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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

DESAI MOTILAL MANGALJI (*Original Plaintiff*), Appellant v. DESAI
PARASHOTAM NANDLAL (*Original Defendant*), Respondent.*
[11th January, 1893.]

Registration—Evidence—Act III of 1877, s. 17—Retrospective operation of section—Document not registrable under Act in force (XX of 1866) when executed, but requiring registration under Act III of 1877—Immoveable property, what is—Hereditary allowance attached to office of Desai not immoveable property under Act XX of 1866—Deed of gift of such property originally not registrable—Hereditary office when immoveable property by Hindu law—Desaigiri sukhdī.

Section 17 of the Registration Act (III of 1877) should not be construed as requiring a document to be registered which would not have required registration when it was executed.

Raju Balu v. Krishnarav (1) distinguished.

An instrument which did not require registration under Act XX of 1866 is not inadmissible in evidence by reason of Act III of 1877.

Dues incidental to an office such as that of a Desai, which is capable of being held by a person other than a Hindu, were not immoveable property when the Registration Act XX of 1866 was enacted.

[F., 8 A.L.J. 609=10 Ind. Cas. 314.]

SECOND appeal from the decision of T. Hart-Davies, Joint Judge of Ahmedabad.

The plaintiff Desai sued to recover Rs. 99 on account of his share in the *Desaigiri sukhdī* allowance for three years. He alleged that he and the defendant were members of the family of the Bania Desais of Godhra; that the *sukhdī* allowance was received from the Government treasury by a senior representative [93] of the family; that a dispute having arisen between the defendant's father, and the plaintiff's father, it had been agreed that the defendant's father and his descendants should continue to recover the allowance and should pay Rs. 33 out of it to the plaintiff's father and his descendants every year, and that an agreement to that effect had been accordingly executed by the defendant's father on the 24th May, 1866. The defendant had refused to pay the plaintiff's share of the allowance since 1886.

The defendant denied the plaintiff's right to a share in the allowance, disputed the genuineness of the agreement sued on, and contended that it was inadmissible in evidence for want of registration.

The Subordinate Judge found that the agreement sued upon was a deed of gift which being unregistered was not admissible in evidence. He, therefore, rejected the claim.

The plaintiff preferred a second appeal.

Gokuldas K. Parekh, for the appellant.—Hereditary allowances are for the first time included in immoveable property for the purposes of registration by s. 3 of the Registration Act III of 1877. The document in question was passed in 1866; and at that time hereditary allowances were not immoveable property for the purposes of registration. Act III of 1877 has no retrospective operation—*Ram Coomar Singh v. Kishari* (2).

* Second Appeal No. 754 of 1891.

(1) 2 B. 273.

(2) 9 C. 68.

Hereditary allowances may be immoveable property under Hindu law; but the office of a Desai is not such as is incapable of being held by persons other than Hindus. We find that even Mahomedans and Parsis are Desais. Therefore the question whether Desaigiri *sukhdi* is immoveable property for the purposes of registration, cannot be governed by Hindu law—*Maharana Fattehsangji v. Desai Kallianraiji* (1).

Rao Saheb Vasudeo J. Kirtikar (Government Pleader), for the respondent (defendant).—The Registration Act III of 1877 has retrospective operation—*Lachman Das v. Dip Chand* (2); *Raju Balu v. Krishnarav* (3). As the suit is between Hindus, the question whether Desaigiri *sukhdi* is immoveable property should [94] be determined by Hindu law. Hereditary offices are immoveable property under Hindu law—*Balvantrav v. Purshotam* (4); *The Government of Bombay v. Gosvami Shri Girdharlalji* (5); *Krishnabhat v. Kapabhat* (6).

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JUDGMENT.

SARGENT, C. J.—The plaintiff in this suit, which has arisen out of a dispute between two branches of the Bania family of Desais of Godhra, sues on an agreement (Ex. 3), dated 24th May, 1866, by which the defendant undertook that he and his descendants would pay the plaintiff's father and his descendants an annual sum of Rs. 33 out of the *sukhdi* allowance payable out of the Government treasury at Godhra and which was to be collected by the defendant and his descendants. Both the lower Courts have held that the document was a deed of gift of immoveable property and required registration under s. 17 of Act III of 1877, and not being registered, was not admissible in evidence.

Act XX of 1866 was the Registration Act applicable to the document when it was executed, and much argument has been addressed to us on the question whether such a *sukhdi* was immoveable property when that Act came into force. It was common to both parties that the *sukhdi* was an allowance incidental to the hereditary office of Desai, and, as such, it was contended for the respondent that, on the authority of the decisions in *Balvantrav v. Purshotam* (4) and *The Government of Bombay v. Gosvami Shri Girdharlalji* (5), it was of the nature of immoveable property. On the other hand, it was contended by Mr. Gokuldas, for the appellant, that the rulings in these cases only applied to hereditary offices which could only be held by Hindus such as that of a village Joshi, and that the office of Desai, any more than that of a patil, was not necessarily held by a Hindu, and might be held by a Mahomedan or Parsi. This latter statement was admitted by Mr. Vasudev, but he contended that the rulings applied to all hereditary allowances.

It is to be remarked that what was actually decided in *Balvantrav v. Purshotam* (4) was that the dues incidental to an hereditary [95] office such as a village Joshi was by Hindu law regarded as immoveable property. In *The Government of Bombay v. Gosvami Shri Girdharlalji* (5), where the question was as to the nature of allowances to a Hindu temple, Mr. Justice Melvill no doubt refers to the last case as deciding that "allowances incidental to hereditary offices are immoveable property." However, in *Maharana Fattehsangji v. Desai Kallianraiji* (1), their Lordships of the Privy Council treat the ruling to be that for the interpretation of s. 1, cl. 12 of Act XIV of 1859 immoveable property must, when it concerns the rights

(1) 1 I. A. 34 (50). (2) 2 A. 351. (3) 2 B. 273.
(4) 9 B. H. C. R. 99. (5) 9 B. H. C. R. 222. (6) 6 B. H. C. R. A. C. J. 137.

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of Hindus, be taken to include whatever Hindu law classes as immoveable, and their Lordships say they see no objection to the rule within proper limits, and express approval of the decision on the ground "that 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."

We think it is impossible, with due regard to these remarks of the Privy Council, to hold that the dues incidental to an office such as that of Desai were immoveable property when Act XX of 1866 was enacted, and it becomes necessary to consider the view taken by the Joint Judge that, whatever may have been the character of a Desai's *sukhdi* at the time Act XX of 1866 was enacted, the document in question required to be registered under s. 17 of Act III of 1877, which includes hereditary allowances in the interpretation of "immoveable property." This raises a question of some difficulty on which the High Courts of Calcutta and Allahabad have apparently differed—*Ram Coomar Singh v. Kishari* (1) and *Lachman Das v. Dip Chand* (2)—the former Court being of opinion that neither s. 17 of Act III of 1877 nor the similar sections of the preceding Acts have the effect of rendering a document, which was not registrable under Act XVI of 1864, inadmissible in evidence under the succeeding Acts without registration. Mr. Justice Green had to consider s. 17 in *Raju Balu v. Krishnarav* (3) with respect to a document [96] dated 15th July, 1865. After referring to the peculiar language of s. 17 and pointing out that "the greater strictness of the requirements of Act VIII of 1871 and the earlier Registration Acts has been mitigated, and the Act was framed as it is, very probably with a view to admit to the benefit of such mitigations documents though executed before the day on which the Act came into force," he arrives at the conclusion that "the practical result is, that the provisions of Act III of 1877 apply to all documents tendered in evidence on or after 1st April, 1877." It is to be remarked that the document in question, which was held to require registration in that case, was clearly one which ought to have been registered under Act XVI of 1864. The case, therefore, has no direct bearing on the present question whether s. 17 of the Act is to be construed as requiring a document to be registered, which would not have required registration when it was executed. It is plain that if it is so regarded, as the Act provides no means of registering such a document (unless perhaps it was executed within three months before the Act of 1877 comes into force), the section will have the retrospective effect of invalidating for all practical purposes documents which when they were executed were free from defects according to the existing law. The presumption is of course against the Legislature having such an intention. The actual question here arises from the change in the interpretation clause which in the Act of 1877 includes "hereditary allowances" without any restriction in immoveable property, and we think that such a change cannot on principle affect instruments executed before the Act.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

(1) 9 C. 68. (2) 2 A. 851 (853). (3) 2 B. 273 (281).