitled to fall back upon his original mortgage, and to retain possession until his mortgage was paid off.

Generally, slight evidence will suffice to show that the prior mortgagee intended to retain the benefit of his mortgage. The fact that the mortgage deed remains with the mortgagee who purchases is evidence that he intends to retain the benefit of his mortgage.

THIS was a second appeal from the decision of C. F. H. Shaw, Judge of Belgaum, confirming the decree of A. M. Cantem, Subordinate Judge (First Class) at Belgaum.

One Yeshvant owned a piece of land in the village of Karalgi, taluka Bidi, of the Belgaum District. He mortgaged it to the defendant, Shantapa, when, it did not appear, the deed of mortgage not having been produced in the case; but Shantapa obtained a decree upon it, which directed that Yeshvant should pay him annually Rs. 100 until the debt, amounting to Rs. 706-10-9, was liquidated, and, in default of the punctual payment of this sum of Rs. 100, the said Shantapa was to be immediately placed in possession of the land. The stipulated sum was not paid,

*Second Appeal, No. 387 of 1878.

(1) I. L. R., 6 Bom., 404.