1885.

QUEEN-EMPRESS v. DORÁBJI HORMASJI.

before him, he has come to the conclusion that the evidence against the accused is not sufficiently strong to put him upon his defence. We have not heard Mr. Anderson upon that evidence, and are, therefore, not in a position to express any opinion as to whether Ráv Sáheb Sitárám is right or wrong in his estimate of it. But we find that the District Magistrate has come to an opposite conclusion. In doing so, however, he had not the advantage of a discussion of the evidence from the accused's point of view; and it is quite possible, if he had had that advantage, that he might have come to the same conclusion as Ráv Sáheb Sitárám had arrived at. The case is one of a somewhat complicated character, involving conflict of evidence, and we think the District Magistrate should now give the accused an opportunity of being heard in support of the order of discharge. If after doing so he considers that order to be right, or if it appears to him unnecessary or undesirable to prosecute the accused any further, he is at liberty to withdraw his order of the 4th July.

Order accordingly.

APPELLATE CIVIL.

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

1885. *September* 21.

LAKSHMANDA'S BHAGATRA'MJI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MANOHAR GANESH TA'MBEKAR AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Nibandh—Prescription—Grant—Allowance—Immoveable property—Hindu law.

The right to receive annually a fixed permanent allowance payable out of the revenues of a temple is '*nibandh*,' and must be regarded as immoveable property under the Hindu law; but this rule could not enable the right to be acquired by prescription.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of Ahmedabad, reversing the decree of Ráv Sáheb Harderám Anuprám Munshi, Subordinate Judge of Umreth.

The plaintiff, the priest of the temple of Raghunáthji, sued Manohar Ganesh Támbekar, *inámdár* and manager of the temple of Ranchhodráiji at Dákor, to recover five years' arrears of a fixed

* Second Appeal, No. 474 of 1883.

1885.

LAKSHMAN-DÁS BHAGAT-RÁMJI v. MANOHAR GÁNESH TÁMBEKAR.

permanent allowance payable out of the revenues of that temple under a *sanad* granted by the *Subhá* of Ahmedabad in the time of the Great Moguls.

The defendant contended that the allowance had been ordered to be withheld by a decree of the High Court in Special Appeal No. 448 of 1870, and that his temple was not liable to the payment asked for.

The Subordinate Judge awarded the plaintiff's claim.

The defendant appealed to the District Court. Narotam Purshotam and ten others, *shevaks* or worshippers of the temple of Ranchhodráiji, applied to the Court to be made parties. They were made defendants, and the case was remanded to the Subordinate Judge for a fresh finding.

At the rehearing of the appeal the District Judge held that the allowance demanded was not a charge on immoveable property, and that the evidence was not sufficient to prove a grant under a *sanad* from any competent authority. He, therefore, reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

K. T. Telang, (with *Shivrám Vithal Bhándárkár*), for the appellant.—The schedule to the Summary Settlement Act (Bombay) VII of 1863 shows that the *Subhá* of Ahmedábád had authority to confer grants exempting lands wholly or partially from the payment of public revenue. Even if the *subhá* had no authority, long enjoyment would support a grant. Every supposition, not irrational, should be made in favour of a long-continued enjoyment—*Mayor of Penryn* v. *Best*[1].

The allowance claimed by the plaintiff is a fixed permanent payment of the nature of '*nibandha*' under the Hindu law—*The Collector of Thána* v. *Krishnánáth Govind* [2]; *The Collector of Thána* v. *Hari Sitárám* [3]. The succession of a son to his father in an hereditary office is primarily referred to a right based upon the relation subsisting between them—*Giriapa* v. *Jakana* [4].

(1) L. R., 3 Ex. D., 292.
(2) I. L. R., 5 Bom., 322.
(3) I. L. R., 6 Bom., 546.
(4) 12 Bom. H. C. Rep., 172, A. C. J.

Shántárám Náráyan for respondent No. 1 and *Gokaldás Káhándás* for the other respondents.—Mere money payments, even out of immoveable property, for any number of years do not create prescriptive right—*The Government of Bombay* v. *Gosvami Shri Girdharlálji*[1]; *The Government of Bombay* v. *Desái Kalyánrái*[2]. A prescriptive right to have a yearly payment made by Government to a private individual cannot be acquired by reason of a continued series of voluntary payments made to him by Government extending over more than thirty years—*The Collector of Surat* v. *Dáji Jogi*[3].

SARGENT, C. J.—This is a suit by the appellant, as owner of the temple of Shri Raghunáthji Mahárái, to recover arrears of a certain annual allowance for the *Samvat* years 1930 to 1935 (A.D. 1874-78) inclusive, payable out of the *sawasthán* of Ranchhodji's temple at Dákor. The District Judge held, on the authority of *The Government of Bombay* v. *Desái Kaliánrái*[4], that, as the allowance claimed by appellant was not a charge on immoveable property, he could not acquire a title to it by prescription, and that the evidence was too vague to allow of a *sanad* or grant being inferred, and accordingly dismissed the claim.

The appellant urges that the District Judge was wrong in holding that the allowance claimed by the plaintiff was not a charge on immoveable property. It was said that the allowance claimed was a fixed permanent payment or *nibandha*, and, therefore, to be regarded by Hindu law as immoveable estate; for which the decisions in the cases of *The Collector of Thána* v. *Krishnánáth Govind*[5] and *The Collector of Thána* v. *Hari Sitárám*[6] were cited. But, although this would be true as regards the allowance in question, when the right to it had been acquired, the above rule of Hindu law could not enable the payments to be regarded as the possession of immoveable estate, so as to enable the right to be acquired by prescription.

(1) 9 Bom. H. C. Rep., 222.
(2) 9 Bom. H. C. Rep., 228.
(3) 8 Bom. H. C. Rep., 166, A. C. J.
(4) 9 Bom. H. C. Rep., 226.
(5) I. L. R., 5 Bom., 322.
(6) I. L. R., 6 Bom., 546.

1885.

LAKSHMAN-DÁS BHAGAT-RÁMJI v. MANOHAR GANESH TA'MBEKAR.

As to the plaintiff's title by grant, it was urged that the District Judge ought to have held that the *Subhá* of Ahmedabad had authority, in *Samvat* 1808 (A.D. 1852) to make a grant of the revenues of the Peishwá. The schedule to (Bombay) Act VII of 1863 was referred to, in order to show who had authority under the Emperors of Delhi, but it leaves the question still in doubt whether the *Subhá* of Ahmedábád was a person so authorized. However, the District Judge does not decide against the plaintiff's claim solely on the ground that the alleged grant was by an unauthorized person, but that a *sanad* or grant by a duly constituted authority cannot be inferred from so vague a reference to it as is to be found in exhibit 29, the report of the *majumdárs* in A. D. 1827. Sitting in second appeal, we do not think we should be entitled to interfere with this finding.

We must, therefore, confirm the decree, but, under the circumstances, without costs.

Decree confirmed.

APPELLATE CIVIL.

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

1885. *September* 21.

BA'I VIJLI, (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'NSA' NA'GAR, (ORIGINAL PLAINTIFF), RESPONDENT.*

Husband and wife—Agreement contrary to public policy—Divorce—Promise of marriage.

In consideration of advances of money made by N. to V., a married woman, (both being of the Kunbi caste), in order to enable her to obtain a divorce from her husband, V. promised to marry N. as soon as she should obtain a divorce. N. subsequently sued V. to recover the advances.

Held, that the agreement, having for its object the divorce of the defendant from her husband and her marriage with the plaintiff, was *contra bonos mores*, and, therefore, void.

THIS was a second appeal from the decision of F. Beaman, Assistant Judge of Ahmedábád, amending the decree of Ráv Sáhel Lallubhái Pránvallabhdás Párekh, Subordinate Judge (Second Class) at Ahmedábád.

* Second Appeal, No. 50 of 1884.