

*Special Appeal No. 604 of 1864.*

AMRITRA'V P. KOKDI' and others ..... *Appellants.*

MA'NA'JI J. JAGTA'P and others ..... *Respondents.*

*Possession of immoveable property—Burden of proof—Reg. V. of 1827, Sec. 1, cl. 1—Application for Review—Discovery of new evidence—Civ. Proc. Code, Sec. 376.*

The plaintiffs' ancestors having been declared by a decree of the Peshwa's Government in A. D. 1722 to be entitled to the whole of the *Patilki watan* of Pánderaí; and the defendants having produced a *watanpatra* from the Rájá of Sátará in A. D. 1742 in favour of their claim to a half-share, but being unable to show that their ancestors had any concern with the *watan* for a period of 96 years subsequent thereto—during which the plaintiffs' ancestors were recognised as the sole owners:—

*Held* that the District Judge did not act contrary to law in throwing upon the defendants the burden of proving possession as proprietors for more than 30 years without interruption before the institution of the suit.

A rule to show cause why the decree of the High Court should not be reviewed, on the ground of the discovery of new evidence, was discharged; as the applicants failed to show that the document brought forward was admissible as evidence, and that it was not within their knowledge, or could not be adduced by them at the time when such decree was passed.

THIS was a special appeal from the decision of F. D. Melvill, Officiating Judge of the Puná District, in Appeal Suit No. 112 of 1863, confirming the decree of Chinto Vásudev, Munsif of Pátas.

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The Original Suit was brought on the 10th of September 1861 by the Jagtáps: alleging that they were the owners of the whole of the *Patilki watan* of Pánderaí, in the Purandhar Taluká of the Puná District, the management of which had been continued to them from early times down to the Fasí year 1270 (A. D. 1860), when the defendants, the Kokdís, claimed to be entitled to half the profits, and appointed one of their own family to conduct the office of *Pátíl* of half the *watan*, which he did since then; and praying that they may be declared to be the exclusive owners of the *Pátilki watan*.

The following judgment was recorded in the District Court:—

“This action was instituted by the Jagtáps against the Kokdís, to establish their rights to the whole of the *Pátilki watan* of Pánderaí. \* \* \*

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“The Pátas Munsif considered that the plaintiffs had established their right to the whole of the watan ; and awarded the claim.

“The defendants have appealed on the following grounds :—(1) The decree is opposed to evidence ; (2) it is opposed to the decree No. 23 ; (3) certain documentary evidence should have been received. This last ground of appeal has apparently been waived by the appellants, as they have in no way alluded to it.

“The points at issue are :—(1) Have the plaintiffs proved that they were at any time entitled to the whole of the watan ; (2) if so, have the defendants proved 30 years' adverse possession.

“The plaintiffs have produced a decree (No. 4) passed by the Peshwá's Government, in A. D. 1722, in which they were declared to be the sole owners of the watan, to the exclusion of the Kokdís. They have also produced a great number of documents, bearing date in the 17th and 18th centuries, in which constant allusion is made to their exclusive right, in opposition to the Kokdís. To disprove the inference that would naturally be drawn from them, the defendants have produced a decree (No. 23), in which they are declared entitled to a moiety of the watan, and bearing date 1742 ; and a document (No. 125) bearing date 1743, in which orders were given that the terms of the decree were to be adhered to. With reference to this the plaintiffs admit that such a decree was passed ; but urge that it was fraudulent and that this was recognised afterwards by the Government. \*

\* NOTE.—The decree No. 23 is as follows :—“*Watanpatra* from Rájá Sháhu Chhatrapati to Sultánjí Sukhají and others, Kokdí Mukádam Pátíl of Pándarái, written on Shrávan Shuddha 5, Sunday, in the 69th year of the Era of Shiváji, to wit : There had been a long-standing dispute between you and the Jagtáp, and, therefore, you came before the Rájá last year, and stated as follows: that the Pátílkí watan of Pándarái belonged to you as your own property ; and that you had

appointed, the Jagtáp to manage the watan as your agent ; that the Jagtáp subsequently claimed the watan, and enjoyed it in the absence of your father ; that the dispute was afterwards decided in favour of the Jagtáp, and you were compelled to give up in writing all your claims to the Jagtáp : whereupon you left the country and remained in exile, and on your return requested the Rájá to decide the matter again, as the former decision was wrong, and requested us to peruse all the rázinámás by the par-

Many of the documents produced by them have reference to the fact of such a decree having been passed and to its being null and void. The defendants have produced no document bearing date between 1743 and 1839. There is nothing to show that they had any concern in the watan during that period of 96 years ; whereas on the contrary the documentary evidence for the plaintiffs prove that they were during that period recognised as the sole owners. It is clear that no oral evidence can prove what were the rights of the parties during the last century. I consider it established, then, that the plaintiffs were at one time,—that is, at the end of the last century,—entitled to the whole of the watan.

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“The *onus probandi* on the second point at issue is, of course, on the defendants. The earliest of the documents filed by them, which have any reference to this part of the case, bears date 1839,—that is, only 21 years before the institution of the suit. There is no doubt that since that time their names have been entered jointly with the plaintiffs. All the oral evidence is in favour of the defendants ; but on the face of the documentary evidence I cannot consider that it proves the fact of 30 years’ possession. The most important witness is one for the plaintiffs (No. 52), who states that the watan was attached by Government, who have from the

ties, in which they agree to settle the dispute amicably by the Jagtáp taking only one half-share, and the Kokdi taking the other half-share of the Pátílkí watan. The Rájá has perused the three rázinámás, and is of opinion that the whole Pátílkí watan at one time belonged to the Kokdi, but it was enjoyed by the Jagtáp for a long period ; and it is hereby ordered that half the watan be given to the Jagtáp, and that the other half be enjoyed by the Kokdi, as agreed to between the parties in the rázinámás ; and all the other documents, which may be in the possession of the parties, should be considered as cancelled.”

On this the plaintiffs observe :—  
“The ancestors of the defendants having obtained this *watanpatra* by improper means from the Mahárájá, our ancestors obtained a

letter from the Peshwá, from which, and from others which followed, it appears that the contention of the defendants is not true, and the management (*vahivút*) has never been in accordance with it.”

The letter (Ex. No. 34) from Báláji Bájiráo Peshwá to Mudhojí Jagtáp and others is as follows :—“Your letter has been received. The dispute about the watan has been already decided by the Rájá. And, notwithstanding that decision, the Kokdi have now renewed the dispute, by taking Sachiv Pant on their side ; but you need not fear on that account. We have written much to Sadobá and Dádobá, who will suspend the sealing and execution of the documents by the Rájá until we come to Sátará and procure the release of Sambháji Jagtáp, now imprisoned by the Sachiv.”—Ed.

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year 1833 appointed one or more from each family to conduct the Pátílkí duties. The watan was, it appears, attached in consequence of disputes between the two families. The plaintiffs have admitted the accuracy of that date (*vide* exhibit No. 36); but that only shows about 28 years' possession on the defendants' part. It is difficult to understand how the defendants have not been able to produce any documentary evidence to prove their 30 years' possession, if such has been the case. And as they have not done so, I must, as I have already observed, refuse to consider the fact proved by the oral evidence alone.

"My finding on the points at issue is: (1) that the plaintiffs have proved that they were at one time entitled to the whole of the watan; (2) that the defendants have failed to prove 30 years' possession. \* \*"

"I confirm the decree of the Munsif: costs on the appellants."

The *spécial* appeal came on for hearing on the 21st of December 1864 before COUCH and WARDEN, JJ.

*Vishvánáth N. Mandlik* for the appellants.—Exhibit No. 23 being the last decree between the ancestors of the parties produced, the Judge was wrong in presuming it to be tainted with fraud. There was no proof that it had actually been obtained by fraud, or that it was formally set aside by any subsequent decree. The burden of proving 30 years' adverse possession was improperly thrown upon the defendants.

*Reid* (with him *Shántarám Náráyan*) for the respondents.—Having found that the plaintiffs' ancestors were at one time declared to be the exclusive owners of the watan, and were recognised as such in the documents for a period of 96 years; and that the defendants had failed to show that their ancestors had any concern with the watan during that period, or that the *watanpatra*, No. 23, produced by them had ever been acted upon; the Judge was justified in requiring the defendants to prove possession as proprietors for a period

of 30 years preceding the suit, under Reg. V. of 1827,  
Sec. 1, cl. 1.

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COUCH, J.—In this case the Judge below laid down two points for decision ; and put upon the plaintiffs the burden of proving the 1st issue, namely, that they were at one time entitled to the whole of the watan. And this the plaintiffs proved by the production of the decree of 1722 (Exhibit No. 4), and by showing an adverse possession by their ancestors for a period of 96 years (from 1743 to 1839), during which they were recognised in the documents as the sole owners of the watan ; and that was after the decree (Exhibit No. 23) in favour of the defendants' ancestors for a half share had been passed in 1742.

Now, it is contended on behalf of the defendants (the special appellants in this Court) that, Exhibit No. 23 being the last decree between the ancestors of the parties that has been produced in the case, it should be shown either that it had actually been obtained by fraud and consequently treated as null and void, or that it was formally set aside by some subsequent decree. The Judge says that many of the documents produced by the plaintiffs have reference to such a document having been passed, and to its being null and void ; and as he found no reliable evidence adduced by the defendants to show that the decree had ever been acted upon, he was justified in presuming, after such a lapse of time, either that it had been formally set aside, or that it had been abandoned as a decree that could not be maintained.

The plaintiffs having succeeded in establishing the first issue, the Judge did not, we think, act contrary to law in throwing upon the defendants the burden of proving possession as proprietors for more than 30 years ; as otherwise the plaintiffs were entitled to the judgment of the Court on the first issue.

We, therefore, affirm the Judge's decree.

*Decree affirmed.*

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*Dallas*, on the 25th of March 1865, obtained a *Rule nisi*: calling upon the respondents to show cause why this decree should not be reviewed, on the ground of the discovery of fresh evidence—a paper which had been produced before the Inám Commissioner, and which related to the management of the watan by the appellants.

*Reid* now (Dec. 6) appeared to show cause.—We have had no opportunity of seeing the new evidence. The document should have been filed in Court and translated. It must also be shown that the document was not within the applicants' knowledge, or could not have been adduced by them when the decree of this Court was passed.

*Hayllar*, in support of the Rule:—The document now produced purports to be a copy of an original agreement between the Collector and the Kokdis in A. D. 1828-9,—that is, within the period of 96 years, during which the Judge found that there was nothing to show that the defendants had any concern with the watan.

*It was ordered* by the Court that the deposition of the applicants' Muktyár should be taken before the Registrar; and on the same being read in Court it appeared that the document produced was not even a correct copy to the knowledge of the deponent, and that the absence of the original was not accounted for; and also that the deponent, who had been managing the defendants' case from the first, was aware of the existence of the paper now produced when the suit was tried by the Munsif, but that he did not search for it then, and that it was found amongst his papers after the decree of the High Court had been passed by the kárkún who copied it some years before.

PER CURIAM:—*Rule discharged.*