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Again, we think the District Judge was wrong in holding that the mortgage had merged in the decree passed against the mortgagor on the mortgagee's suit No. 356 of 1866. The mortgage could not merge into the decree in a suit brought by the mortgagee to recover a different mortgage-debt secured by different property. The question, whether the property now in suit should be considered to be still held in mortgage by the mortgagee, was mentioned by the parties in that suit, but it [82] could not be directly and substantially in issue at that time, and it certainly was not decided by the Court in its finding as to what was due from the mortgagor to the mortgagee on taking an account of the debt then in litigation.

Lastly, the District Judge held that the conduct and clear understanding of the parties subsequent to the expiry of the five years sufficed to neutralize whatever sense or meaning there may have been in the expression in the mortgage-deed, showing the subsistence of the mortgage in the parties' minds, notwithstanding the terms of the conditional sale. Now no doubt up to 1866 the understanding of the parties was that the mortgage had been converted into a sale, and that the property had passed to defendant by purchase. But it has been held that mere admissions of such an understanding, even in depositions and pleadings, do not operate as estoppel or prevent the mortgagor from redeeming his property. (See *Ramshet Bachashet* v. *Pandharinath* (1), *Vallabh Bhulu* v. *Rama* (2) and *Anaji Ramji Bhagvat* v. *Dhondi Salu Kotwal* (3).

We must, therefore, reverse the decree of the lower Court, and remand the case to be tried on the merits. All costs up to date on respondent.

Decree reversed.

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14 B. 82.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BHIMAJI BALVANT AND ANOTHER (*Original Defendants*), *Appellants* v. GIRIAPA TIMAPA DESAI, (*Original Plaintiff*), *Respondent.**
[4th May, 1889].

Vatan—Power of a vatandar to create a perpetual mutalik—Exclusion of successors from entire management of vatan—Kararpatra—Sanad—Construction.

The creation of a perpetual *mutalik*, with a certain share of the *vatan* as *vritti* on account of *mutaliki*, is within the powers of a holder of the *vatan* for the time [83] being, more especially when it is done for good and valuable consideration passing to the *vatan*. But it is not competent to him exclude his successors from the entire management of the *vatan*.

In 1825 the ancestor of the plaintiff, who was a *desai* and the last proprietor of the *deshgati vatan* of Tegur, granted to the ancestor of the defendants a *kararpatra* (Ex. A.) whereby, in consideration of the services the latter was to render to the former in recovering the *vatan*, the defendants' ancestor was to enjoy one-third of *vatan* as *vatani mutalik* from generation to generation. Subsequently the plaintiff's ancestor granted to the defendants' ancestor *sanad* (Ex. B) which referred to the *kararpatra* already executed, and vested the entire management of the *vatan*. In the defendants' ancestor from generation to generation after the said *vatan* was recovered.

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* Appeal No. 9 of 1887.

(1) 8 B. H. C. Rep. A. C. J. 236.
(2) 9 B.H. C.R. 65.
(3) Printed Judgments for 1874, p. 133.

After protracted legal proceedings, in which the defendants' ancestor assisted the plaintiff's great-grandfather, the *vatan* was recovered in 1839. In 1846 the defendants' ancestor actually entered into the management, and continued to manage till 1850, in which year Government put the *vatan* under attachment. From 1850 to 1864 he remained out of possession in consequence of the attachment. In 1864 Government removed the attachment and restored the *vatan* to the plaintiff's father. On being asked by the Collector to appoint some one to take possession and management of the *vatan*, the plaintiff's father wrote a reply on the 15th July, 1865, that he had appointed the defendants' father to manage it, and the defendants' father continued to manage it till his death in 1880. On his death a fresh *mukhtyarnama* was executed to the defendants Nos. 1 and 4 by the mother of the plaintiff, who was then a minor. Under that *mukhtyarnama* the defendants managed the *vatan* till 1882, in which year the plaintiff having attained his majority wished to manage it himself, but was opposed by the defendants. The services in connection with the *vatan* had ceased in 1864.

The plaintiff, therefore, brought the present suit in 1884 to recover the *vatan*, with mesne profits. The defendants set up the *kararpatra* (Ex. A) and the *sanad* (Ex. B) by which they contended they had acquired the hereditary right to keep the whole *vatan* in their possession and management and to take one-third of the income derived from the same. The plaintiff impeached these documents as forgeries, and contended that in any case they were not binding on him, as it was not competent to his ancestor to make a permanent alienation of the *vatan* or its management beyond his life-time. The Court of first instance awarded the plaintiff's claim. On appeal by the defendants to the High Court.

Held, reversing the decree of the lower Court, that the rights of the defendants under the *kararpatra* were in force and binding on the plaintiff notwithstanding that the services incidental to the *vatan* had ceased. That document had been executed not merely to create a permanent office for the services of which a certain share in the *vatan* was alloted as remuneration, but it proceeded on the special service to be rendered to the family of the grantor by the recovery of the *vatan* itself. In other words, the performance of the service as *mutalik* was not the entire consideration or motive for the grant, nor did it expressly provide for the grant ceasing when the services should be no longer required.

[84] *Held*, also, that the *sanad* purported to exclude the grantor's successors in the *vatan* entirely from the management of the *vatan*, and to vest it in the permanent *mutalik*, and whilst leaving them as the absolute owners of the two-thirds to deprive them of all control over it. This was virtually to attach an incident to the *vatan* inconsistent with its nature which the plaintiff's ancestor was not competent to do. The parties were entitled to the joint management of the *vatan* as tenants-in-common in respect of their undivided shares.

[F., 22 B. 422.]

THIS was an appeal from a decision of Rav Bahadur G. V. Bhanap, First Class Subordinate Judge of Dharwar.

The plaintiff sought to recover possession from the defendants of the *deshgati vatan* lands of Tegur Mahal, in Dharwar Taluka, alleging that he was the sole owner and proprietor thereof. He claimed also Rs. 2,368-6-1 as the amount of three years' profits received by the defendants Nos. 1 and 4.

In their written statements the defendants alleged that the *vatan* in question was held by them under a *kararpatra* and *sanad* passed to their ancestor Vyankaji in 1825 by Giriapa, the great-grandfather of the plaintiff; that by these documents they had been created permanent *mutaliks* and had acquired the hereditary right to keep the whole *vatan* in their possession and management, and to take one-third share of the income of the property.

The *kararpatra* and the *sanad*, which are Exs. A and B in the judgment (see *infra*), were impeached by the plaintiff as forgeries, but he

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further contended that in any case they were not binding on him, as it was not competent to his great-grandfather Giriapa to make a permanent alienation of the *vatan* or its management beyond his own lifetime; and, lastly, that if such right was created in favour of the defendants' ancestor, it was extinguished in 1857, in which year the *vatan* was resumed by Government although subsequently acquired by the plaintiffs' father in 1864 by a new grant from Government and upon a different tenure.

The Subordinate Judge held the *kararpatra* and *sanad* (Exs. A and B), relied on by the defendants, as not proved, and was of opinion that the right set up by the defendants, if any, had ceased on the resumption and subsequent new grant in 1864 by the Government.

[85] The defendants appealed to the High Court.

Latham, Advocate-General (*Ganesh Ramchandra Kirloskar* with him), for the appellants:—The ancestor of the appellants was constituted under Exs. A and B a *vatani mutalik* in consideration of rendering service in recovering the *vatan*, of which the plaintiff's ancestor was deprived and dispossessed. The *kararpatra* did not make the grant of the one-third dependent on performance of services incidental to the *vatan*, and the circumstance that services had no longer to be performed does not affect the grant. *Forbes* v. *Meer Mahomed Tuquee* (1) is in point. The grant, besides, was made prior to 1827, and the Regulation of 1827, which forbids alienation of service *vatans*, can only be made to apply if it has a retrospective effect—*Rachapa* v. *Amingavda* (2). It is competent to a holder of a *vatan* to create a perpetual *mutalik*—*Kishnarav Ganesh* v. *Rangrav* (3); *Radhabai* v. *Anantrav*(4), The grant in question, therefore, is binding on the plaintiff.

Inverarity and *Viccaji*, (*Manekshah Jehangirshah* with them), for the respondent:—There are two points for decision in this case, *viz.*, (1) whether Exs. A and B are proved, and, (2), what is their effect. The *mutalik* is a deputy of the *desai*. In 1825 the grantee was a *mutalik* and he was bound to look to the interest of the *vatan*. The *desai* had to provide funds for the management, and the *mutalik* to manage the *vatan* as servant of the *desai* and receive a small remuneration for it. A *vatani mutalik* is no better than a deputy of the *desai*. Such a grant as that of one-third could not possibly have been made to the defendants' ancestors, and, therefore, the documents creating it were rightly held to be forgeries. Such a grant as this, if true, would have been on a stamp paper. The alienation under the instruments was not until after Reg. XVI of 1827 had come into force, and cannot be upheld if the instruments be held genuine. An agreement to deprive oneself of ownership and control is opposed to public policy, and unlawful. The grantor was not in possession at the time of the grant, and there was not immediate grant, **[86]** but one *in futuro*. The grant is not binding on the grantor's successors—*Ravji Raghunath* v. *Mahadevrav Vishvanath*(5). Conceding that the defendants were created hereditary deputies, the services having been dispensed with, the grant does not continue—*Krishnaji* v. *Vithalrao* (6).

JUDGMENT.

SARGENT, C. J.—The plaintiff alleges that he is the sole proprietor of the *deshgati vatan* of Tegur Mahal, in Dharwar Taluka, consisting of

(1) 13 M.I.A. 438 (464).
(2) 5 B. 283.
(3) 4 B.H.C.R. A.C.J. 1 (12).
(4) 9 B. 298 (208).
(5) 2 B.H.C.R. 237.
(6) 12 B. 80 (84).

the landed property mentioned in his plaint, and seeks to recover possession of the same from the defendants together with Rs. 2,368-6-1. the amount of three years' profit wrongfully received by the first and fourth defendants. The defendants 1 and 4 by their written statement say that the plaintiff's great-grandfather, Giriapa Balapa Desai, executed a *kararpatra* and *sanad* to their ancestor Vyankaji Rayaji in 1825, by which they acquired the hereditary right to keep the whole *vatan* in their possession and management, and to take one-third share of the income derived from the same. The plaintiff's case is that the *kararpatra* and *sanad*, which are Exs. A and B in the case, are forgeries, but that in any case they are not binding on him, as it was not competent to his great-grandfather, Giriapa, to make a permanent alienation of the *vatan*, or its management, beyond his own life-time, and, lastly, that such right was extinguished when the *vatan* was made *khalsa* and resumed by Government in 1857, although subsequently acquired by the plaintiff's father, Timapa, in 1864 by a new grant from Government and upon a different tenure.

The Subordinate Judge held Exs. A and B not proved, on the ground that there was no direct evidence of their execution; and that although "more than thirty years old they were not supported by the subsequent action and conduct of the parties, or their heirs, who are alleged to have executed them, or in whose favour they are alleged to have been executed," and further he held that if the defendants' ancestors had any such rights as they allege, they were extinguished by the resumption of the *vatan* by Government and subsequent new grant.

[87] Exhibit A is in the following terms:—

"Rajashri Vyankaji Rayaji Khasanis Mutalik Desai by Giriapa Balapa Hebbule Naik Bahadur Desai Nadgavda (of) pargana Yadvad, samat Tegur, kasba Todakod, is given in writing this inampatra in the Sur year 1226. It is as follows:—The progenitor of the Deshmukh of kasba Todakod in samat Tegur and our progenitor was one and the same individual and he was in the enjoyment of his estate. Rayapa Timinaik was doing the deshmuki (work) on the estate there. He died without a male issue: his wife was Avojava. She of her own free will gave the estate to my great-grandfather Balapa Desai and passed a paper in writing of her own accord; and having caused a paper to be made and delivered by Ghorpade she took Krishnapa, a boy from our family, in adoption. The three generations of Krishnapa, *viz.*, Krishnapa, his son Shivapa, his son Balapa, these persons continued to enjoy the *vatan*. Now Balapa Desai is dead. His wife Sabava (widow) was managing the estate, There was a person named Musanna Pujari who was son of Bandi (slave). He caused a disturbance, and during the administration of Gokhle he entered into the desbgat, took possession of the *vatan*, and having misrepresented the facts to the Sarkar he became powerful. Thereupon we sent a karkun to Gokhle at Poona, and of late after the establishment of the Company's rule we sent karkuns to Dharwar two or four times and did our best, but it was to no purpose. He enjoyed the *vatan* for ten or fifteen years. As to that our elders had acquired the *vatan* with great pains: it is missed in vain. When (once) the possession of vatandari business is lost, it is difficult to recover it again, it should not be allowed to go out (from our hands). Therefore it is agreed with you that you should work very hard in the Sarkar, &c., and recover possession of the aforesaid *vatan*, which is enjoyed by Musanna's son. In consideration thereof I have of my own free will given to you by this

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writing, as remuneration on account of mutaliki, a third share in the whole deshgat (in) the inam villages and kamat-katte jamin*-jumala, hak-dak, jakat and kul-bab kulkanu—a third share in whatever that is continued (to us). Therefore you are to enjoy the mutaliki estate [88] through your sons, grandsons, &c., from generation to generation until the sun and the moon continue to exist, and live in happiness. Should any of my dscendants fail to continue (the grant to you) he will be sinning aganst his tutelar deity."

Exhibit B is as follows :—

"To Rajashri Vyankaji Rayaji Khasanis Mu (talik) Desai Mahameru Rajamanya from Giriapa Balapa Hebbule Naik Bahadur Desai Nadgavda of pargana Yadvad, samat Tegur, kasba Tadkod .....The Shahur year one thousand two hundred and twenty-six (1825 A.C.). The deshgat at kasba Tadkod in samat Tegur has been usurped by a Bandi Avaliyad, (son of a slave). As to that you are to make in this respect complaint, &c., to the Company's Government on my behalf and try (to recover it). In consideration of the trouble on this account I have executed a separate sanad granting in respect of mutaliki a third share of the vatan out of the whole deshgat. I will pay the expenses that may be incurred in connection with it. After the aforesaid vatan is recovered by the grace of God from the Bandi Avaliyad, the management of the entire vatan is to be made by you from generation to generation, you being a vatani mutalik, and you are to enjoy a third share and continue to pay to me the (other) two shares. In case the money for the aforesaid expenses be not paid by me in time, you are to borrow money and do the work. I will discharge the money borrowed. In the meantime after the vatan is got into possession you are to get the debt discharged. I will not fail to do so".

It is not in dispute that the plaintiff's great grandfather Giriapa Balapa had been dispossessed of the *desaigiri vatan* in question by one Bishtapa in 1825, and that after protracted legal proceedings, in which the defendants' ancestor Bhimaji Vyankaji acted as Giriapa's *mukhtyar* or agent, he recovered possession at the end of 1839. (His Lordship, after discussing at length the evidence in the case, continued) :—On the whole we think that the documents A and B should be regarded as proved.

The next question for consideration is how far the agreements in question were binding on Giriapa's successors. They were passed prior to the Regulation of 1827, which forbids alienations [89] of service *vatan*. The creation of a perpetual *mutalik* with a certain share of the *vatan* as *vritti* on account of *mutaliki* would not, therefore, be open to the objection which obtained in *Ravji Raghunath* v. *Mahadevrav Vishvanath* (1) and would appear, according to the view taken by Sir M. Westropp in *Krishnarav* v. *Rangrav* (2), and followed by this Court in *Radhabai* v. *Anantrav* (3) to have been within the powers of a holder of the *vatan* for the time being, more especially when, as in this case, it was done for good and valuable consideration passing to the *vatan*. It was said indeed that the agreement was not executed until after the Regulation of 1827, but the agreement created a right in *vatan* of which he could not be deprived without giving a retrospective effect to the Regulation.

* Jamin-jumala = lands and tenements.

(1) 2 B.H.C.R. 237. (2) 4 B. H. C. R. A. C. J. 1 (12.) (3) 9 B. 193 (203).

The decision in *Rachapa* v. *Amingavda* (1), where the question was as to a compromise before 1827, is to the same effect. If, therefore, Ex. A is now to be held not binding, it must be on the terms of the instrument itself.

It is to be observed that Ex. A is not merely the creation of a permanent office, for the services of which a certain share in the *vatan* is allotted as remuneration, but that it proceeds on the special service to be rendered to the family by the recovery of the *vatan* itself. In other words, the performance of the service as *mutalik* is not the entire consideration or motive for the grant, nor does it expressly provide for the grant ceasing when the services should be no longer required. This distinguishes it from the grant in *Krishnaji* v. *Vithalrav* (2) and brings it within the principle upon which the Privy Council decided in favour of the continuance of the grant in *Forbes* v. *Meer Mahamad Tuquee* (3) where there was no longer any occasion for the service to a performed, *viz.*, the keeping up a body of men to repel the incursions of elephants. We are, therefore, of opinion that the rights of the defendants under Ex. A are still in force notwithstanding that the services incidental to the *vatan* have ceased.

[90] As to Ex. B, it purports to exclude the grantor's successors in the *vatan* from the entire managment of the *vatan* and to vest it in the permanent *mutalik*, and, whilst leaving them as the absolute owners of the two-thirds, to deprive them of all control over its management. This was virtually to attach an incident to their estate which was inconsistent with its nature, and which he was not competent to do. As to plaintiff's cross objections, they were not insisted on.

We must, therefore, reverse the decree of the Court below and dismiss the plaintiff's claim so far as it seeks to establish a proprietary right to more than two-thirds of the *vatan* and the lands, &c., mentioned in the plaint and to the sum of Rs. 2,368-6-1 in respect to the income of the one-third of the *vatan* received by the defendants, and declare that the parties are entitled to the joint management of the *vatan* as tenants-in-common in respect of their undivided shares. Parties to pay their own costs throughout.

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14 B. 90.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt, Chief Justice; and Mr. Justice Candy.

TARANAIKIN (*Original Plaintiff*), *Appellant* v. NANA LAKSHMAN (*Original Defendant*), *Respondent.** [1st July, 1889.]

Temple endowment—Dancing girls attached to a temple inheritance—Succession to the office of a dancing girl connected with such temple—Public policy—Custom.

The existence in India of dancing girls in connection with Hindu temples is according to the ancient established usage, and the Court would not be justified in refusing to recognize existing endowments in connexion with such an institution.

Accordingly where the plaintiff sued, as the adopted daughter of a dancing girl attached to a temple, to redeem and have her right to manage the *inam* lands

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* Second Appeal No. 624 of 1887.

(1) 5 B. 283. (2) 12 B. 80 (84). (3) 18 M. I. A. 438 (464).