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proceeding, wherein the Magistrate, upon the statements of the respective cases of the rival claimants, should make an order for delivery of property to the one which he considered had made out a *primâ facie* case. If the correctness of the Magistrate's decision be impugned, that may be done as in this case in a civil suit. That being so, it does not appear to me that it was incumbent upon the Magistrate to hear the applicant's witnesses, the effect of whose evidence and the alleged legal result therefrom he had heard already stated before him by the applicant's solicitor, and it is not competent to this Court to review the decision of the Magistrate, even if I were of opinion—which I am not—that he had come to a wrong conclusion as to the disposal of the property upon the statements before him of the cases of the respective claimants (*d*). For these reasons I think the rule must be discharged, and with costs.

(*d*) With regard to the correctness of the Magistrate's conclusion as to the disposal of the property, see the case of *Swan* v. *The N. British Australasian Company* (2 H. & C. 175) affirming the judgment of the Court of Exchequer (7 H. & N. 603).

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 24 *of* 1874.

June 14.

* SA'VITRIAVA' and another ... *Defendants and Appellants.*

ANANDRA'V; deceased; his sons and heirs, APA' SA'HEB and BA'BA' SA'HEB ... ... } *Plaintiffs and Respondents.*

Watan—Partition of watan—Cessation of duties attached to watan.

A cessation, (even though sanctioned by the Government,) of the performance of the duties attached to an impartible *watan*, does not alter the nature of the estate and make it partible.

THIS was an appeal from the decision of A. M. Cantem, 1st Class Subordinate Judge of Dharwar, in original suit No. 613 of 1866.

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The appeal was argued before WESTROPP, C.J., and LARPENT, J.

Ráv Sáheb Vishvanáth Nárávan Mandlik for the appellants.

Bahiravnáth Mangesh for the respondents.

The facts of the case, in so far as they are material for the purposes of this report, are stated in the judgment of the Court delivered by

WESTROPP, C.J. :—Mulápá, the last male who (before the second defendant) performed the duties of the four offices of Nadgavdá, Deshgat, Gavdá (*alias* Pátil), and Patanshetayuki of Narendra, and enjoyed the *watan* thereto appendant, died childless in A.D. 1830. The late plaintiff, Anandráv, who was the son of Dada Tumápá, one of Mulápá's four brothers, did not institute any suit to obtain a share of the *watan* until 1866, *i.e.*, a period of 36 years from the death of Mulápá. Sakravá, the elder widow of Mulápá, succeeded him, and managed the offices as well as the *watan* until A.D. 1846, when she, with the consent of the revenue authorities, made over the management to Sávitriavá, the junior widow of Mulápá, who continued to manage the offices and *watan* until 1856, in which year, in pursuance of her request made in 1854, Kumárgavdá, the second defendant, was substituted by the revenue authorities as *vahivátdár* of the offices and *watan*. He is the son of Venkawgavdá, who was the eldest son of Fakirápá, the brother of, and next in seniority to Mulápá. If, as the defendants contend, the *watan* be impartible and should follow in descent the law of primogeniture, Kumárgavdá is the next male heir of Mulápá. The plaintiff is in the enjoyment of three fields and a house as *potgi*, to which he succeeded on the death of his father Dada Jumápá in A.D. 1814 or 1815. That *potgi* is maintenance out of the family estate; other junior branches of the family are also in the enjoyment of *potgi*. In 1821 an attempt by suit against Mulápá made by Basápá, one of the brothers of Mulápá, failed. It was referred to arbitration, and the arbitrators in that year (see Exhibit 58), in rejecting his claim, stated that Basápá had been in the enjoyment of *potgi*, and was not entitled to more, the estate being in their opinion

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impartible, and proved to be so for several generations. The plaintiffs' acquiescence of 36 years in the exclusive possession, first of Sakravá, next of Sávitriavá, and, lastly, of Kumárgavdá, and remaining, throughout that time, content with his *potgi* inherited from his father, tells strongly in favour of the impartibility, according to custom, of the *watan*. The plaintiff (who was divided in food and residence from Mulápá and his family), evidently sensible that his acquiescence would, without some explanation, have that effect, relied upon Exhibit 54 (purporting to be dated as of the 20th May 1830) as such an explanation. But the Subordinate Judge has, for apparently good reasons, held it to be spurious and fabricated. His finding on that point has not been impeached by the plaintiff on this appeal, although he has attacked some of the other rulings of the Subordinate Judge. We, while adhering to our previously expressed view, (*a*) that clear and satisfactory evidence of a custom contrary to the ordinary rule of Hindu law is necessary for its establishment, are of opinion that the Subordinate Judge was right in finding that by family custom the *watan* was impartible, but we cannot agree in his decision that it has now become partible. We differ from him on that point, 1st because there is not any evidence that the duties of the four offices, or of any of them, are no longer performed by the *watandár*. The evidence is rather in the opposite direction. The revenue authorities appear to have recognized first the elder widow, next the junior widow, and, lastly, Kumárgavdá, as the officiator. But, even if the offices have become, as conjectured by the Subordinate Judge, sinecures, that circumstance would not render the *watan* appendant to them partible. There is not any authority for holding that a cessation of the performance of the duties of the office, even though sanctioned by Government, would alter the nature of the estates appendant to them (*b*). The decision

(*a*) See 7 Bom. H. C. Rep. A. C. J. 175, 10 Bom. H. C. Rep. 260.

(*b*) See *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*, L. R. Ind. App. P. C. 186, 191, published since this case was decided, and which supports the view here expressed. See also *Baboo Beer Pertab Sahee* v. *Maharajah Rajinder Pertab Sahee*, 12 Moo. Ind. App. 1.

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of the Subordinate Judge's predecessor, to which he refers, appears to have been appealed against. It has been stated at the bar by the appellants' pleader to have been reversed, but there is not any evidence on that point. We, therefore, do not know what was the result of that appeal, and, for aught that appears to the contrary, that case may have been decided in the Court of first instance for want of the evidence of custom which exists in this case.

Again, even if the merits of this case were with the plaintiffs, which in our opinion they are not, their suit is completely defective for want of parties. None of the junior members of the family (who would be co-parceners if the plaintiffs' case be true) have been made parties to it. Further, these junior branches are holders of *potgi;* and, unless their *potgi* as well as that of the plaintiff were brought into hotchpot, no proper partition could be made. The plaintiff has not even offered to bring his *potgi* into hotchpot.

It might be a question whether, in the case of so stale a claim as that of the plaintiff, we could properly allow him to amend his plaint at this stage by adding parties.

It is unnecessary to decide that question, as, for the reasons already given, he must fail on the merits.

We reverse the decree of the Subordinate Judge, and direct the plaintiffs to pay to the defendants the costs of the suit and of this appeal, and dismiss the plaintiffs' claim.

Decree accordingly.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Regular Appeal No. 6 of 1874.

June 15.

KRISHNARA'V.....*Plaintiff and Appellant.*

ANTA'JI VIRUPUKSHA .....*Defendant and Respondent.*

Act VII. of 1870, *Section* 11—*Additional stamp duty—Interest on decree.*

The Court Fees' Act (No. VII. of 1870), Section 11, is not applicable to interest accruing upon a decree in a suit which is neither for mesne profits nor for immoveable property, nor for an account, but simply an action for money lent.