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of admissions damaging to his case and of facts which were indubitably within his knowledge was still more unmistakeably disingenuous, and as it is clear that if, instead of protracting the case by prevarications and unjustifiable contentions, he had in his written statements, or unmistakeably at an early stage in the suit, disclosed his intention of impugning plaintiff's interest in a trade-mark referred to in the pleadings of both parties as the plaintiff's, the case would have been disposed of or reconstituted either without an appearance of either party or at least the costs of these protracted proceedings would have been almost entirely, if not altogether, avoided.

Under these circumstances, in dismissing the plaintiff's suit, no order is made as to costs.

*Suit dismissed.*

Attorneys for plaintiff:—*Messrs. Bicknell, Merwanji and Motilal.*

Attorneys for defendants:—*Messrs. Smetham, Bland & Noble.*

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *November* 21.

BAI JADAV AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3), APPELLANTS, *v.* NARSILAL AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Vatan—Vatan in Guzerat—Service commutation settlement—Inheritance—Succession to a vatan—Succession through females—Bombay Act III of 1874, section 5, as amended by sections 1 and 2 of Bombay Act V of 1886—Alienation of vatan.*

A *vatan* in Guzerat does not cease to be *vatan* property as defined by section 4 of Bombay Act III of 1874, merely because a service commutation settlement has been effected. Such a settlement does not change the nature of the property simply because service is not demanded.

As far as the power of alienation is concerned, if it is granted by the settlement, it cannot be taken away by the change introduced in section 5 of Bombay Act III of 1874 by section 1 of Bombay Act V of 1886.

Section 2 of Act V of 1886 (which amends section 5 of Act III of 1874) gives a preference to male members of the vatan family over persons claiming through females.

* Second Appeals Nos. 192 and 234 of 1900.

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*Held*, that the section applies to vatans in Guzerat, even though the services originally appertaining to such vatan had ceased to be demanded.

One Niamatrai was a *vatandár* in Guzerat. He died in 1844, leaving behind him a widow, a daughter, and a separated brother. His property consisted of certain *pasaita* lands and a cash allowance attached to his *vatan*. In 1868 Government effected a service settlement with the *vatandár* by which the *vatan* property was continued to *Niamatrai's* heirs, free from all liability to render any services in connection with the *vatan*. In 1889 Niamatrai's widow died, her daughter having predeceased her. Thereupon plaintiffs, who were the sons of *Niamatrai's* daughter, sued to establish their title as heirs to the *vatan* property as against the defendants who were the son's sons of Niamatrai's separated brother.

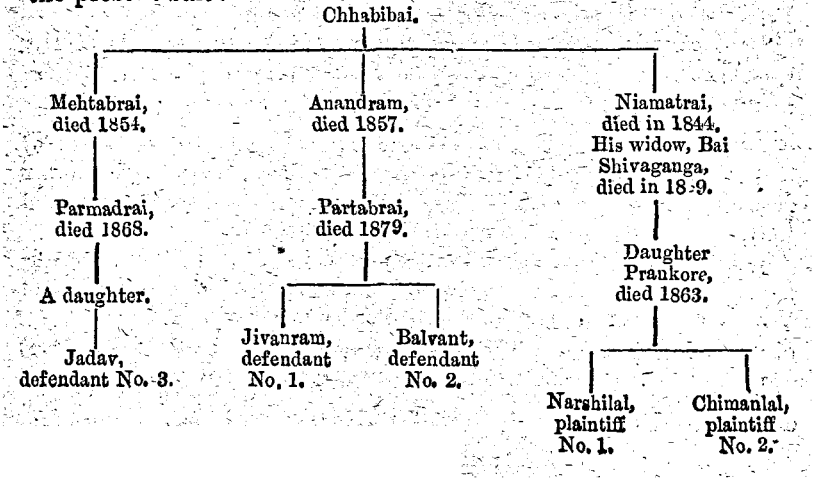
*Held*, that under section 2 of Bombay Act V of 1886, plaintiffs, as claiming through a female, were not entitled to succeed to Niamatrai's *vatan* property in preference to the defendants who were male members of the deceased *vatandar's* family.

SECOND appeal from the decision of Ráo Bahádur Krishnamukh A. Mehta, Acting First Class Subordinate Judge, A.P., of Broach, reversing the decree of Khán Sáheb J. E. Modi, Second Class Subordinate Judge at Ankleshwar.

One Niamatrai, a hereditary *vatandár* of the Broach District, died in 1844 possessed of certain lands and an annual cash allowance of Rs. 34-6-4 received from the Government Treasury. This property was his service *vatan* property.

He left him surviving a widow, Bai Shivaganga, a daughter, Prankore, and two separated brothers, Mehtabrai and Anandram.

The following table explains the relationship of the parties to the present suit:



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In 1856 Shivaganga, widow of Niamatrai, brought a suit against her nephew Parmadrai, son of Mehtabrai, alleging that after her husband's death, Mehtabrai and his son had dispossessed her of the *pasaita* lands and got the cash allowance transferred to their names.

This suit was privately compromised, and it was agreed that the lands and the cash allowance should be held by Parmadrai on his undertaking to discharge Niamatrai's debts and pay his widow, Bai Shivaganga, a yearly allowance of Rs. 42 during her lifetime.

In accordance with this compromise, a consent decree was passed in 1857.

In 1863 Shivaganga's daughter, Prankore, died, leaving two sons, Narshilal and Chimanlal (the plaintiffs).

In 1868 the services attached to the *vatan* were dispensed with and a sanad issued by Government to the following effect:

"The *vatan*, as now confirmed, shall be continued without demand of service or any objection or question on the part of Government as to title to whomsoever shall from time to time be the lawful holder thereof, but without affecting the rights and interests of other parties."

In 1889 Bai Shivaganga died.

In 1896 plaintiffs Narsilal and Chimanlal (grandsons of Niamatrai by his daughter Prankore) filed the present suit as reversionary heirs of Niamatrai, to recover possession of his property consisting of the *pasaita* lands and the cash allowance received from the Government treasury.

Defendants 1 and 2, Jivanram and Balvant, pleaded *inter alia* that under Bombay Act V of 1886, section 2, they as grandsons of *Niamatrai's* brother, Anandram (sons' sons), were preferable heirs to Niamatrai as against the plaintiffs, who, being sons of Niamatrai's daughter, were heirs claiming through a female. They also contended that the suit was time-barred and *res judicata* by reason of the consent decree passed in the suit of 1856.

Defendant No. 3, Bai Jadav (grand-daughter of Niamatrai's other brother), raised similar defences.

Defendants 4 to 7, who were mortgagees in possession under defendants 1 and 2, disputed plaintiff's title.

The Subordinate Judge held that under the sanad granted by Government the property became private alienable property and that the provisions of Bombay Act V of 1886 did not apply to *vatans* in Guzerat, in respect of which a settlement had been made for commutation of services. He however held that the suit was time-barred and that the compromise effected in the suit of 1856 operated as *res judicata*. He therefore dismissed the suit.

In appeal the Acting Additional First Class Subordinate Judge, A.P., agreed with the Court of first instance that Bombay Act V of 1886 was not applicable to *vatans* in Guzerat. But he held that the suit was not time-barred and that the decree based upon the compromise in the suit of 1856 did not operate as *res judicata*. He therefore reversed the decision of the Court of first instance and passed a decree declaring that the plaintiffs were entitled to inherit the whole of Niamatrai's property.

Against this decision defendants 1 and 2 preferred a second appeal (No. 234 of 1900) to the High Court.

Defendant No. 3 also filed a separate appeal, No. 192 of 1900.

*C. H. Setalvad* (with *H. C. Coyaji*) for appellants (defendants Nos. 1, 2, and 3):—We submit that the property in dispute is *vatan* property as defined by section 4 of Bombay Act III of 1874. Government have no doubt dispensed with the services connected with the *vatan*. But that circumstance does not change the nature of the property. If before the settlement it was *vatan* property it continues to be such even after the settlement—*Ramrao* v. *Yeshvantrao*[1]; *Savitriava* v. *Anandrav*.[2] This rule is as applicable to *vatans* in Guzerat as it is to *vatans* in the Dekkhan or in any other part of the Bombay Presidency. The service settlement effected with the *vatandárs* in Guzerat, no doubt, makes their *vatans* alienable; but the character of the property is not affected by it. It follows therefore that the plaintiffs, as persons claiming through a female, must be postponed under section 2 of Bombay Act V of 1886 to the male members of the *vatandár's* family. Plaintiffs' suit therefore must be dismissed.

(1) (1885) 10 Bom. 327. (2) (1875) 12 Bom. H. C. R. 224.

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*G. K. Parekh* for respondents (plaintiffs) :—Under the settlement effected in 1868 between Government and the *vatandár*, the property in dispute ceased to be *vatan* property. There is no longer any hereditary office or any service attaching to that office and the property has become ordinary alienable property—*Radhabhai* v. *Anantrav*.[1] According to the sanad issued by Government the *vatandár* has an express power of alienation. This power cannot be taken away by a subsequent enactment such as Bombay Act V of 1886. And therefore neither section 5 clause 2 of Bombay Act III of 1874, nor section 2 of Bombay Act V of 1886 applies to the present case. Supposing that the Acts apply, plaintiffs cannot be said to claim through a female; for they claim in their own right as grandsons and not as heirs of their mother.

RANADE, J.:—The appellants' counsel, Mr. Setalvad, raised several contentions—first, of limitation; second, of *res judicata*; third, about the application of Act V of 1886 to the vatan property in dispute. It was agreed that the last of these questions should be first disposed of, and accordingly Mr. Gokuldas, respondents' pleader, addressed his remarks chiefly to that point, reserving his arguments on the other points to a later stage.

Mr. Setalvad contended that the property in dispute was vatan property as defined in section 4 of Act III of 1874, being held in respect of an hereditary office, even though the services originally appertaining to it had ceased to be demanded, and that section 5 of Act III of 1874, as amended by Act V of 1886, applied to such vatans, and section 2 of Act V of 1886 gave preference to male members of the vatan family over persons claiming through females. Therefore the appellants were entitled to such preference over the respondents.

Mr. Gokuldas, on the other hand, argued that, as the settlement had taken place and a service commutation had been effected, the property cannot be regarded as vatan property held on account of a hereditary office, and that therefore section 5 clause 2 of Act III of 1874 and section 2 of Act V of 1886 did not apply to this property.

(1) (1885) 9 Bom. 198. F. B.

Both the lower Courts have taken this latter view of the nature of the property in dispute. The lower Appellate Court has not discussed this point at length, but has agreed generally with the Court of first instance. This latter Court held that as there was a commutation effected by the sanad (Exhibit 130, 25th August 1868,) the nature of the property was changed and therefore section 2 of Act V of 1886 did not apply. It made a distinction between settlements effected under what is called the "Gordon Settlements," under which the power of alienation was not conferred on holders, and the Guzerat settlements where such power was expressly conferred on the holders, and made the property alienable and heritable like any other private property, and therefore the decisions in *Appaji* v. *Keshav*(1) and *Bhau* v. *Ramchandrarao*(2) did not govern the present case. Any other view, it was said, would involve a breach of faith on the part of Government, and therefore, in spite of the definition of vatan property in Act III of 1874, the word "vatan" must be held in section 2 of Act V of 1886 not to include vatans in Guzerat, where the settlement had been effected and service abrogated. The first Court was of opinion that the section required amendment. This was also the view which Mr. Gokuldas pressed upon our attention.

On a careful consideration of the arguments urged on both sides, we feel satisfied that the view taken by the Courts below on this point as to the nature of the property is not correct and that vatan in Guzerat does not cease to be vatan property held in connection with an hereditary office as defined in section 4 of Act III of 1874, simply because a service settlement has been effected and the word "vatan" used in section 2 of Act V of 1886 is not to be understood in a restricted sense by reason of such settlement. It would be seen that though the Court of first instance took another view of the matter, it did so on the supposition that the section required amendment; in other words, that the Legislature was mistaken in not qualifying the word "vatan" in section 2 of Act V of 1886 so as to exclude service vatans settled in Guzerat. Such an assumption cannot be made in the face of the fact that Act V of 1886 was passed expressly

(1) (1890) 15 Bom. 13. (2) (1895) 20 Bom. 423.

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to supply what the Legislature regarded as an important omission in Act III of 1874. The Legislature was satisfied on inquiries held that the feeling against females being allowed to inherit vatan property was a general one throughout the Presidency, and though the people concerned did not wish that females should be entirely excluded, yet they desired that they should be postponed in the order of inheritance to males. Section 2 was included to give effect to this feeling, and it is quite clear that, unless by reason of settlement vatan property ceased to be vatan, the new section 2 would apply.

The definition of "hereditary office" expressly includes offices where the services have ceased to be demanded. In section 5, clause 2 also treats vatan as vatan property even though a service settlement had been effected either under section 15 or before that section came into force. A distinction should be made between the power of alienation without sanction of Government referred to in amended section 5 of Act III of 1874 and the new rule of succession laid down by section 2 of Act V of 1886. Mr. Gokuldas appeared to have confounded the effect of these two provisions. As far as the power of alienation is concerned, there can be no doubt that clause 2 of section 5 would not apply to Guzerat vatans, where the settlement recognised the right of alienation without sanction, but such settlement did not change the nature of the property merely because service was not demanded. It continued to be vatan property held in connection with a hereditary office. Though the restriction about alienation without sanction did not apply to such settled vatans in Guzerat, the particular change in the rule of succession was a different matter, and it applied to all vatans whether settled or not settled, whether in Guzerat or in the Dekkhan. If the Legislature had intended to exempt Guzerat settled vatans, nothing would have been easier than to lay it down accordingly. It did not exempt these Guzerat vatans from this new incident attached to vatan property in general by section 2 of Act V of 1886. The statement of objects and reasons expressly recites that the feeling against female succession was general throughout the Presidency. It is worth noting that clause 2 of section 15, which refers to old settlements effected before Act III of 1874 was passed,

has been repealed by Act XVI of 1895, apparently because clause 2 of section 5 was substituted in old section 5 by Act V of 1886.

We are disposed to agree with Mr. Gokuldas in his contention that the power of alienation, where it was granted by the settlement, cannot be taken away by the change introduced in section 5 of Act III of 1874 by section 1 of Act V of 1886, but we cannot accept this view that the property ceased to be vatan property held in connection with an hereditary office. It is not open to us to insert restrictive words not to be found in the definition in section 4 of Act III of 1874. The property remains vatan, though service may not be demanded. It may be alienated without sanction if the settlement confers that power, but the property continues to be vatan property, and as such section 2 of Act V of 1886 applies.

The argument based on a supposed breach of faith appears to be without force. The power of the Legislature to alter certain rules of succession cannot be questioned, and in this case the change was made to give effect to a general wish which was not confined to Hindus only. If the vatan passes by alienations to other sections of the community, they will be bound by section 2 equally with Hindus. The new section has been held as a matter of fact to apply to Mahomedans—*Rahim Khan* v. *Fatu Bibi*.[3]

Mr. Gokuldas further tried to argue that the respondents cannot be said to have claimed through a female within the meaning of section 2 as they succeeded as heirs to their grandfather. This seems to us to be a distinction without a difference, and we must therefore overrule this objection also. We must decide this point against the respondents and in appellants' favour.

*Appeal allowed.*

(1) (1895) P. J. p. 371.