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PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

[*On appeal from the High Court, Bombay.*]

ADRISHAPPA (*Original Defendant*), *Appellant v.* GURUSHIDAPPA (*Original Plaintiff*), *Respondent.* [3rd, 4th and 5th March, 1880.]

Deshghat vatan *held by desai—Presumption as to partibility—Custom—Burden of proof.*

In a suit for the partition of part of a *deshgat vatan*, brought by the younger brothers of a joint Hindu family against their eldest brother, the desai, the defence was that the *vatan* was held by him as an impartible inheritance, subject to a right by custom, that a brother should receive maintenance out of the income derived from it.

Held, that there was no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof, which was upon the desai, to show that the *vatan* had, contrary to the general Hindu law, been inherited by him alone.

It was for the desai to show, by evidence of the nature of the tenure of the *vatan*, that it was impartible, or to show, by evidence of family custom, or of district, *i.e.*, local custom, that impartibility attached to it, such evidence being strong enough to rebut the presumption of the prevalence of the general Hindu law.

Where the defendant in a suit for the partition of a *deshgat vatan* held the hereditary office of desai, and the *vatan* was property appertaining to the office, the decree for partition was accompanied by a declaration that it was made without prejudice to the right of the desai to any income, payable out of it, for the performance of his duties, to which he might be entitled under any law in force.

[R., 9 B. 198 (203); 27 B. 353 (357)=5 Bom. L.R. 408 (410)=7 C.W.N. 409=30 I.A. 77 (P.C.)=8 Sar. P. C. J. 453.]

APPEAL from a decree of the High Court of Bombay (28th July, 1875) reversing a decree of the Political Agent, Southern Maratha Country (11th March, 1874).

The parties to this suit, with Kadappa, one of the plaintiffs, who died after its institution, were the three sons of Gadgiappa, who died in 1836, having held, as part of a *deshgat vatan*, the village [495] of Konur, in the Belgaum Collectorate, in reference where to the question, whether it was or was not an impartible inheritance, was now raised. The rest of the *deshgat vatan* was situate in the territory of the Chief of Jamkhandi, and the whole formed, according to the appellant, a total *potgi* of about Rs. 6,819. From early times this *deshgat vatan* had been held, with the office of deshmukh or desai, in the family of the litigants. In 1771 it was resumed by Government, but in 1780 it was released, and granted, with certain *haks*, to Gurushidappa Nandirav, one of the ancestors of the family, by documents in evidence in this suit. On his death, in 1814, the *vatan* went to his only son Gadgiappa, who was treated by the ruling power as desai, and, on his death, to Adrishappa, the appellant, the eldest of Gadgiappa's three sons, who held it for many years in undisputed possession. It was reduced by the Inam Commissioner in 1856 to a life interest, but this fact did not affect the present question. In 1854, disputes

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having arisen among the brothers, a complaint was made by Adrishappa to the Chief of Jamkhandi, in whose dominions the great part of the *vatan* lands were situate, to the effect that his younger brothers demanded their shares in the *deshghat vatan*. The Chief in 1855 decided adversely to their claims, that they were only entitled to residence and maintenance, and not to equal shares with their elder brother. In March, 1860, however, on a reference to him by the Political Agent, Southern Maratha Country, the Chief gave another decision, *viz.*, that a partition of the entire *potgi* should be made between the three brothers. In November, 1860, the Political Agent, on application made by Gurushidappa and Kadappa, that this partition should be carried out, pointed out that the Chief of Jamkhandi had no authority to order a partition so far as regarded the village of Konur, in British territory; but he recommended, for the confirmation of Government, the rest of the decision—"providing for a division being made of the income arising within the dependency of Jamkhandi." This was confirmed by the Resolution of the Government of Bombay, dated 27th September, 1861; and as to the village Konur, in British territory, Gurushidappa and his brother Kadappa on the 30th December, 1861, brought the present suit against Adrishappa, who, being a third class sardar, was sued in the Court of the Political Agent. [496] They claimed two-thirds of village Konur, and of a house situate there, with a division of cattle and grain, and also mesne profits for six years. The defence was that the *deshghat vatan* had been continued to Adrishappa for services relating to the *deshghat*, and that he was entitled, as desai, alone to manage the whole *vatan*, taking the profits, the younger brothers being entitled only to maintenance.

On the 11th March, 1874, the suit for partition was dismissed by the Political Agent, an allowance of Rs. 250 *per annum* being ordered to be paid to Gurushidappa for his maintenance. The judgment—after referring to the evidence, consisting of the records of other cases and the replies of Chiefs and other persons to questions, the collection of which had extended over a long period—concluded as follows:—"From the above, and also from various other cases which might be quoted from other districts, there does not appear to have been one invariable rule regarding the partition of such *vatans*. Generally, in the times of former Native Governments, an equal or other partition of *deshghat vatans* appears to have been the exception and not the rule. Some of the desais were amongst the foremost of Maratha leaders, and it was probably not an object with the Governments of the day to weaken their influence by splitting up their ancestral properties. In some cases a junior member of a desai's family, by finding favour at Court, or by having more energy of character than the head of the family, might acquire a share; but more frequently the ancestral property appears to have remained intact in the possession of the head of the family, the junior members being assigned allowances for maintenance. The Court, therefore, does not consider that usage or custom would warrant a partition of the property claimed."

On appeal to the High Court the following judgment was given:—

"The main question for our consideration is a simple one, depending entirely on the appreciation of the evidence recorded in the case.

"There can be no doubt that, under the ordinary law of succession, the plaintiffs would have been entitled to ask for a [497] partition of the *vatan*, the principal subject-matter of this suit, and the point is whether the defendant has got rid, in this case, of the usual presumption of partibility. Some attempt has been made here, on behalf of the plaintiffs, to

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show that the *vatan* was really "*potgi*," and not *deshghat*, and thereby to do away with the effect of such evidence as the defendant has been able to produce, but we think there is no place for such a contention. The *vatan* was treated by both parties as *deshghat* in their pleadings, and was so treated throughout the suit.

"It is too well established to admit of argument that custom may override the usual law of inheritance; but, as observed by the Privy Council, 'it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence.'

"The Political Agent would appear, from the concluding portion of his judgment, to have rejected the plaintiffs' claim, because they had failed to show that it was the usage or custom to divide such *vatans*; but it is admitted here that the burden of proof of the usage or custom as to impartibility lay, not on them, but on the defendant. The point attempted to be made, is that there is a custom of primogeniture, not in this particular family, but in regard to desai *vatans* generally, in the Southern Maratha Country, and we are told; first, that, as the defendant is a sardar of the third class, we are bound by Reg. XXIX of 1827, s. 5, cl. 3, not to require as strict proof from him as would be necessary in a similar suit between ordinary individuals; and second, that if a general, though not invariable, custom in favour of impartibility of such property is made out, that is sufficient to warrant a deviation from the ordinary rules of inheritance. We think it unnecessary seriously to discuss the first proposition; we will, therefore, pass on to a consideration of the second. That there is no invariable custom of impartibility in respect of the *deshghat vatans*, the evidence shows beyond a doubt. Certain witnesses say that the custom is for the eldest to take the *vatans*, for the younger members to receive '*potgi*,' but certain others depose the other way; and can we, upon this, say that there is satisfactory [493] evidence of an uninterrupted general custom of primogeniture such as would warrant us in rejecting the plaintiff's claim? Much stress has been laid on the judgment of this Court in the case of *Shidojirav* v. *Naikojirav* (1), decided by Sir C. Sargent and Melvill, JJ.; but we do not see how that advances the defendant's case. The Judges there quoted with approval the following remarks of the Madras High Court (*vide* 3 Mad. H. C. Rep. 77):—'It must be satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the family, class, or district of country; and the course of practice upon which the custom rests, must not be left in doubt, but be proved with certainty.' Accepting that rule, is it possible to say that it has been fulfilled here? The Political Agent appears to have been guided, in a very large degree, by the published views of Government as to the impartible nature of *deshghat vatans*; but it is needless to say that, although such opinions are to be treated with every respect, they cannot be received as evidence either of or against a custom. We further readily admit that, politically, it would, perhaps, be better were such *vatans* impartible, but we cannot allow ourselves to be influenced by any such consideration. The burden of proof was on the defendant, and we cannot but hold that he has failed to rebut the presumption which,

(1) 10 B.H.C.R. 228.

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of necessity, arose. Since the institution of this suit one of the plaintiffs has died, and the survivor, the present appellant, claims now a right to his deceased co-plaintiff's share, and asks to have the two-thirds share decreed to him because there had been a previous partition of some of the family property, and the act of filing a suit together constituted a division as against the third. But we are not aware of any such authority for such a contention, and we must hold that, one of the co-sharers having died, the plaintiff is entitled only to a half of the ancestral property claimed by him.

We reverse the decree of the Political Agent, and award the plaintiff's claim to the extent of one-half. Costs to come out of the property in dispute."

[499] *Digby* and *Graham*, for the appellant.

Leith, Q. C., and *Mayne*, for the respondent.

For the appellant it was argued that the customary law of a class of land-owners, the *vatan* being attached to the ancient office of desai, was applicable, and not the general Hindu law. So that the presumption affecting ordinary questions of partition did not arise in the present case, in which evidence had been given sufficient to establish the impartibility of the *vatans*. Reference was made to *Ramalakshmi* v. *Sivanantha*(1), *Shidhojirav* v. *Naikojirav* (2), *Bisavntrav* v. *Mantappa*(3), *Vasudeo Sadashiv Modak* v. *Collector of Ratnagiri* (4).

For the respondent it was maintained that the Court of first instance having found that there was no invariable rule against the partition of a *deshgat vatan*, the High Court had rightly refused to allow effect to be given to what had not been proved to be "the established governing rule of the family, class, or district of country" : *Sivananja Perumal Sethurayer* v. *Muthu Ramılinga Sethurayer*(5). Reference was made to Steel's Law and Custom of Hindu Castes in the Dekhan Provinces (2nd Ed.), 229. Although, in their origin, *deshgat vatans* had been granted for actual service to be rendered, in the lapse of time many of them had become, to all intents and purposes, private property and hereditary. The *vatan* in question had thus become subject to the general condition of the Hindu law of property, including the presumption as to the right to partition belonging to the members of the family in which it had descended.

JUDGMENT.

At the conclusion of the arguments their Lordships' judgment was delivered by

Sir R. P. COLLIER.—In this case a suit was instituted by two younger brothers against their elder brother, all being members of a joint Hindu family whereby the younger brothers claimed two thirds of the *inam* village of Konur, which is admitted to be that part of a *deshgat vatan*, or property held as appertaining to the office of desai, which lies within what is, strictly speaking, [500] British territory ; the rest of the *vatan* being within the territory of the feudal Chief of Jamkhandi in the Southern Maratha Country. The elder brother insisted that, inasmuch as he held the office of desai, and this property belonged to his office, he was entitled to hold it as impartible, subject to the customary right of his brothers to receive allowances by way of maintenance. The action was brought in the year 1861 in the Court of the Political Agent, and, through a lamentable delay, as their Lordships cannot help thinking

(1) 14 M. I. A. 570. (2) 1 B.H.C.R. Apox. xlii. (3) 10 B.H.C.R. 228.
(4) 4 I. A. 119=2 B. 99. (5) 3 M.H.C. R. 75.

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it, of successive Political Agents, was not decided, in the first instance, until the year 1874. The effect of the decision of the Political Agent, whose judgment was for the defendant, may be stated to be this: that the property appertaining to a desaiship must be assumed, *prima facie*, to be impartible, and that sufficient evidence had not been given of its partibility. The judgment, on appeal, was reversed by the High Court, who laid down a different rule, or rather presumption, of law. The effect of the judgment of the High Court was, that there is no general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof in the manner which the Political Agent supposed; that in such cases the burden of proof is upon the desai, who seeks to show that the property devolves upon him alone, in contravention of the ordinary rule of succession, according to the Hindu law. The High Court further came to the conclusion that no sufficient evidence had been given, by the defendant, either of family custom, or of district custom, to prevent the operation of the ordinary rule of law whereby the property would be partible. The question in the cause, in a great measure, depends upon which of these two views of the law is right. Their Lordships are of opinion that the High Court was right; that there is no general presumption, as has been contended for on the part of the appellants, which shifts the burden of proof; and that it lies upon the defendant, who seeks to show that the estate is impartible, to give evidence of the special tenure of the *vatan*, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the general law. Their Lordships have also come to the conclusion that the High Court was right in the opinion which they formed, that the evidence given in this case was insufficient.

[501] The High Court intimate that the contention with respect to a family custom was abandoned in the argument before them, but, be that as it may, their Lordships are of opinion that no such family custom has been proved. A pedigree has been put in, whereby it appears that, as far back as the year 1780, the *vatan* which had been resumed at that time by the Native Government, was conferred on or restored to one Gurushidappa, but, inasmuch as Gurushidappa appears to have been an only son, that devolution of the property throws no light upon the question in dispute. From Gurushidappa it appears to have devolved, in 1814, upon his only son Gadgiappa. Subsequently, in 1836, the desaiship devolved upon Adrishappa, the present defendant. It would appear that his family, consisting of himself and his two brothers, remained joint until the year 1854, when, for the first time, a dispute arose, and the younger brothers claimed the shares which they claimed subsequently in this suit. It appears to their Lordships that this state of things throws very little right upon the controversy; it certainly does not support the contention of the defendant that he was entitled to the possession of the property, as impartible, giving his brothers only maintenance.

An official document has been put in, bearing date 1800, being an official account of certain desaiships then under sequestration by the Government, whereby it would appear that a sum of Rs. 150 *per annum*, payable out of the *vatan*, had been allotted to one Kadappa, who seems to have been a distant cousin of Gurushidappa. It further appears that that allowance has continued up to the present day to be enjoyed by a descendant of this Kadappa, and that a similar allowance is enjoyed by another member of the family, descended from a common ancestor with the parties to this cause. That circumstance, however, of itself and without

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further explanation does not appear to their Lordships sufficient to maintain the contention of the defendant. These two members of the family, who are said to be still living and to receive the allowances, might have been called, and they might, if the case of the defendant is correct, have shown the origin of their allowances, and possibly that there had been some previous custom in the family whereby the eldest son took the property, subject to allowances to his younger brothers, or to [502] other members of the family. Even such evidence, it may be remarked, if forthcoming, would presumably have related to a period anterior to the re-grant of the *vatan* to Gurushidappa in 1780. But, in the absence of any such evidence, their Lordships are not disposed to attach much weight to this mere entry in the account. Beyond that there is no evidence.

Their Lordships, therefore, are of opinion that the High Court was right in determining that there was no evidence, in this case, of family custom, one way or the other.

With respect to the custom of the district, although the evidence may show that tenures of this kind are more frequently impartible than partible, it is not, in their Lordships' opinion, of that conclusive character which is necessary to establish a general district custom. They are of opinion that the High Court was justified in finding that no sufficient evidence of such a district custom had been given.

Their Lordships may observe that in the year 1854, upon the brothers quarrelling, the case came before the Chieftain of Jamkhandi in respect of that part of the *vatan* which is in his territory. He, in the first instance, decided in favour of the defendant; but subsequently, some years after, upon receiving evidence, which he appears not to have done before, decided in favour of the plaintiffs. That decision, although it was subsequently set aside by the Secretary of State on the ground that, for the special reason stated in his despatch, the Chief had no jurisdiction in the matter, may be invoked by the plaintiffs as, at all events, some evidence in their favour.

On the whole, therefore, their Lordships have come to the conclusion that the High Court was right in the view which they took of the law and of the burden of proof, and of the proof itself, and that their decision *quoad* the partibility of this property should be confirmed.

A difficulty, which their Lordships have felt in the case, and to which the High Court have not adverted, is the following: The defendant held the hereditary office of desai, and the *vatan* is admittedly property appertaining to the office; and it appears to have been the policy of the Indian Government that desaiships [503] should be maintained, and that the desai himself should be enabled to perform the functions of his office, be they greater or less, properly and in a manner suitable to his position as a subordinate officer, and to some extent a representative of the Government. This policy has been recognized and enforced by various Acts of the Legislature, the latest being, apparently, Act No. III of 1874 of the Legislative Council of Bombay. The provisions of that statute seem to be in some degree retrospective.

Hence, although the decision of the High Court is in substance right, their Lordships think that it should be accompanied by a declaration that the decree is to be without prejudice to the defendant's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force. And, accordingly, they will humbly recommend to Her Majesty that such a declaration be

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added to the decree of the High Court; but that, subject thereto, the said decree be affirmed. They also direct that the costs of this appeal be taxed; that the amount of such costs, when taxed, be added to the costs of the cause, and paid with them out of the estate.

Solicitors for the appellant.—Messrs. *Ashurst, Morris, Crisp and Co.*

Solicitors for the respondent.—Messrs. *Ramsden and Austin.*

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APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Pinhey.

CHHAGANLAL NAGARDAS, (*Plaintiff*) *v.* JESHAN RAV DALSUKHRAM, (*Defendant*).* [23rd September, 1879.]

Jurisdiction—Personal property—Court of Small Causes—Suit by decree-holder.

A suit by a decree-holder to establish his right to attach and sell moveable property as belonging to his judgment-debtor, is not a suit for personal property within the meaning of s. 6 of Act XI of 1865, and a mofussil Court of Small Causes has no jurisdiction to entertain it, even though the value of the property be such as to fall within its pecuniary limit.

[Diss., 7 A. 152 (F.B.)=4 A.W.N. 349; F., 8 B. 259.]

THIS was a case stated by S.H. Phillpotts, Judge of Ahmedabad, under s. 527 of the Code of Civil Procedure.

[504] The plaintiff's deceased father obtained a decree in the Small Cause Court of Ahmedabad against one Jagjivan, and in execution thereof attached certain moveable property, valuing it at Rs. 60-5-3. The defendant Jeshan Rav intervened, alleging that the property had been sold to him, and the attachment was in consequence removed. The plaintiff thereupon brought the present suit, and presented his plaint in the Court of the Subordinate Judge (First Class) at Ahmedabad. The plaint was, however, returned by the Joint Subordinate Judge, who was of opinion that he had no jurisdiction. The plaintiff next presented his plaint to the Judge of the Court of Small Causes, who held that he had no jurisdiction. The plaintiff, therefore, went back to the First Class Subordinate Judge, but he refused to alter the previous decision of the Joint Subordinate Judge. An appeal was, therefore, made to the District Judge, who, in referring the case for the orders of the High Court, said: "I am of opinion that the Small Cause Court has jurisdiction, as I can conceive no reason for any difference being made between this and the converse case, and the High Court have decided in *Gordhan Prema* v. *Kasandas* (1) that the suit brought by a defeated claimant, under s. 283 of Act X of 1877, is cognizable by a Court of Small Causes."

There was no appearance in the High Court by either party.

JUDGMENT.

The judgment was delivered by—

MELVILL, J.—It has been decided by the Court, in *Nathu Ganesh* v. *Kalidas* (2) and *Gordhan Prema* v. *Kasandas*, (1) that whether under the old or the new Code, the suit of a claimant, whose property has been

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* Civil Reference, No. 12 of 1879.

(1) 3 B. 179 (181). (2) 2 B. 365.