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For all the above reasons I am of opinion that the decision of the lower Court in Appeal No. 4 should be reversed; and for the reasons based both upon the special facts of the case and on section 137 of the Contract Act I am of opinion that the decision of the lower Court in Appeal No. 7 should also be reversed. In each case the unsuccessful respondent must pay the costs throughout, except that in Appeal No. 4 the unsuccessful respondent Ramdas will have his costs of issues 1 to 5 and 8 against the appellants. In each case the person, in whose hands the sale-proceeds are, must hand over the net sale-proceeds, deducting any charges justly due, to the successful appellants.

In Appeal No. 4 of 1912—

Attorneys for the appellant: *Messrs. Jamsetji, Rustomji and Devidas.*

Attorneys for the respondent: *Messrs. Edgelow, Gulabchand, Wadia & Co.*

In Appeal No. 7 of 1912—

Attorneys for the appellants: *Messrs. Matubhai, Jamietram and Madan.*

Attorneys for the respondent: *Messrs. Edgelow, Gulabchand, Wadia & Co.*

Decrees reversed.

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

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August 1.

B. A. BRENDON, COLLECTOR OF BELGAUM, AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHRIMANT SUNDARABAI, HUSBAND'S NAME LINGAPPA JAYAPPA SAR DESAI, AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Regulation XVI of 1827—Bombay Act XI of 1843, section 2—Summary Settlement Act (Bom. Act II of 1863), section 12—Hereditary Offices Act

* First Appeal No. 80 of 1912.

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(Bom. Act III of 1874)—Civil Procedure Code (Act V of 1908), sections 11 and 15—Service inam land—Summary settlement—Alienation—Will—Probate—Decision of Probate Court not to be destroyed by adjudication in a regular suit—Res judicata.

The title of the family of Navalgund Desai came into existence in the time of the Bijapur Monarchs in the 17th century. The Desai was the chief revenue officer of the district under both the Mahomedan rule and the Maratha rule which followed it.

The services of the Desai as revenue officer were not made use of during the British rule and he was informed in 1848 by the Collector under the provisions of section 2 of Bom. Act XI of 1843 that his services as a revenue officer would not be required of him. As the result of inquiry regarding claims to inam lands, the Desai for the time being was offered the option of commuting his service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on a service tenure, or by occasional payments in the nature of fines, both which classes of payments were styled "Nazarana".

In the year 1862 the Government passed a Resolution No. 455, sanctioning the treatment of the Navalgund Desai's *potgee* (allowance) as a personal holding continuable to the holder on the terms of the summary settlement and the Desai consequently accepted the settlement on the terms that the commutation payment should be in the nature of an annual "Nazarana" or quit-rent.

Lingappa Sar Desai, the last male member of the Desai family, made a will prohibiting his widow from making an adoption and bequeathing the whole of his property to charity. The will was propounded for probate in the District Court of Belgaum and was duly admitted to probate and the grant of the probate was confirmed by the High Court in appeal.

The widow of Lingappa made an adoption and she and the adopted son brought the present suit for a declaration that the testator had no power to make a will and to alienate the property which being service inam was inalienable.

Held, that the settlement of the Navalgund Desai of the year 1862 was a settlement valid and binding upon Government, that under the settlement the Desai was no longer liable to render any service in respect of the lands held by him and they were, therefore, no longer held upon service tenure and that the possession of lands as service lands for 200 years in the absence of any evidence as to family custom could not impress them with the character of inalienability.

Held, further, that where service has been commuted for a quit-rent, if the donee's descendants should continue to pay the rent, the tenure would be

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altered from service to rent, that in the case of service land, which in practice at all events was not usually alienated, it would be difficult to establish a family custom which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land had remained in a family for a long period of years and had descended by the rule of primogeniture where it was service land, would be more consistent with the fact of its having been held for service than with the theory of any special family custom and that when service had come to an end the last holder, if he had no sons or co-sharers, could put an end to a tenure based upon family custom, and that the lands might be treated as the property of an ordinary Hindu land owner subject to the payment of the agreed quit-rent to Government and in the absence of co-parceners the owner could dispose of the lands by will.

Held, further, that under section 11 of the Code of Civil Procedure it was not open to the Court, after the decision of the District Court granting probate of the will, to try the question of the authority of the widow to adopt, which question was bound up with the question of the revocation of the will in the present suit, inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given authority to his widow to adopt expressed his wishes at the time of his death, and inasmuch as the District Court which had tried the probate case was a Court competent to have tried the present case.

FIRST appeal against the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, in original suit No. 50 of 1909.

Suit for declarations and injunction.

The facts were as follows :—

The Sar Desai family of Navalgund was at one time one of the most important Desai families in the Belgaum District and enjoyed enormous income derived from inam villages. The representative member of the family for the time being was the chief revenue officer of the Province. The title of the family came into existence in the time of the Bijapur Monarchs in the 17th century and it was recognized by the Maratha rule which followed the Mahomedan rule. The grants of inam villages had been made to the Desai for the time being. The grants were sometimes made to the

Desai simply and sometimes they were expressed to be for the Desai and his karkuns. The family continued to enjoy the inams till they were confiscated by Tippu Sultan at the time of his conquest of the Southern Maratha Country. After the reconquest of the country by the Peshwa Government, the inam in its entirety was not restored to the family, but the grant was confined only to ten villages for the maintenance of the Desai and his karkuns. The grant was shown in the revenue records under the heading "service vatan". After the introduction of the British rule the grant was continued to the Desai on the original terms for allowance under an order, dated the 11th January 1818. Later on orders were issued by Government that all holders of service vatans must perform service. The Sar Dēsai of Navalgund was accordingly called upon to render service and he having refused to do so some of his lands were ordered to be attached. He appealed to the Collector and Political Agent of Dharwar who decided on the 21st December 1836 that the said order did not apply to *sansthans* (chiefs) like the Sar Desai and the attachment was removed. In 1840 the inam was again attached because the widows of Lingappa, who was then the Sar Dēsai, made an adoption which had not been authorized. Subsequently the adoption was sanctioned by Government and the attachment was removed in or about 1847.

In the Government records the inam being entered as "land held for service", the Collector informed in the year 1848 the then Sar Desai that his services as a revenue official would not be required of him. At that time and for many years afterwards the Government was occupied in investigating the claims to inam lands held whether for service or as reward for past services and in the course of the proceedings the Sar Desai for the time being was offered the option of commuting his

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service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on service tenure or by occasional payments in the nature of fines both which classes of payments were called "Nazarana".

Then came the Government Resolution No. 455 of 1862, dated the 6th February 1862, sanctioning the proposal of the Revenue Commissioner to treat Navalgund Desai's *potgee* (allowance) as a personal holding continuable to the holder on the terms of the summary settlement. The settlement thus sanctioned was accepted by the Sar Desai the same year.

Lingappa, the last representative of the Sar Desai family, made a will on the 26th June 1906 and a codicil, dated the 13th August 1906, whereby he prohibited his wife Sundarabai from making an adoption and bequeathed his property to charity, namely, Lingayat Fund, an institution founded with a view to encourage and assist Lingayat students. Lingappa died on the 23rd August 1906. Sundarabai, notwithstanding the prohibition in her husband's will, adopted Jayappa on the 10th December 1906.

On the 22nd February 1909 Sundarabai and Jayappa, as plaintiffs 1 and 2, respectively, brought the present suit for a declaration that the will and codicil of Lingappa were illegal and he had no authority to execute them and that the defendants, who were the executors under the will, acquired no rights under it. The plaintiffs further prayed for a declaration that plaintiff 2 was the lawfully adopted son of the deceased Lingappa and for an injunction calling upon the defendants not to obtain possession of the property from the Court of Wards which had, under the order of the District Court, taken charge of it owing to the minority of plaintiff 1. The plaint alleged that in accordance

with the direction given by the deceased, plaintiff 1 duly adopted plaintiff 2, that the will and the codicil were owing to various reasons illegal because at their dates the deceased was very ill and was not in a fit state of mind to execute them, that at the time of the codicil some selfish persons had obtained complete influence over the mind of the deceased and he was no longer master of his own will and did not know what he was doing, that, therefore, the deceased in the presence of many persons revoked the will and gave permission to plaintiff 1 to adopt a boy and to continue the *sansthan* as formerly, that the property was granted by the Peshwa for the maintenance of the Desai and his family and the karkuns of the family, that according to the orders of Government and the will of the adoptive father of the deceased and the agreements entered into by the deceased with his adoptive mother, he had no right to alienate the property and that as the karkuns as well as the members of the Desai family were interested in the property, Venkaji Krishna Kulkarni was joined as plaintiff 3, he being an old karkun of the family having interest in the property. The plaintiffs did not claim possession of the property from the defendants as it was already in the possession of the Court of Wards.

The defendants answered that the deceased Lingappa was full owner of the property in suit and had full testamentary power to dispose of it, that nothing in the original grant, or in the terms of his own adoption, or in the will of his adoptive father did or could restrict deceased Lingappa's power of disposition, that at the time of making the will and the codicil the deceased was in full possession of his mental faculties and was under no external influence, that he did not authorize plaintiff 1 to adopt a son, that the allegation that the deceased cancelled his testamentary disposition was

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untrue, that plaintiff 2 was brother of plaintiff 1 and the adoption of the former was invalid in law, it being prohibited by the will of the husband of the latter and that plaintiff 3 had no right to join in the suit.

The executors appointed under the will applied in the meanwhile for the grant of a probate and the District Court at Belgaum having made the grant, it was confirmed by the High Court in appeal.

The Subordinate Judge found that the will and codicil relied on by the defendants were proved to have been executed by the deceased Lingappa, that the deceased was then in such mental condition as to understand the nature and effect of the disposition that he was making, that the deceased had no power to dispose of the property in the way he did, that the deceased had not revoked the disposition, that plaintiff 1 had adopted plaintiff 2 and the adoption was valid and that plaintiff 3 had a right to bring the suit. The Subordinate Judge, therefore, granted the declarations and injunction prayed for in the plaint.

With respect to the settlement effected by Government in the year 1862 the Subordinate Judge was of opinion that the settlement "was defective inasmuch as the Resolution of 1862 was passed in the absence of information that the Desai had been rendering service during the British rule. Consequently the property remained and still remains *property held for service.*"

The defendants appealed.

Jayakar and *Rudrappa*, with *G. S. Mulgavkar*, for the appellants (defendants):—The main question involved in the case is whether the property in suit was alienable in the hands of Lingappa and could pass by his will. We submit that it was so alienable having regard to the terms of the grants under which it was held and the decision of the Bombay Government under

Bombay Acts XI of 1852 and II of 1863. (Counsel traced the history of the property from the days of Bijapur Princes, Tippu Sultan and the Peshwas ending with several orders of the British Government passed from time to time regarding the nature of the vatan.) We contend that there is hardly anything in these grants and orders making the property inalienable. But assuming it was so, we further say that the Government Resolution No. 455, dated the 6th February 1862, taken along with the correspondence and the other material on the basis of which the British Government passed the said Resolution is an adjudication as to the alienability of the property under Act XI of 1852, Exhibits 236, 154 and 151. Notices of the said Resolution were given to the Desai and Nazarana on the footing thereof was demanded and levied, Exhibits 243, 246 and 248. See also sections 4 and 5 of the said Act. Thereupon the Government went on issuing fresh sanads to the Desai alone of the lands in suit the terms of which make the property heritable and alienable on the satisfaction of the terms and conditions mentioned in the said sanads, Exhibits 108, 99 and 126. Therefore it is no longer open to a Civil Court to determine the nature of the property by going behind the sanads and the settlement by the Government under the said Acts. Government alone were competent to determine its nature under section 16 (*d*) of the Summary Settlement Act, which applies to provinces governed by Act II of 1862 and therefore to this property. See section 1, clauses 1 and 2, sections 2, 3, 4, 12, 16 (*d*), (*e*), (*g*) of the Summary Settlement Act. The lower Court was wrong in observing that Government had not sufficient material before them. See Exhibit 164 and compare also section 16 (*d*) of the Summary Settlement Act and section 114 of the Evidence Act under which a presumption will arise in our favour that Government made all

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regular inquiry: *Jamal Saheb* v. *Murgaya Swami*[1]. Government must be presumed to have all proper material before them and in fact they had it before them, Exhibits 77, 154, 80, 82, 88 and 200, which give a clear idea of the circumstances relating to the nature of the vatan. Sanads, Exhibits 108, 99 and 126, also confirm the same view. Courts cannot go behind such an inquiry: *Jamal Saheb* v. *Murgaya Swami*[1]. Section 4 of the Revenue Jurisdiction Act (Bom. Act X of 1876) is also a bar to such an inquiry on the part of Civil Courts.

The word "determine" used in the sections of the Summary Settlement Act, *e.g.*, section 16 (*d*) points to a conclusive determination. In the Land Revenue Code the said word has been so construed: *Bai Ujam* v. *Valiji Rasulbhai*[2], *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[3].

Even assuming that the property could be regarded as a service vatan *ab initio* the power of Government to give up the required service is complete under the various Acts relating to vatans. Moreover, the condition of service as a consideration for the enjoyment of the vatan was imposed by Government for their own benefit and they are entitled to give up the benefit if they choose. No one else is entitled to question the act of Government, not certainly the heirs of Lingappa who had himself acted on and benefited by the relinquishment of service.

Assuming that Courts could go into the said question and inquire into the nature of the vatan, we say that in 1906 when Lingappa's will became operative, the lands were not in fact service vatan. The Mahomedan sanads do not show that the rendition of future service

(1) (1885) 10 Bom. 34 at p. 40. (2) (1886) 10 Bom. 456 at p. 460.
(3) (1885) 9 Bom. 198 at p. 214.

was made a condition. Very few of the said sanads speak of any service at all. A few of them speak only of past and present service and when present service is mentioned, it is simply the implied service of paying homage by being present in Court, Exhibits 176, 183 and 213. Therefore the case would come under the words "nominally for the performance of service" contained in section 16 of the Summary Settlement Act.

The Maratha sanads are also similar. Only two of them mention past service. When no service is mentioned in connection with the lands, such lands are private property. The British Government continued the lands on the same tenure as before, Exhibits 201, 202. Even if service was once attached as a condition, the same has been given up by Government, the only party interested in the question, Exhibit 154, and on that footing the Government had formerly released the lands from attachment, Exhibit 200. In this view of the case we rely upon the ruling of the Full Bench in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[1]. Further there was a regrant of the property to Lingappa's father on certain conditions which had been fulfilled by the grantee, Exhibits 80, 82 and 85.

The settlement has been in operation for over half a century. The Desai himself could not have gone behind the settlement, much less can his heirs.

As to the position of the karkuns represented by plaintiff 3, we submit that they have no interest in the lands in suit and they cannot join in the present claim. The allegations in the plaint in this behalf are not clear and we resist the karkun's claim on grounds such as follow:—

(1) The original grants mentioned the karkuns but no distinct interest was given to them as donees.

[1] (1885) 9 Bom. 198.

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Reference was made to the purpose of the grant, namely, a provision for the establishment of karkuns. Therefore the principle of section 125 of the Indian Succession Act would apply. The class of karkuns besides is too indefinite to be made direct donees. No sanads were issued to the karkuns and no ancestors were mentioned by name. We, therefore, say that no interest was given to them as donees under the grants. (2) Whatever interest they might have had in the property, the same was carved out by the Desai who had given by a *pot* grant separate lands, which have been kept and enjoyed by them for several years and are not included in the suit, Exhibits 67, 77, 79, 80 and 91. (3) Owing to the said circumstance the British Government, in making fresh grants with reference to the lands in suit, treated the estate as split up and made no mention of the karkuns at all in the grants made to the Desai. The karkuns had separate sanads issued to them by the Government with reference to the lands carved out and enjoyed by them. These lands are not included in the suit and that being so, why should the karkuns claim any share in our lands? (4) Whatever rights the karkuns may have had in the lands in suit, the same have become time-barred. The Desai enjoyed the lands in suit for 400 years and the karkuns have not enjoyed any benefit out of these lands for 12 years before suit. This is admitted by plaintiff 3 in his deposition, Exhibit 67. (5) Whatever rights the karkuns may have as true owners, those rights are even now saved by section 3 of the Summary Settlement Act and the decision in the present suit will not bar any rights they may have. They can sue those who hold the lands under Lingappa's will.

As regards the question of the validity or otherwise of the adoption of plaintiff 2, we say that Lingappa's

will, Exhibit 93, prohibits the adoption. The plaintiffs allege that the will was revoked and a fresh authority was given to the widow to adopt. The same story of revocation was urged in the previous probate proceedings and was rejected by the High Court. The question is, therefore, *res judicata*. The judgment on this point was given by the lower Court before the date of the High Court's decision.

Lastly we submit that in any event the property of the Desai, which is admittedly not of the nature of service vatan, is not open to the objection raised in the plaint and must pass to the defendants under Lingappa's will.

Weldon, with *N. A. Shiveshvarkar*, for the respondents (plaintiffs) :—The lands were held for service and the fact that the service ceased to be demanded could not make them private property. See the definition of "hereditary office" in the Vatan Act : *Ramrao Trimbak* v. *Yeshvantrao Madhavrao*[1], *Savitriava* v. *Anandrav*[2], *Bai Jadav* v. *Narsilal*[3]. The lands could not be dealt with under the Summary Settlement Act because service lands were expressly excluded from the operation of the Act by section 1, clause 2, exception No. 3.

No doubt the Government had power to determine whether the lands were held for service or not. But the power was given to Government by the Act which had not been passed at the date of the Government Resolution of 1862. Therefore any settlement based upon the Government Resolution was *ultra vires* in its inception and could not affect the character of the property : *Jamal Saheb* v. *Murgaya Swami*[4].

(1) (1885) 10 Bom. 327.
(2) (1875) 12 Bom. H. C. R. 224.
(3) (1900) 25 Bom. 470.
(4) (1885) 10 Bom. 34 at p. 40.

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Section 12 of the Summary Settlement Act, no doubt, validates the prior settlement, but that section does not validate the "determination" by Government. Moreover the section says that the settlement made for the purpose of carrying out the object of the Act shall be valid. The object of the Act as set out in the preamble is to provide for the final adjustment summarily of unsettled claims to exemption from the payment of land revenue, etc. From this it is clear that the object was to secure the adjustment of claims to exemption from the payment of land revenue to Government and nothing more. To this extent the settlement was valid. But it could not make the property private.

Moreover there has been no determination whatever. The Revenue Commissioner merely asked for sanction to the treatment of the Desai's *potgee* as a personal holding and the Government granted the sanction. This cannot be called a determination which connotes some inquiry and decision or exercise of judgment by Government.

The property was inalienable in 1862 under section 20 of Regulation XVI of 1827. The privilege of declaring the interpretation of law was vested in the Governor in Council for two years and then in the Sadar Diwani Adawlat, see clauses 2 and 3 of section 7 of Bombay Regulation I of 1827. Under the interpretations it was held that lands attached to hereditary offices are entailed estates: *Bhimappa* v. *Mariappa*[1], *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[2].

We further say that even if the Summary Settlement Act had been passed before the settlement, still the property would not be alienable private property, *vide*

(1) (1866) 3 Bom. H. C. R., A. C. J., 128 at p. 130.
(2) (1885) 9 Bom. 198 at p. 209.

Government Resolution No. 4425, dated the 16th December 1867, which was followed in other Resolutions, No. 6502, dated the 16th October 1900, No. 482, dated the 26th January 1901, and No. 6183, dated the 2nd November 1875.

With respect to adoption. The probate proceedings do not form part of the record of the case. They were not put in evidence in the lower Court, nor is there any application here that they should be admitted. Moreover there was no express prohibition to the adoption. Having regard to the fact that part of the property is inalienable, the adoption is good in law. *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[1].

SCOTT, C. J.:—The plaintiff sued for a declaration that the will and codicil of the deceased Desai of Navalgund was inoperative and the defendants as executors had no rights under it, and that the plaintiff 2 was the lawfully adopted son of the deceased, and they prayed for an injunction restraining the defendants from entering into possession of the plaint property. The Desai of Navalgund was the last of a series of Desais whose title came into existence in the time of the Bijapur Monarchs in the 17th century. The Desai was the chief revenue officer of the district under both the Mahomedan rule and the Maratha rule which followed it. During the tenure of office of the family, to which the deceased Lingappa belonged, many grants in inam of villages had been made to the Desai for the time being. Sometimes they were expressed to be for the Desai and his karkuns and sometimes they were grants given to the Desai simply. After the disturbance and the unsettlement caused by the irruption of Tippu Sultan into the Southern Maratha Country, the grants

[1] (1868) 12 Moo. I. A. 397 at pp. 443, 445.

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to the Desai family were eventually confined to ten villages.

The services of the Desai as a revenue officer were not made use of during the British rule and he was informed in 1848 by the Collector under the provisions of section 2 of Bombay Act XI of 1843 that his services as a revenue official would not be required of him. At that time and for many years afterwards the officials of the British Government in the Southern Maratha Country were occupied in investigating and passing decisions and coming to settlements regarding claims to inam lands held, whether for service or as reward for past services, and in the course of the proceedings the Desai for the time being was offered the option of commuting his service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on service tenure, or by occasional payments in the nature of fines, both which classes of payments were styled "Nazarana".

Under the Government Resolution No. 455 of the 6th of February 1862, the request of the Revenue Commissioner for sanction to the treatment of the Navalgund Desai's *potgee* as a personal holding continuable to the holder on the terms of the summary settlement was sanctioned, and in consequence of that sanction the offer of the settlement was made to the Desai, and that offer was accepted on the terms that the commutation payment should be in the nature of an annual Nazarana or quit-rent. That was in the year 1862. At that time there was no express legislative provision sanctioning such settlements, although it may well be argued that the commutation of a service, which was no longer wanted, by an agreement to pay a fixed yearly sum, was within the competence of the executive authority in the Bombay Presidency. But any doubt as to the validity of the settlement is put an end to by reference to section

12 of Bombay Act II of 1863, which applies to the districts in which the Navalgund Desai's inam villages lay. It is in the following terms :—

> All notices and orders issued, and all settlements made, in the districts subject to the operation of Act XI of 1852, previous to the passing of this Act for the purpose of carrying out its objects, shall be as valid and as binding on Government, and on the holders and owners of, and all persons interested in, lands affected by such notices, orders, and settlements as if this Act had been passed before the said notices and orders were issued, and the said settlements made, which shall accordingly be regarded and taken to have been made under this Act, all the provisions of which, as to the future rights, privileges, and duties of the holders and owners of land to be brought under settlement by it, shall apply to the holders and owners of land already brought under settlement as aforesaid.

It has not been contended that the Bombay Legislature had not authority to enact that section validating the settlements so made, and the settlement made of the Navalgund Desai must, therefore, be takan to be a settlement valid and binding upon the Government.

What then was the position of the Navalgund Desai after this settlement? He was no longer liable to render any service in respect of the lands held by him, and they were, therefore, no longer held upon a service tenure. The terms upon which they were held were that a fixed annual quit-rent should be paid for them. It is contended for the plaintiffs that the lands, as service lands in the possession of the Desais for the last 200 years, were impressed with the character of inalienability. It has been suggested, but faintly, that the inalienability arose by reason of family custom, but no evidence of any importance has been adduced in support of that contention.

The more serious argument is that lands assigned as emoluments of district revenue officers were inalienable by custom and by express legislative provision. The first legislative provision on the subject, to which we have

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been referred, is Regulation XVI of 1827. As regards the argument based on custom we must consider whether the character of inalienability was attached to these lands by law or custom at the time of the passing of that Regulation. The question was discussed by Sir Michael Westropp in *Krishnarav Ganesh* v. *Rangrav*[1]. He says :—"As to civil hereditary offices, and the inams (watan) annexed to them, the balance of authority seems to incline in favour of the alienability in permanence (*previously to British legislation*) as well of the offices as of the inams appendant to them, together or separately..... In the case of some, but not of all, such offices, the assent of the Native Government seems to have been necessary to the validity of the alienation, and also, if the watan were undivided, the assent of the co-parceners, if any." With reference to those last remarks, it is to be observed that after the settlement, which derives its conclusive validity from the legislative provisions of Act II of 1863, there can be no doubt as to the assent of the Government for the time being to the alienability of the inams, and as far as concerns the testator in the present case, there is no question of any co-parceners, unless it be held that the 2nd plaintiff is an adopted son, and in that position entitled to the rights of a co-parcener. Authority, therefore, is in favour of the conclusion that up to the legislation of 1827 these inams were not inalienable.

The Regulation XVI of 1827, section 20, prohibited alienation, by any hereditary officer, of his official emoluments, and directed that such official emoluments enjoyed by a co-sharer should not leave the family in which the office was vested. The Regulation of 1827 was superseded by the Vatan Act of 1874. But that Act came into force long after the settlement of the inam

[1] (1867) 4 Bom. H. C. R. (A. C. J.) 1 at pp. 11 and 12.

lands in 1862, and settlements which have been effected under, and are within the purview of Act II of 1863, prevent the inam lands, to which they relate, from being subject to the provisions of the Vatan Act, because the holder under the settlement is no longer a hereditary officer holding for service.

Is there then any reason why the inams held by the Desai should, subsequent to the settlement, be regarded as impressed by any inalienable character such as does not appertain to the property of an ordinary Hindu land owner? It appears to us that there is not, and that conclusion is supported by the judgment of the Privy Council in *Rajah Mahendra Singh* v. *Jokha Singh*[1], with reference to what was known as "Mafeebirt tenure". Service was commuted for a quit-rent, and it was held by the Judicial Committee, if the donee's descendants continue to pay the rent, the tenure is altered from service to rent. In the case of service land, which in practice at all events is not usually alienated, it is difficult to establish a family custom, which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land has remained in a family for a long period of years, and descended by the rule of primogeniture where it is service land, is more consistent with the fact of its being held for service than with the theory of any special family custom. Moreover when the service has come to an end the last holder, if he have no sons or co-sharers, can put an end to a tenure based upon family custom: see *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*[2]. If then the inams of the Desai may be treated as the property of an ordinary Hindu land owner, subject to the payment of the agreed quit-rent to Government, there is no reason

[1] (1873) 19 W. R. 211.

[2] (1872) 1 Cal. 186 at p. 195.

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why he, in the absence of co-parceners, should not dispose of that property by will. He has made some provision for his wife, the 1st plaintiff, providing her with Rs. 100 a month, and a certain retinue, and if he did make a will, as is alleged, it is difficult to see how a subsequently adopted son can defeat the provisions of that will.

The will was propounded for probate in the District Court of Belgaum, a Court competent to try the questions arising in this suit. That Court decided that the will and codicil, under which the defendants claim, was a testamentary document executed by the testator, and as a consequence the provisions of the testator speak from the time of his death. These testamentary provisions include a provision for charity, based upon the recognition of the fact that he has no natural born son, and upon the assertion that he has not given and will not give the widow authority to adopt any son after his death. The contention, however, on behalf of the second plaintiff is that he is a validly adopted son of the testator. In order to prove that, eleven witnesses are produced who speak to words uttered by the testator within twenty-four hours of his death in which he stated that he had revoked his will and given his widow authority to adopt a son. These allegations were put forward in the Probate Court by the same parties, the 1st and 2nd plaintiffs, in their contention with the executors, who are the present defendants, who were then propounding the will and the codicil. Thirteen other witnesses were upon that occasion produced to prove the statements of the testator as to revocation of the will and authority to adopt and those thirteen witnesses were disbelieved by the Probate Court. The decision of the Court upon that point was affirmed by the High Court in appeal. The allegation of the plaintiffs involves the destruction of the conclusion arrived by the Probate Court negativing the alleged

revocation and affirming the testamentary character of the will which contains the statement with reference to authority to adopt. It appears to us that the learned Judge of the lower Court was in error in thinking that it was open to him, after the decision of the District Court in the will case, to try the question of the authority which was bound up with the question of revocation in the present suit. The issue which was decided by the Probate Court was that the words of clause 9, as part of the will, formed part of the testamentary document speaking from the death of the testator, and that conclusively determined between the parties the question whether or not the testator had revoked his will twenty-four hours before his death, and whether or not the statement, as to his having given any authority to his widow to adopt, expressed his wishes at the time of his death. Therefore, under section 11 of the Civil Procedure Code the Subordinate Judge should not have tried the issue, because the District Court which tried the probate case was competent to try the present suit, although in order to relieve the superior Court of part of its work section 15 of the Code provides that every suit shall be instituted in the Court of the lowest grade competent to try it, and, therefore, this suit was instituted in the Court of the First Class Subordinate Judge: see *Nidhi Lal* v. *Mazhar Husain*[1] and *Matra Mondal* v. *Hari Mohun Mullick*[2].

We now come to the case of the 3rd plaintiff. He can only be joined in this suit with the other plaintiffs if he makes common cause with them, and claims that he is entitled jointly, severally or in the alternative, upon proof of the allegations contained in the plaint. His case is, he being a man of forty years of age, born subsequent to the settlement of 1862, that from his own

(1) (1884) 7 All. 230. (2) (1889) 17 Cal. 155

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knowledge he can say that his father and grand-father and great-grand-father were karkuns under the Desai of Navalgund, and that therefore, they were entitled as beneficiaries, as persons answering a particular description in the sanads, to share in the revenues of the inam villages with the Desai. In so far as there is any contest between the 3rd plaintiff and the 1st and the 2nd plaintiffs as to their respective rights to the revenues of the inam villages, the third plaintiff is not competent to join with them in this suit, but we do not think that any question of misjoinder really arises, because upon the evidence in the case the only inam, in which it is clearly shown that the karkuns, whom the 3rd plaintiff claims to represent, were interested, was an inam of land amounting to twenty acres in Kalapur which is not in question in this suit (see Exhibit 77, cl. 11, 1, and Exhibit 91). The 3rd plaintiff, therefore, in relation to lands in suit stands in no better position than the 1st and the 2nd plaintiff. In respect of the lands in suit, other than the patilki and kulkarniki vatans, in which the 1st plaintiff, as the widow of the testator, would be interested as vatandar, and which under section 5 of the Vatan Act of 1874 would not be alienable by the will, the suit must fail. If it is agreed which lands mentioned in the plaint are held upon service tenure as patilki or kulkarniki vatans, they can be excluded from the decree dismissing the suit, and the plaintiff will be entitled to a declaration regarding them. If an agreement cannot be arrived at, there must be a remand to the lower Court to ascertain what those lands are. We think that in this case the costs of both parties in both the Courts should come out of the estate.

Decree reversed.

G. B. R.