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to do such a thing. Agreeing with the first Court and differing from the appeal Court we hold that it does not. Rule 68 empowers a Collector to restore a forfeited occupancy to the original occupant. But when a forfeited occupancy has been disposed of by grant to a new occupant, it ceases to be a forfeited occupancy and Rule 68 no longer has any application. That rule states the law or a part of the law applicable to lands which are forfeited occupancies ; not the law applicable to those lands, which, having once been forfeited occupancies, have, by disposal, according to the rules, become something different.

We allow this appeal, reverse the decree of the lower appellate Court, and restore that of the Court of first instance, with costs both of this appeal and of the appeal to the lower appellate Court on the respondent.

*Decree reversed.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Hayward.*

1911.
*August* 10.

GHELABHAI GAVRISHANKAR (ORIGINAL PLAINTIFF), APPELLANT, v. HARGOWAN RAMJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Hindu law—Office of hereditary priest*—Yajman vritti—Nibandha—*Caste can appoint a priest—Grant from King not necessary—Removal of priest not allowed except on valid ground—Caste—Caste question—Bombay Regulation II of 1827—Civil Court—Jurisdiction.*

Under Hindu law, the office of hereditary priest (*yajman vritti*) is a *nibandha* and is ranked among the hereditary rights of immoveable property.

The office of hereditary priest, where it is held in relation to a family, owes its origin, continuance, and binding character to custom and not to a grant from the King or agreement between the parties.

Where the office is one of hereditary family priest, the mere fact that in any individual case it has been created originally by the caste for the purposes of families belonging to it cannot affect it, because the office carries with it a hereditary right in the nature of property, and the incumbent cannot be deprived of it by anyone, unless he has become a *patita* (outcaste) or has declined to officiate. The caste in such a case makes the selection for the families of its members ; and when any family accepts the officiator as its hereditary family priest, custom

* Second Appeal No. 130 of 1910.

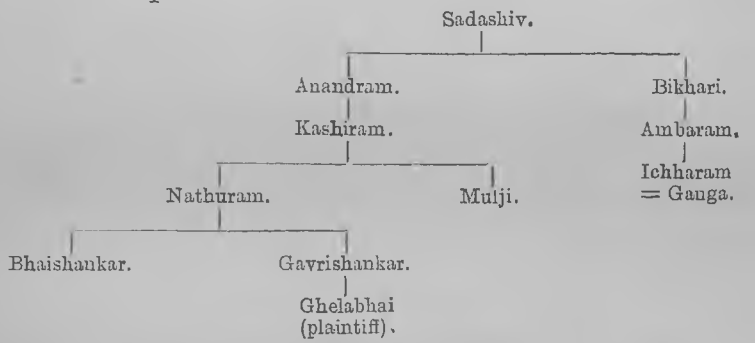
annexes to the office certain incidents in the nature of civil rights as against the family, which neither the family nor the caste has power to annul except on the ground of some offence under the Hindu law committed by the officiator, or of refusal by the officiator to discharge his duty as family priest.

Where a caste has appointed a man to a mere priestly office, there is doubtless no right of property conferred. His continuance or removal is exclusively within the competence of the caste and it is a caste question. But it is difficult where the office of hereditary priest is created for the performance of religious ceremonies in certain families, provided, according to Hindu law, either the caste or the families have power to create such an office and give it the character of immoveable property.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Surat, confirming the decree passed by N. R. Majmundar, Subordinate Judge of Surat.

Suit to recover an amount of money as the fees of the *yajman vritti*.

The following genealogical tree shows the relationship between the parties :—




The Kasba *tad* of the Kachhia Kunbis of Surat had at first a family priestess named Bai Panba. In the year 1739 A. D., the Kasba *tad* by a formal document dismissed her from the office; and appointed one Trikam Vasudeo and his descendants as hereditary priest of the *tad*.

Trikam was an ancestor of Sadashiv, who was related to the plaintiff, as shown above.

The *yajman vritti* in question was twice partitioned, once in 1749 A. D., between Anandram and Bhikari, and again in the year 1829 A. D. between Mulji on the one hand and Bhaishankar and Gavrishankar on the other.

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It came up before the Court on three occasions. First, in 1818, when Mulji sued Ambaram for the latter had officiated at a *yajman's* (patron) who had fallen to Mulji's share. He also brought another suit against the *yajman*. Both suits were decided in Mulji's favour; in the one he was awarded Rs. 7 as damages, and in the other he was given an injunction restraining Ambaram from officiating in the families of Mulji's *yajmans*.

Secondly, a few years after this Ambaram again officiated as a priest at some of the *yajman* appertaining to Mulji. It gave rise to a suit by Mulji, Bhaishankar and Gavrishankar against Ambaram and the *yajman*. The Court decided the suit in the plaintiffs' favour, and declared that the *yajman* was liable to the plaintiffs for their fees and in future to entertain the plaintiffs only in performing the priestly duties; it also directed Ambaram to pay Rs. 35 to the plaintiffs as damages.

The third litigation was commenced in 1899 under the following circumstances. Ambaram's son Ichharam having predeceased him, he made a will in favour of Ganga (widow of Iccharam) whereby he bequeathed the whole of his property to Ganga, directing her to maintain herself from the *yajman vritti*. Ganga had a sister Tapi by name. She and her husband Ichhashankar began to live with Ganga and the *yajman vritti* was looked after to by Ichhashankar on behalf of Ganga. Ganga died on the 15th July 1898. A week after her death the Kasba *tad* of the Kachhia Kunbis appointed Ichhashankar as their "gor" (priest) and passed a formal document appointing him and repudiating Ghelabhai. Thereupon, in 1899, Ghelabhai sued Tapi, Ichhashankar and their son Umedram and obtained a declaration that he (Ghelabhai) as the heir of Ganga and Ambaram was entitled to the *yajman vritti* of the *tad* in question. At the date of these proceedings Ghelabhai was the sole surviving male member in Anandram's branch of the family.

In the year 1904, there were marriages of a son and a daughter of Hargowan Ramji (defendant No. 1), who was a patron in Ambaram's share. Those marriages were performed by Ichha-

shankar's sons; and they received the fees which were payable to them as *kul gors* (family priests).

In 1905, the plaintiff Ghelabhai commenced the present suit against Hargowan (defendant No. 1) and Ichhashankar's sons (defendants Nos. 2-4) to recover from them the amount of Rs. 16-14-0, the damages which he suffered on account of the aforesaid two marriages having been performed by defendants Nos. 2-4. The defendants contended *inter alia* that the suit being one in respect of *yajman vritti* its cognizance by the Civil Court was barred under section 21 of Bombay Regulation II of 1827.

The Subordinate Judge held that the suit was barred by section 20, clause 1 of Bombay Regulation II of 1827, as the question whether the plaintiff was or was not the *kul gor* was a caste question. He, therefore, dismissed the suit as against the defendant No. 1. But as regards the remaining defendants, he was of opinion that as between them and the plaintiff the question was *res judicata* on account of the litigation of 1899. He therefore decreed the plaintiff's claim as against those defendants and made them liable to pay Rs. 16-14-0 as damages to the plaintiff.

There were two appeals against this decree. The one was preferred by Ghelabhai (the plaintiff) who sought to make the defendant No. 1 amenable to his claim. The other was preferred by the defendants Nos. 2-4 who contended that the decree was wrongly passed against them.

The District Judge dismissed the plaintiff's appeal; and allowed the appeal by the defendants Nos. 2-5, holding that the question involved in the suit was a caste question and that the litigation of the year 1899 did not operate as *res judicata* to the present suit. The following were his grounds :—

"Is the question in suit, *viz.*, the appointment of a *gor* or priest, a caste question within the meaning of section 21 of Bombay Regulation II of 1827? This section, there is little doubt, is an affirmation of the ordinary policy of the British Government in India of non-interference in religious and social matters. The "tad" *gor* is as integral a post of the "tad" organization as the "tad" patel or panch; the *gor's* appointment as shown is the very basis of plaintiff's non-title, *viz.*, the deed of

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appointment of his ancestor at the expense of his predecessor, Bai Panba, has been, as one would expect it to be, peculiarly a caste matter. Applying the test laid down by Sargent, C. J., in *Murari* v. *Suba* (Indian Law Reports, 6 Bom. 725) and by Farran, J., in *Lalji* v. *Walji* (Indian Law Reports, 19 Bom. 517), would the taking cognizance of the matter be an interference with the autonomy of the caste, the answer must be clearly in the affirmative. The *tad* is the best judge of the fitness of its *gors*, and the law precludes the Courts from judging the goodness or badness of the reasons of the *tad* for its appointment, which is essentially a matter of its internal economy and governance. *Jethabhai* v. *Chapsey* (11 Bom. L. R. 1014).

If the question in suit is viewed in its contractual aspect, the result is the same. Firstly, the plaintiff's ancestor was appointed by the *tad* as their hereditary priest and the plaintiff, therefore, is the hereditary priest of the "tad". But at the very time that the *tad* appointed the plaintiff's ancestor they depose his predecessor. Therefore, secondly, the hereditary priest is removable from his office by the *tad*, which has never abrogated its power in this respect. Thirdly, the plaintiff has been so removed by the *tad* from his appointment. Therefore, his right to officiate ceases and no cause of action remained, and no tort has been caused to him by the action of the first defendant in employing the other defendant or by the action of the latter from officiating. The first issue in appeal as to jurisdiction must be answered in the defendant's favour and the suit held barred under section 21 of Bombay Regulation II of 1827 against all the defendants. No other conclusion is possible except on the hypothesis that the *tad*, having once appointed a hereditary priest, have abrogated their right to remove him and his descendants and have given to him and his descendants a right in perpetuity of levying fees from all the persons of the *tad*. Such a legal proposition, I do not hesitate to affirm, is not less repugnant to Hindu notions of the priest or any other caste officer being a servant and not a master of the caste than to English notions of liberty and of liberty of contract. The Hindu hereditary office is, as a general rule, hereditary as between the members of the family and in the absence of interference from the body which appoints and pays; but this hereditary office, however customary, because of the actual small and occasional interference of the appointing authority, has never in the Hindu theory of law been allowed to encroach upon the theoretical power of the appointing authority to depose and to replace; and it would be an extremely one-sided and inequitable application of the English notion of property and one opposed to the practice of the Indian Courts to take away such authority and to impose a perpetual irremovable officer and a perpetual tax."

The plaintiff appealed to the High Court.

*L. A. Shah* for the appellant.

*Coyaji*, with *D. A. Khare* and *N. K. Mehta*, for the respondents.

The following authorities were cited in arguments:—West and Buhler's Hindu Law, pp. 174, 411 (3rd Edn.); Smriti

Chandrika (Kristnaswami Iyer's Translation), p. 98; Colebrooke's Digest, Book II, Chapter IV, pp. 442, 443; Book V, Chapter II, p. 251, pl. 92; Book III, Chapter II, p. 53, pl. 6; Yajnyavalkya, verse 318; *Maharana Fatesangji* v. *Desai Kallianrayaji*[1]; *The Government of Bombay* v. *Gosvami Shri Girdharlalji*[2]; *Krishnabhat Hiragange* v. *Kapabhat Mahalbhat*[3]; *Balvantrav T. Bapaji* v. *Purshotam Sidheshvar*[4]; and *The Collector of Thana* v. *Hari Sitaram*[5].

CHANDAVARKAR, J.:—The suit, out of which this second appeal arises, was brought by the appellant to establish his right "as hereditary priest of the Kachhia Kunbis of the Kasba section of Surat to officiate as family priest in the family of defendant No. 1". He alleged in his plaint that, from the time of the ancestors of defendant No. 1, his ancestors had continued to be their family priests and that the defendant and his ancestors had continued to recognise his own ancestors as their hereditary priests. The claim was thus one known to Hindu law as that of *yajman vritti*, of which the learned editors of West and Buhler's Digest on Hindu Law say (p. 411, 3rd Edn.): "The right to the fees and offerings thus becoming due from particular families or classes is regarded as a family estate...a subject for inheritance and partition like other sources of income."

The lower Courts, however, have negatived the appellant's claim on the ground that it involves a caste question. Their reason for so holding is shortly this. They find that the caste, to which the parties belong, had originally appointed one of the appellant's ancestors as "the hereditary priest" of the caste, and that on that account "the hereditary priest is removeable from his office" by the caste. The learned District Judge thinks that, where a caste has conferred a hereditary office of this character, it has the right to take it away, and that the contrary proposition is "no less repugnant to Hindu notions of the priest or any other caste officer being a servant and not a

(1) (1873) 10 Bom. H. C. R. 231.
(2) (1872) 9 Bom. H. C. R. 222.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 137.
(4) (1872) 9 Bom. H. C. R. 99.
(5) (1882) 6 Bom. 546.

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master of the caste than to English notions of liberty and of liberty of contract." This view of the law ignores the nature of the right which is in dispute in the present case.

"English notions of liberty and of liberty of contract" are out of place in a case arising under Hindu law and custom, which from of old has recognised a kind of estate termed *yajman vritti* and ranked it among hereditary rights of immoveable property. Where a caste has appointed a man to a mere priestly office, there is doubtless no right of property conferred. His continuance or removal is exclusively within the competence of the caste and it is a caste question. But it is different where the office of hereditary priest is created for the performance of religious ceremonies in certain families, provided, according to Hindu law, either the caste or the families, have power to create such an office and give it the character of immoveable property.

In *Krishnabhat Hiragange* v. *Kapabhat Mahalbhat*[1] it was said by Couch, C. J.: "In Elberling on Inheritance, section 206, it is said that the right of performing the religious ceremonies of certain classes of people as Purohit, is by custom considered analogous to real property; and in 2 Strange H. L. 363, Mr. Colebrooke says, that if an office in a family be hereditary, the dues or profits appertaining to it must be subject to be shared; but in such case it classes with immoveables. And it would seem that the classing hereditary offices with immoveable property in section 1 of Regulation V of 1827 was in consequence of the custom amongst Hindus to consider them as such." Gibbs, J., in the same case, pointed out on the authority of Mr. Justice Strange, of Colebrooke, and of Elberling, that the office of hereditary priest is "*vritti*, the same as *nibandha*, hereditary, and, therefore, treated as immoveable" in Hindu law; and that "by custom these offices are considered analogous to real property."

That decision of a Division Bench of this Court was considered and upheld by a Full Bench in *Balvantrav T. Bapaji* v. *Purshotam Sidheshvar*[2].

(1) (1869) 6 Bom. H. C. R. A. C. J. 137. (2) (1872) 9 Bom. H. C. R. 99.

The question, however, remains whether such an office, being in the nature of that class of immoveable property which is regarded as *nibandha* by Hindu lawyers, can be created except by a grant from the King. That question would appear to have been raised before, but was not decided by a Full Bench of this Court, in *The Collector of Thana* v. *Hari Sitaram*[1]. The Full Bench said (p. 559 of the report): "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."

The question arises because of a certain gloss of Vijnaneshwara in the Mitakshara on a *smriti* of Yajnyavalkya, which is translated into English at p. 555 of the report of the said Full Bench case. The *smriti* prescribes the mode in which the King must make grants of land or corrody (*nibandha*), if they are to be legal. Vijnaneshwara's gloss explains the meaning of *nibandha* and he then adds: "This," *i. e.*, the *smriti* in question, "indicates that a King alone can grant land or *nibandha*, not the governor of a town or province:" (the Mitakshara, Moghe's 3rd Edn., p. 94).

Vijnaneshwara in this gloss was merely contrasting the power of the King with that of his deputy, not with the power of any subject of the King to carve out of his private estate any immoveable property in the nature of *nibandha* by agreement or custom. Nilakantha in his Vyavahara Mayukha defines *nibandha* "(corrody) as what is given by the King, &c., out of the produce of a mine and the like": (Mandlik's Hindu Law, p. 19). This would show that, in Nilakantha's opinion, it is not the King only who can make a grant of *nibandha*. That seems to be also the view of the Smriti Chandrika (T. Kristnaswamy Iyer's 2nd Edn., p. 98, para. 18).

(1) (1882) 6 Bom. 546.

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However that be, the office of hereditary priest with reference to a locality, community, caste, or family, is a creature of custom, according to Hindu law, not the result of a grant. There is no authority, so far as we are aware, for the proposition that to be valid and legal it must have had its origin in a grant from the King. In his Digest, Vol. I, p. 377 (3rd Edn.), Colebrooke cites certain texts and the glosses of commentators which bear on this subject. The texts divide "officiating priest" into three classes, of which the first is "an hereditary priest." This class, it is further pointed out there, arises not in virtue of agreement, but from custom. "It is the custom that he, whom the father called to all solemn rites, should officiate also for the son"; and "here proof must be brought from practice." At p. 377 we read: "On this subject it is said the usage is ascertained as implied by this text: thus by saying 'Be my priest (or *purohita*)', he is fully appointed to be priest *of the family* for a long space of time; and whatever be implied, the priest so appointed by the father shall not be forsaken by the son, unless he be guilty of some offence. This, virtually, is the sense *of the text*." Further on it is said: "If the sacrifice have been uninterruptedly performed by father and son, as family priest, without an express appointment in this form: 'Be my family priest,' what is the consequence? Even in this case, the law concerning hereditary priests is apposite, since such an appointment of father and son is admitted by implication."

It follows from these texts and commentaries cited by Colebrooke that the office of hereditary priest, where it is held in relation to a family, owes its origin, continuance, and binding character, to custom, not to a grant or agreement. And that conclusion was adopted by this Court in *Krishnabhat Hiragange* v. *Kapabhat Mahalbhat*[1].

In the present case it is found by the Courts below that the hereditary office of family priest was vested in the plaintiff's family by the caste to which the parties belong about 150 years ago and that the plaintiff's family has held the office with

(1) (1869) 6 Bom. H. C. R. A. C. J. 137.

reference to the defendant's family during that period. The lower appellate Court has, however, held that the plaintiff's claim raises a caste question which is outside the jurisdiction of a Civil Court. That view of the claim gives the go-by to the essential nature of the office and the right attached to it by custom. If the office is one of hereditary family priest, the mere fact that in any individual case it had been created originally by the caste for the purposes of families belonging to it cannot affect it, because the office carried with it a hereditary right in the nature of property, and the incumbent could not be deprived of it by anyone, unless he had become a *patita* (outcaste) or had declined to officiate. The caste in such a case made the selection for the families of its members; and when any family accepted the officiator as its hereditary family priest, custom annexed to the office certain incidents in the nature of civil rights as against the family, which neither the family nor the caste has power to annul except on the ground of some offence under the Hindu law committed by the officiator, or of refusal by the officiator to discharge his duty as family priest.

This conclusion is supported by the result of the litigation between the ancestors of the parties to the present suit, once in 1818 and the second time in 1834. In the litigation of 1818 the Court consulted a Shastri and his opinion was as follows (see Exhibit 93): "If there be 13 *tads* in a caste, and if each *tad* has its separate hereditary priest, the men of the *tad*, even if they wish, have no right to remove that priest, so long as he has not become *patita* (fallen from virtue, an outcaste), neither can he be removed by the men of the 13 *tads*." The Court, acting on that reply, decided in favour of the present plaintiff's ancestor's right as hereditary priest. To the same effect was the decision in 1834. That was by the Sudder Divani Adalut in Special Appeal No. 608 of 1834 (see Exhibit 49). That decision also was arrived at after consulting a Shastri. Reference can also be made to the case of *Ramasawami Aiyan* v. *Venkata Achari*[1] and to the practice on this side of

[1] (1863) 9 M. I. A. 343 at pp. 374, 384.

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India indicated in the case of *Dinanath Abaji* v. *Sadashiv Hari Madhave*[1].

We may point out that any other view would be disastrous to Hindu society as it is constituted. Hereditary priesthood vested in particular families is regarded as *vritti* or immoveable property which is the source of their maintenance. Such families have for generations lived on these *vrittis* ; and to turn them adrift now on the ground that their castes can take away their hereditary rights would be not only contrary to the nature of the right, created by custom, but it would amount to spoliation. It is virtually telling these hereditary priests that they must hereafter live on some other property than that on which they have lived as their *vatan*, so to say, for generations, and that their ancestors were badly advised in turning their families into an hereditary priesthood for their maintenance in reliance on their castes. To the enlightened sentiment of the present day it does indeed seem unfair and oppressive that a man should be compelled by law to receive religious ministrations from another person who is not of his choice, and that simply because that has been the course of the relations of the families of both for generations on the ground of hereditary rights. But if a Hindu wishes to remain a Hindu and have the benefit of his religion, he must take its burden also, when that burden is annexed to the benefit by Hindu law on the ground of custom.

The plaintiff's family have been found in this case to have officiated as hereditary priests of defendant's family for at least one hundred and fifty years. According to Hindu law, long enjoyment of property—either for one hundred years or from grandfather to grandson—is conclusive evidence of a legal right when its origin cannot be ascertained (see Mitakshara, Moghe's 3rd Edn., pp. 128 and 129). Here the hereditary office concerned is immoveable property, according to Hindu law. The plaintiff is, therefore, entitled to succeed.

The decree is reversed and the claim awarded with costs throughout on the respondents.

*Decree reversed.*

R. R.

(1) (1878) 3 Bom. 9.