1888
AUG. 17.

APPELLATE CIVIL.

13 B. 429.

13 B. 429.

[429] APPELLATE CIVIL.

Before Mr. Justice Nanabhai Haridas and Mr. Justice Parsons.

SAYAD HASHIM SAHEB VALAD SAYAD AHMED SAHEB, (*Original Plaintiff*), *Appellant v.* HUSENSHA VALAD KARIMSHA FAKIR, (*Original Defendant*), *Respondent.** [17th August, 1888.]

Civil Procedure Code (*Act XIV of* 1882). *s.* 11—*Jurisdiction of Civil Courts—Suit for an office to which no fixed fees are attached—Reg. II of* 1827, *s.* 21—*Its application to suits between Mahomedans—Caste question.*

Under s. 11 of the Code of Civil Procedure (Act XIV of 1882) a suit for an office will lie, even though the office be a religious one, to which no fixed fees are attached.

Section 21 of Reg. II of 1827 has no application to suits between Mahomedans. A dispute as to the right to an office, such as the office of *khatib* (or preacher) is said to be among Mahomedans, is not a caste question within the meaning of the term as used in the section.

[R., 12 C.L.J. 74 (78) = 14 C.W.N. 1057 = 6 Ind. Cas. 864.]

SECOND appeal from the decision of J. L. Johnston, Acting District Judge of Dharwar, in appeal No. 209 of 1885 of the District File.

The plaintiff stated in his plaint as follows:—

"I am the *vatandar kazi* and *khatib* (1) of Gadag, and have the right to perform all the duties appertaining to the office of *kazi* and *khatib* so far as the Mahomedans are concerned. I have also the right to receive all the *hakbabs* (fees and perquisites) due to a *kazi* and *khatib*.

"On the day of the *khutba*(2), festival in the month of Ramzan, I have the right to read the *khutba*(2) over to the people of the Mahomedan persuasion at a spot called *Eedga*, which is situate outside the limits of the village of Gadag. But the defendant read the same and received all the *hakbabs* which were due to me on the last *khutba* festival.

"The defendant received in all Rs. 20 to which I was so entitled.

"I pray, therefore, for the issue of a perpetual injunction to the defendant restraining him in future from reading the *khutba* [430] in opposition to my right, and for a decree awarding me the sum of Rs. 20 wrongfully received by the defendant."

The defendant pleaded that the suit was barred under s. 21 of Reg. II of 1827; that there were factions among the Mahomedans of Gadag; that his faction consisted of more than 200 persons, who had directed him to read the *khutba*; that the plaintiff was not competent to read the *khutba* according to the Mahomedan law; that the spot *Eedga* was public property, and did not belong to the plaintiff alone; that no section of the Mahomedan religion could be prohibited from reading the *khutba* according to their pleasure; that it was not obligatory on the Mahomedans to pay any fee when they attended the reading of the *khutba*, and that he had received nothing when he read it; and that the plaintiff was not entitled to recover any damages from him.

* Second Appeal, No. 501 of 1886.

(1) *Khatib* means a preacher or reader of prayers.

(2) *Khutba* means an oration delivered in praise of God, Mahomed, and his descendants, and prayers for the ruling power.

1888 AUG. 17. — APPELLATE CIVIL. — 13 B. 429.

The Subordinate Judge found that the fees received by the plaintiff were not attached to the office of *khatib* as of right, but merely voluntary gratuities bestowed on him by such members of the caste as were pleased to do so. He further held that the suit involved a caste question within the meaning of s. 21 of Reg. II of 1827. He, therefore, rejected the plaintiff's claim.

This decision was confirmed, on appeal, by the District Judge. His reasons are stated in the following extract from his judgment:—

"It is quite clear that there are no fees fixed, no fixed payments annexed, to the discharge of the office of *khatib*, but that what is paid to plaintiff and what is claimed as wrongfully appropriated by defendant are mere gratuities of uncertain amount and of no legal obligation, and that their privation is a mere *damnum sine injuria* for which no action will lie. These are the principles stated as those on which an action, like the present, can be supported by Sausse, C. J., in *Muhammad Yussub* v. *Sayad Ahmed* (1). The cases now quoted by the appellant's pleader do not show any modification of these principles. *Pranshankar* **[431]** v. *Prannath Mahanand* (2), deciding that an action will lie for declaration of right as *pujari* of a *mandir*, is inapplicable. In *Krishna Aiyan* v. *Anantarama Aiyan* (3) it was a question of fees paid to *purohits* of a temple by pilgrims, and, besides, the claim was rejected in the absence of proof of long and uninterrupted usage. *Eshan Chunder Roy* v. *Monmohini Dassi* (4) does not apply.

"On the other hand the case quoted by the Subordinate Judge shows that an action will not lie for the gratuities as moneys alleged to be received by defendant for plaintiff's use—*Padgaya Somshetti* v. *Baji Babaji* (5).

"The cases quoted by the plaintiff, *Dinanath Abaji* v. *Sadasihiv Hari* (6) and *Raja valad Shivapa* v. *Krishnabhat* (7) apply where fixed fees were received.

"As the plaintiff cannot sue for mere gratuities received by defendant, so he cannot bring his suit for injunction to defendant restraining him from reading the *khutba* within the jurisdiction of the Civil Court. It is settled law that no such suit will lie regarding the right to perform a merely religious duty to which no fixed fees are attached as of right."

Against this decision the plaintiff appealed to the High Court.

Ghanasham Nilkant Nadkarni, for appellant.—The question is, whether the plaintiff has the sole right to the office of *khatib*. This was declared in our favour by the High Court in special appeal No. 56 of 1873. The ruling in *Shankara* v. *Hanma* (8) has no application to the present case. The present is not a suit for the vindication of a mere dignity. Nor does it involve a caste question in the sense in which the term is used in s. 21 of Reg. II of 1827.

Ganesh R. Kirloskar, for respondent.—This is not a suit for an office, but for an injunction restraining the defendant from reading the *khutba*. It is a suit substantially for the vindication of a mere dignity. There are two factions in the Mahomedan **[432]** community at Gadag, one supporting the plaintiff, the other favouring the defendant. The suit involves a caste question within the meaning of s. 21 of Reg. II of 1827.

---

(1) 1 B.H. C.R. Appx. xviii. (2) 1 B. H. C. R. 12.
(3) 2 M. H. C. R. 330. (4) 4 C. 683. (5) 11 B. 469.
(6) 3 B. 9. (7) 3 B. 232. (8) 2 B. 470.

1888
AUG. 17.

APPELLATE CIVIL.

13 B. 429.

[PARSONS, J.—Can you show us any case in which the Regulation is held to apply to Mahomedans? Is not caste peculiar to Hindus?]

I cannot show any case. But I maintain that a suit for an office to which no fees are attached will not lie—*Vasudev* v. *Vamnaji*(1).

JUDGMENT.

The judgment of the Court (NANABHAI and PARSONS, JJ.,) was delivered by

PARSONS, J.—The plaintiff in this case, alleging that he is the *vatandar kazi* and the *khatib* of Gadag and that the defendant obstructs him in the exercise of the latter office, sues for a declaration of his sole right to hold the office of *khatib* and for an injunction to restrain the defendant from obstructing him in the enjoyment of that office. The lower Courts have dismissed the suit: the Court of first instance—on the ground that the suit was barred by s. 21 of Reg. II of 1827, the point at issue being a caste question; the appellate Court—on the ground that the suit would not lie, as it was one regarding the right to perform a merely religious duty to which no fees are attached as of right. We accept the finding that no fixed fees are attached to the office as one of fact, (indeed the correctness of the finding is not disputed on behalf of the plaintiff); still we think that both the Courts are wrong in the view they have taken of their want of jurisdiction. No case has been cited to us in which it has been decided that s. 21 of Reg. II of 1827 applies to suits between Mahomedans; and we cannot hold that a dispute as to the right to an office, such as the office of *khatib* is said to be, is a caste question within the meaning of the term as used in that section. We must take it, then, that this suit is not barred by Reg. II of 1827, and it is not alleged that it is barred by any other enactment now in force. The Civil Procedure Code provides in its eleventh section that "the Courts shall have jurisdiction **[433]** to try all suits of a civil nature * * * *" and it explains that "a suit in which the right to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies." The present suit is one in which the right to an office is contested; and the mere fact that there are no fixed fees attached to the office, does not under the Code make the suit inadmissible. The cases cited by the District Judge do not apply. The principle on which they were decided, was that the suits in them were not for an office, but for a mere dignity, and that the Civil Courts ought not to be involved in the determination of trivial questions of dignity and privilege, even though connected with an office—*Narayan Vithe Parab* v. *Krishnaji Sadashiv* (2). They nowhere lay down the rule, that a suit for an office will not lie, because the office is a religious one to which no fixed fees are attached. Had it been the intention of the Legislature that such a suit should not lie, the same would have been clearly provided for. Such suits have been and are constantly brought. This very plaintiff has before brought a somewhat similar suit to the present which was decided in his favour by the High Court in special appeal No. 56 of 1873 on 4th October, 1876,—see the judgment (Ex. 31) —in which it was found that the plaintiff had a better right than any one else to perform the duties of *kazi*, and it was stated that he was already *khatib*. In *Mamat Ram Bayan* v. *Bapu Ram Atai Bura Bhagat* (3), the principle, which should govern such suits as the present suit

(1) 5 B. 80. (2) 10 B. 233. (3) 15 C. 159.

purports to be, is clearly laid down, and we follow that decision, which, we think, is in accordance with law and in consonance also with the decisions of this Court. We are of opinion that the present suit will lie, and we, therefore, reverse the decrees of the lower Courts, and order that the suit be heard on the merits. Costs to abide the result.

Decree reversed and case remanded.

1888 AUG. 17. APPELLATE CIVIL. 13 B. 429.

---

13 B. 434.

[434] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

MOTILAL RAVICHND (*Original Plaintiff*), *Appellant v.* UTAM JAGJIVANDAS (*Original Defendant*), *Respondent.**

[22nd December, 1888.]

Debtor and creditor—Sale to creditor for old debt and new advance, on debtor's bankruptcy—Intent to delay and defeat creditors—Bona fides *of purchaser—Fraudulent preference—Statute* 13 *Eliz. c.* 5.

On the 27th February, 1886, the firm of Ranchhod Jamna, a family firm, was on the point of failing, being heavily indebted. On that day, the managing member of the firm executed four sale deeds, comprising all the property of the firm, in favour of four different creditors of the firm, of whom the plaintiff was one. The deed executed in favour of the plaintiff was in consideration of a then existing long-standing debt and a fresh advance of Rs. 3,400 made by him to the firm. The next day the firm stopped payment. The defendant was one of the creditors of the firm, and sought to attach and sell the property conveyed to the plaintiff in execution of a decree which the defendant had obtained against the firm. The plaintiff's objection to the attachment by the defendant having been disallowed, he brought the present suit against the defendant, to establish his right to the property attached under his sale-deed. The defendant contended (*inter alia*) that the sale to the plaintiff having been effected in order to delay and defeat the creditors and to give undue preference to the plaintiff, was void.

Held, on the evidence, that the sale to the plaintiff was, on the part of the plaintiff at least, a *bona-fide* sale in consideration of a debt still due, and for payment of which the plaintiff had been pressing, and Rs.3,400 in cash; and that there were no circumstances in the case which showed that the plaintiff in entering into it was a party to any scheme to delay the general body of the creditors. That being the case, the sale was not impeachable at the instance of the defendant; although, having regard to the fact of its having been negotiated on the eve of the failure of the firm it might possibly be regarded as a sale by which the plaintiff obtained an unfair preference, and as such perhaps be impeachable at the suit of the whole body of creditors.

In re Johnson Golden v. *Gillam* (1) referred to and followed.

[F., 15 M.C.C.R. 104 (106); R., 25 B. 202 (213); 16 M. 397 (399); 13 C.P.L.R. 180 (186); (1900) P.L.R. 513 (520); D., 22 B. 255 (258).]

THIS was an appeal from a decision of Dayaram Gidumal, Acting Assistant Judge of Ahmedabad.

Chunilal, Chotalal, Dayabhai and Jivanlal were members of a joint Hindu family, of whom Chunilal was the head and manager, which carried on business under the name of Ranchhod Jamna.

---

* Appeal No. 71 of 1888.

(1) L.R. 20 Ch. Div. 389.