

salary; and even were it otherwise, we cannot apportion the payment, or any part of it, and say that it was made in return for service, and not in consideration of the defendant giving up the will or foregoing his pretended legacy. If anything be due to the defendant for work and labour done, he may be entitled to sue for it, but he cannot retain on this account money which he has obtained partly, if not wholly, by fraud.

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*Decree reversed.*

*Regular Appeal No. 40 of 1870.*

August 9.

RANGOBA' NA'IK bin RA'GHOBA' ..... *Appellant.*  
THE COLLECTOR OF RATNA'GIRI' ..... *Respondent.*

Deshmukh, "usual services" of—Act XI. of 1843. Sec. 2—Limitation—  
Act XIV. of 1859, cl. 12 & 16.

By Sec. 2 of Act XI. of 1843 hereditary officers are bound to "render the usual services of their respective offices, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Government."

*Semble*, that the "usual services" of a Deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mámlatdár or Mahálkari; and that the Deshmukh is bound to perform or get performed so much writing business as is necessary for the above purposes, and no more. But if by reason of the subdivision of his táluká his duties in that respect are increased, he is bound either personally to perform such increased duties, or to provide a Kárkun or Kárkuns to perform them for him.

Where a Collector in the year 1854 employed certain Kárkuns to assist a Deshmukh in the performance of his duty, deducting the amount of their pay from the *deshmukhi watan*, but failed to show that the employment of such Kárkuns was necessary, *it was held* that the Deshmukh was entitled to recover the amount so deducted from his *watan*; that his cause of action was not barred in 1870, for that a new cause of action in respect of such deductions accrued each year in which the deduction was made, and that six years' arrears of such deductions could be recovered under Sec. 1., cl. 16, of Act XIV. of 1859.

THIS was a regular appeal from the decision of A. Lyon, Acting District Judge at Ratnágiri, in Original Suit No. 77 of 1869.

The appeal was argued before MELVILL and KEMBALL, JJ.

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*Latham* (with him *Shivshankar Govindrám*) for the appellant.

*Mayhew* (with him *Dhirajlal Mathurádas*, Government Pleader) for the respondent.

The facts of the case sufficiently appear from the judgment of the court, delivered by—

MELVILL, J. :—This case presents a fair specimen of the manner in which the defence of suits against Government in the Mofussil is ordinarily conducted.

The mode of defence is almost invariably as follows :—A suit being brought against a Collector on account of some revenue exaction, or some payment withheld, the Collector puts in a written statement in which he commences by pleading the Statute of Limitations, whether or not there is the smallest ground for such a plea. He then proceeds to say that the suit is barred by Act XVIII. of 1850, which is an Act for the greater protection of Magistrates and others acting judicially. Then follows a justification of the act complained of, by a reference to certain sections of Regulations and Acts which, as often as not, have nothing to do with the matter in question. After the settlement of issues, the Collector obtains as many adjournments as the court is disposed to grant, and finally, having put in little or no evidence, he leaves the court to arrive at the best decision it can, with the aid of such books of reference as the Judge can lay his hands on, and such knowledge of the details of revenue administration as he may have acquired in the course of his own service as a revenue officer.

In the present case we have the usual plea of limitation, for which there is rather better ground than there ordinarily is; the plea of protection by Act XVIII. of 1850, which is simply absurd, and has of course been abandoned; a justification of the act complained of, by a reference to Sec. 4 of Act XI. of 1843, which is so utterly inapplicable that the learned Legal Remembrancer supposes it to have been quoted by mistake; and the usual omission to put in any evidence

which could in any way assist the court in arriving at a decision.

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The suit is brought by a *Sar Desái* or *Sar Deshmukh* (the terms are interchangeable) to recover from the Collector of Ratnágiri certain sums deducted from the proceeds of the *watan* during the years 1857-58 to 1868-69, and expended by the Collector in payment of two Kárkuns, who were employed without the plaintiff's consent. The plaint states that three Kárkuns were so employed, but it appears from the statement of the plaintiff and one of his witnesses that he, or a member of his family, has all along acted as one of these Kárkuns, and received the salary: so that we have really only to deal with the money of which the plaintiff has been deprived by the employment of two Kárkuns. Two minor demands are stated in the plaint, but it is admitted that we are not called upon to decide on the merits of these claims, as no evidence has been offered that the plaintiff has sustained any loss in respect of them.

The material part of the defence is that the suit is barred by limitation, inasmuch as the two Kárkuns were first employed in 1854; and that the Collector had a right to entertain these Kárkuns to perform duties which the plaintiff either could not or would not perform.

As regards the question of limitation, I am of opinion that the case of *Ráji Manohar v. Desái Kalliánrái Hukmatrái (a)*, on which the District Judge relies, is not in point, and that the claim is not barred, so far at least as it relates to arrears accruing due during the six years preceding the institution of the suit. It is not, and never has been, disputed that the money which the Collector has diverted from the plaintiff's use forms part of the proceeds of the plaintiff's *watan*. The Collector in his written statement says that the Kárkuns were employed in 1854 because an extra establishment was required to assist in the introduction of the Revenue Survey; and exhibit No. 21 shows that this was the reason given at the time for entertaining the Kárkuns. It may

(a) 6 Bom. H. C. Rep., A. C. J. 56.

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be that, as the Collector says, the introduction of the Survey rendered it "urgently necessary" to appoint these Kárkuns in 1854, and he may have had a right to do so; but it does not follow that he had a right to retain their services after the Survey was completed. The plaintiff may have acquiesced while the necessity existed, but it does not follow that he is bound to do so if the necessity has ceased. He may have had no cause of action in 1854, or for some years after, but he may have a cause of action now. I think that the deduction made each year from the plaintiff's allowances must be considered as constituting a new cause of action, and, therefore, that the plaintiff is entitled to recover any such deductions made, without justification, within the period of limitation applicable to the case. Looking to the nature of the claim, I am inclined to think that it is rather a claim for money had and received for the use of the plaintiff, than for the recovery of an interest in immoveable property, and that, therefore, it falls within the provisions of cl. 16, and not cl. 12, of Sec. 1. of Act XIV. of 1859.

I proceed now to consider the merits of the case. The case put before us is that the villages of which the plaintiff is Deshmukh were originally included in one táluká, but that at some time before 1854 that táluká was divided into three. The duties of the plaintiff's office, it is said, require that he, or some person to represent him, should attend at every Mámлатdár's or Mahálkari's *kacheri*; and so long as there was only one Mámлатdár, the plaintiff, or a Kárkun on his behalf, performed this duty. When, in consequence of the division of the táluká, there were three *kacheris* instead of one, the plaintiff was told that he must appoint three Kárkuns instead of one, and on his refusal to do so the Collector made the appointment himself.

Now, if this statement of the case be strictly accurate, I think the Collector was justified in what he did. By Sec. 2 of Act XI. of 1843, hereditary officers are bound "to render the usual services of their respective offices, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Govern-

ment." If the usual service of a Deshmukh is to be constantly in attendance, and perform the business of writing, in the Mámílatdár's or Mahálkari's *kacheri*, then, when circumstances made it impossible for the plaintiff to perform the whole duty himself, he was bound to appoint a Kárkun to perform it in each *kacheri* in which it had to be performed. The plaintiff has no right to complain that his duties have been increased by the subdivision of the *táluká*. When the *watan* was granted to his family in consideration of the performance of duties of a particular kind, there was no undertaking that the quantity of service of that kind which he would be called upon to render should be invariable. Moreover, it may be presumed that the *táluká* was divided because it was too large to be efficiently supervised by a single officer: in which case the measure would tend to better administration, and to a consequent increase of revenue, of which the plaintiff, who is paid by a percentage on the revenue, would have the benefit. If he would not himself engage the establishment necessary to assist him in his duties, he cannot complain that the Collector assumed the responsibility of doing so. It is true that there is nothing in Act XI. of 1843 which directly authorises the Collector to do this; but the Act does authorise the Collector to fine an hereditary officer who does not perform his duty, and out of such fine he may pay persons to perform it; so that, to all intents and purposes, the law gives to the Collector the power to entertain such establishment as is necessary for the performance of the usual duties of a *watan*, if the *watandár* refuses to do so himself.

But the question still remains, what are the usual services of a Deshmukh? and was the employment of two extra Kárkuns, or one of them, necessary to enable the plaintiff to perform those services? On these points the Collector has offered no evidence and given no information; and yet it is upon these points that the whole case turns. It is not to be tolerated that Collectors should regard the *watans* of hereditary officers as a fund out of which they may employ as many Kárkuns as they please, and thus make the *watandárs* bear

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the cost of supplementing deficient establishments in Government offices. If the Collector take upon himself to spend any of the proceeds of a *watan*, he is bound to show that the money was spent in securing the performance of duties which the *watandár* was bound to perform.

I hardly find myself in a position to say what the duties of a Deshmukh are. Under the Maráthá government the Deshmukh and Deshpánde held respectively the same position in a pargañá which the Pátíl and Kulkarni occupied in a village. The Deshmukh was the chief police and revenue authority, and was responsible for the collection of the revenue. He occupied a position somewhat similar to that of our Mámлатdárs, and since the appointment of Mámлатdárs there would appear to be little occasion for the performance by the Deshmukh of any of his ancient functions. What functions have been substituted for them does not clearly appear. The duties of a Deshpánde have been defined with the most minute detail (Rev. Circular Orders, p. 268); but those of a Deshmukh do not appear ever to have been defined. The plaintiff has put in two exhibits, which have some bearing on the question. Exhibit No. 13 is an order by the Collector of Ratnágirí in 1841 to the effect that Deshmukhs were not to be required to appoint Kárkuns, because writing was not their business. Their duty, the Collector said, was to give information respecting the revenue, or other matters connected with the land, and to accompany the Mámлатdár when required to go out upon any investigation. Such, it was added, was the result of inquiries which had been made as to the custom. Exhibit No. 14 is a circular issued under the order of the Revenue Commissioner in 1847. It forbids the appointment of outsiders when there is any sharer in the *watan* who is competent, and it declares that Deshmukhs are not to be held incompetent because they cannot write, inasmuch as writing is not their business. I find in the Revenue Circular Orders (p. 275) a Government letter, No. 5318, dated 8th September 1848, which is to much the same effect; but this letter indicates that some reading and writing business was considered to devolve upon the Deshmukh, and

it is said that there is no objection to a Deshmukh or Deshpánđe employing Kárkuns if he require them. It appears from the plaintiff's own evidence in this case that previously to the division of the táluká he or some member of his family, or a Kárkun on his behalf, did perform some writing business in the Mámлатdár's *kacheri*; and since the division the plaintiff, or his relative, has performed the same duties at one of the Mahál *kacheris*. Mr. Wilson, in his Glossary of Indian terms, says : " Under the present administration the Deshmukh is a district revenue officer who is expected to superintend the cultivation, and report on the state of the crops, to assist in the settlement of the annual revenue, and to give general aid to the Collector and his establishment in the discharge of revenue duties." In a Government letter published at page 271 of the Revenue Circular Orders it is said in regard to Deshmukhs and Deshpánđes : " The institution of such *watans* must have had in view to provide a body of public servants, of a permanent character, who, from their constant residence and employment in their villages or districts, would acquire and perpetuate a knowledge of the minutest details." And again at page 275 : " The very object of these officers is that they should be the depositories of all local information respecting their districts." These last extracts agree with what the plaintiff says in his examination-in-chief by the defendant : " It is the duty of the Sar Desái to give information." From these scanty materials we may perhaps safely arrive at the conclusion that the " usual services" of a Deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mámлатdár or Mahálkari ; and that he is bound to perform or get performed so much writing business as is necessary for the above purpose, and no more. It certainly does not follow as a necessary consequence from this statement of his duties that he is bound to employ a Kárkun in every *kacheri* in his district. There would appear to be no physical impossibility in the plaintiff's performing all the duties personally or with the assistance of the single Kárkun whom he formerly employed. At any rate, as I have before remarked, it was

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for the Collector to show that the two extra Kárkuns, or one of them, were necessary to ensure the performance of the Deshmukh's usual services; and this he has not even attempted to show.

I would allow the claim to the extent of Rs. 216 per annum (the pay of two Kárkuns at Rs. 9 per mensem) for the six years preceding the institution of the suit. I would also allow interest at nine per cent., and costs in proportion.

KEMBALL, J. :—I concur.

*Decree accordingly.*

August 10.

*Regular Appeal No. 45 of 1870.*

RÚ'PCHAND HINDÚ'MAL.....*Appellant.*  
RAKHMÁ'BA'I .....*Respondent.*

*Hindú Law—Adoption by Widow—Consent of Kinsmen of Husband—  
Consent of person in whom Husband's Estate is vested.*

Although, as a general rule, the adoption by a Hindú widow of a son to her deceased husband is in the Maráthá Country good, without the consent of her husband's kinsmen, when the estate of her husband is vested in her or in her and her co-widow jointly, yet when such adoption has the effect of divesting an estate already vested in a third person, (*e. g.*) the widow of her husband's deceased brother, the consent of such third person would appear to be necessary to give validity to such an adoption.

*Rakhmábái v. Rákhábái (a) and The Collector of Madura v. Muttu Ramalinga Sathupathy (b) commented on and compared.*

THIS was an appeal from the decision of Madán Shríkrishnáji, First Class Subordinate Judge of Puná, in Original Suit No. 39 of 1869.

The plaintiff, Rúpchand Hindúmal, obtained a decree against one Badridás Anandráam, and attached certain immoveable property and 500 Rs. in cash in execution of that decree. The attachment, however, was raised on the application of the defendant, Rakhmábái, under Sec. 246 of the Civil Proceduro Code. The plaintiff thereupon brought this suit to establish the right of his judgment-debtor (Badridás)

(a) 5 Bom. H. C. Rep., A. C. J. 181.

(b) 12 Moo. Ind. App. 397; S. C. 10 Calc. W. Rep., P. C. 17.