1902.

GAEKWAR SARKAR OF BARODA v. GANDHI KACHRABHAI.

Their Lordships will, therefore, humbly advise His Majesty that with this variation the order appealed from should be affirmed and the appeal dismissed. As regards costs, the order will be against both the appellants.

Appeal dismissed.

Solicitors for the appellant—*Messrs. Dollman and Pritchard.*

Solicitors for the respondent—*Messrs. Holman, Birdwood & Co.*

PRIVY COUNCIL.*

1903.

Feb. 11, 12.

VINAYAK WAMAN JOSHI RAYARIKAR (ONE OF THE DEFENDANTS) *v.* GOPAL HARI JOSHI RAYARIKAR (PLAINTIFF) AND OTHERS (DEFENDANTS).

Partition—Inâm village granted by Peishwa—Right of management of Inâm property—Claim that Inâm village was impartible—Right of succession—Custom.

The defendant in a suit for partition alleged that his branch of a joint family to which an *inâm* village had been granted by the Peishwa had, under the grant acquired a right to the perpetual management of the village, and claimed on this and other grounds that the village was impartible.

Held, by the Judicial Committee (affirming the decision of the High Court), that "neither by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession..... has the defendant's branch of the family acquired a right to perpetual management of the village of Ahire, or in consequence to resist its partition."

Adrishappa v. *Gurushidappa*(1) referred to.

APPEAL from a decree (7th January, 1896) of the High Court at Bombay which reversed a decree (28th October, 1893) of the Subordinate Judge of Poona, by which the suit brought by the first respondent had been dismissed.

The suit was brought against the present appellant and the other members of a joint family for partition of an *inâm* which was granted to six brothers of the family in 1762, but which

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

(1) (1880) L. R. 7 I. A. 162 : I. L. R. 4 Bom. 494.

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had been from the time of the grant uniformly managed by Chinto Vithal, the youngest of the six brothers, and his descendants. The claim was resisted by the present appellant, who was defendant No. 13, on the ground that he was entitled to manage the property, and to divide the profits among all the co-sharers according to their shares; and that the plaintiff was therefore not entitled to partition.

The Subordinate Judge held that the property was indivisible and dismissed the suit; but on appeal the High Court (Farran, C. J., and Parsons, J.) granted the partition.

The facts are sufficiently stated in the judgment of the High Court which is reported in I. L. R. 21 Bom. 458, and in their Lordships' judgment. With reference to the *yadis* referred to in the latter judgment the High Court said:

In 1820 it appears that disputes arose between the sharers, and by a *yadi* (Exhibit 78) it was agreed "that Madhavrao should manage the village with which we are dealing and the two other villages and account for the receipts and pay the five brothers' equal shares without practising fraud." It was further by the same *yadi* agreed "that Rs. 200 should be deducted for the collection of the income, and that the balance should be distributed amongst all, and that Madhavrao should receive one-sixth share." With reference to this *yadi* it is to be remarked that no reference is made in it to any right on the part of Madhavrao to manage. His management is recorded to be based on agreement. The same remark applies to the subsequent *yadi* (Exhibit 79). Madhavrao soon after the date of this *yadi* appears to have disagreed with his mother Umabai. Exhibit 30 is a *yadi* (dated in 1822) by which terms are arranged for the settlement of the dispute, amongst which is one that Umabai should manage the villages until Madhavrao should attain twenty years of age. This document has been much relied on as showing that it was then considered that the management of the villages was of right with Chinto's branch, but such an agreement might consistently have been come to whether the management was with that branch by consent for convenience of enjoyment, or whether it was considered that its members had a hereditary right to the management. The other co-sharers were not parties to it, and we think that no inference of any weight can be drawn from it.

In 1830 an agreement (Exhibit 79) was come to between Madhavrao's son Waman and all the co-sharers, the terms of which are of great importance. It recites that the villages had belonged to Madhavrao and to other co-sharers and that Madhavrao had managed them and distributed the shares, and continues: "In consequence of family disputes the management of the villages was with Trimbakrao Balkrishna from 1820 down to the present time. It is now agreed with the consent of the five coparceners that the said villages should be managed by me (Waman), and that the income of the villages should be divided accord-

ing to the respective shares." The agreement then sets out the manner in which the management was to be carried on and provides that Waman should deduct Rs. 200 per annum from the revenues for the management, and concludes thus: "I, Waman, will manage the villages agreeably to the said terms and pay each sharer the amount of his share. Should I fail to pay the income, any one of the six coparceners should manage the villages as agreed above to which I give my consent." This is the last document in evidence save the decision of the *inam* Commissioners in 1857 (Exhibit 82), which continues the *inám* to the descendants of the original grantees.

On this appeal which was heard *ex parte*, Mr. Mayne for the appellants contended that the grant was in the nature of an endowment, it being intended (as is the case with endowments) that the income should be distributed amongst the co-sharers, but that the management should remain in the hands of one member of the family. That this was understood to be the intention was shown by the conduct of the members of the family, who had never divided this property though a separation has taken place between them, and had left the management of it to one branch of the family. By custom the property had so become impartible and the management, having always remained in the appellants' line of descent, has become vested in him and his descendants. The decision of the High Court was, therefore, it was submitted, erroneous, and should be set aside.

Their Lordships' judgment was, on the 12th February, 1903, delivered by—

LORD MACNAGHTEN:—This is an appeal *ex parte* against a decree of the High Court of Bombay reversing the decision of the Subordinate Judge of Poona, who dismissed the plaintiff's suit.

The plaintiff sued for partition of the village of Ahire. It is not disputed that he is entitled to a one-fifth share in the village; but the suit was resisted by one of the co-sharers, the present appellant, on the ground that the management of the village is vested in him and his branch of the family, and that the proper inference to be drawn from this circumstance, from the documents in evidence, and from the acts and conduct of the members of the family ever since the date of the original grant, is that the village is impartible.

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The village was granted in 1762-63 by the Peishwa to six brothers, who were Brahmins, in consideration of their devotion to religious worship, and the arduous services performed by the youngest brother, Chinto Vithal. The grant does not declare the property to be impartible, nor does it say anything about the management of the village, but, in fact, Chinto Vithal acted as manager, paying his brothers their share of the income. Afterwards the village was attached, but ultimately in 1800 the attachment was removed, and the Peishwa regranted or continued the *inám* to Chinto's son. Having thus got into possession, he attempted to appropriate the whole income and refused to recognise the interest of the five elder brothers. The representatives of the elder brothers preferred a complaint to the Peishwa, from which it appears that the brothers had then become separate. An inquiry followed, and an order was made to the effect that in future the representatives of all six brothers (the line of one brother, it may be observed, is now extinct) should receive equal shares. The management, however, was left in the hands of Chinto's son, and notwithstanding some disputes it has ever since remained in the hands of that branch of the family. But there are two *yádis*, one in 1820 and one in 1830, which, in their Lordships' opinion, show conclusively that it was by the consent of the other co-sharers that the management was continued in Chinto's line. That was also the opinion of the High Court.

The argument on behalf of the appellant rested on no solid foundation. It could not be contended that the original grant, or any document emanating from the ruling power, showed that it was intended that the *inám* should be impartible. The argument rather was to this effect: that, although the original grant fell short of proving that the property was impartible, yet there was, so to speak, a savour of religious endowment about the Peishwa's grant, and that this, taken in conjunction with the conduct of the family, the fact that, although the brothers separated, there was never any claim for the partition of this property until quite recently, and the fact that, although there were on more than one occasion disputes or complaints of mismanagement, Chinto's branch held their position, justified the inference that, either according to the true intent of the grant properly understood, or by family custom gradually developed, the *inám* was or had become impartible.

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Their Lordships agree with the conclusion arrived at by the High Court,[1] that "neither..... by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession (if such there could be in a case like this), has Chinto's branch of the family..... acquired a right to perpetual management of the village of Ahire or in consequence to resist its partition."

It may be worth while to refer to a case *Adrishappa* v. *Gurushidappa*[2] the head note of which is that "*Deshgat watan* or property held as appertaining to the office of Desai is not to be assumed *primâ facie* to be impartible. The burden of proving impartibility lies upon the Desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies."

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant—*Messrs. T. L. Wilson & Co.*

(1) (1896) 21 Bom. 458 at p. 462. (2) (1880) L. R. 7 I. A. 162

ORIGINAL CIVIL.

Before Mr. Justice Russell.

JAIRAMDAS GANESHDAS AND ANOTHER, PLAINTIFFS, *v.* ZAMONLAL KISSORILAI, DEFENDANT.*

1903.
February 16.

Injunction—Temporary injunction to restrain suit brought by defendant in the Small Causes Court—Civil Procedure Code (XIV of 1882), sections 492, 493—Specific Relief Act (I of 1877), sections 53, 54 and 56.

In a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Causes Court in respect of the same contract until the hearing of the High Court suit.

* Suit No. 25 of 1903.