
(1929) 06 BOM CK 0019
In the Bombay High Court

Gangadhar Nathu and Others

APPELLANT

Vs

Vishnu Vithal

RESPONDENT

Date of Decision : 10-06-1929

Acts Referred:

Bombay Hereditary Offices Act, 1874 — Section 15

Citation : 122 Ind. Cas. 70

Hon'ble Judges : Wild, J; Patkar, J; Madgavkar, J

Bench : Full Bench

Judgement

Marten, C.J.—This is an important case in the nature of a test case as to whether, when the cash allowance of a representative watandar under the Watan Act has been commuted under the provisions of that Act, the commuted allowance thenceforth becomes in effect joint Hindu family property, and consequently can no longer be claimed by the representative watandar to be his exclusive property, as would be the case with the cash allowance itself prior to the date of the commutation.

2. We have listened to an interesting argument from Mr. Kelkar, Counsel for the defendant, who supports the view that, in the present case, the representative watandars are entitled exclusively to the commuted allowance just as they were to the original allowance. That argument has not been concluded, nor have we heard Mr. Shingne, Counsel for the successful plaintiffs in the lower Appellate Court. We have taken this course for two reasons, (1) because we consider that there are certain facts which should be found and which are or may be material, and (2) because this appears to be a case which may more properly be heard by a Full Bench, particularly having regard, to what prima facie appears to be a conflict of authority between Bhau v. Ramchandrarao 20 B. 423, a decision of Sir Charles Sargent and Mr. Justice Candy, and Vaman Balvant Pophale v. Jagannath Govind Pophale 95 I.C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36, a decision of Sir Norman Macleod and Mr. Justice Crump.

3. As regards the first point, the question of fact which we want to be made clear

is whether the original cash allowance was derived solely from the Government Treasury, or whether it was derived wholly or in part from the watan lands. Accordingly, on that point we will direct a remand to the lower Appellate Court to determine (i) whether the original cash allowance was derived (a) wholly or in part from the watan land and/or (b) wholly or in part from the Government Treasury; and (2) whether since the date of the commutation there has been any increase in the assessment of the watan land. The second question is suggested to us by Counsel for the respondents, who points to condition 2 of the commutation, Ex. 24, which suggests that the assessment on the watan lands themselves might be increased by reason of the settlement arrived " at. Consequently, the interests of other holders in the watan, apart from the representative watandars, may, perhaps, be affected by the settlement.

4. We will direct that this inquiry be answered within two months. On its return we propose to remand the case, when all the facts have thus been ascertained, to a Full Bench. The precise questions, which we will formulate for the Full Bench, will be settled by us when we get the further findings of the lower Appellate Court.

5. But, while the case is fresh in our minds, it may be convenient to indicate shortly how the point arises. Exhibit 24, which is a typical document evidencing the commutation, shows that the representative watandars were two people, one named Damodar Anandrao and the other Gangadhar Nathu an infant acting by his mother Ambabai. The terms as to the rights of service between them were that each should take a ten years" turn. Then under a. 15 of the Watan Act, Government relieved them of their liability for service on the conditions referred to in Ex. 24, so far as the particular villages there mentioned are concerned. Under those conditions, the watandars will get one-third of the cash allowance according to the Wingate scale. The lands themselves will remain in the possession of those who have got them according to the Watan Act. Then there is to be a sanad according to the Gordon settlement, but with these alterations, viz., that the first, grantee of the cash allowance will have it continued to his direct descendants; that adoptions are to be made from the family only and that cash allowances of Rs. 5 or less are liable to be redeemed by Government at twenty times the amount. Forms of the Gordon settlement in somewhat different cases will be found in Phadnis"s Watan Act at page 541, Form VIII.

6. This deed of commutation was effected in 1914 and some five years afterwards, the plaintiffs brought this Suit No. 958 of 1919 claiming to be entitled to share in the commuted allowance. The Subordinate Judge dismissed their suit in 1920. But four years afterwards in 1924, the learned Assistant Judge reversed that decree, and in effect passed judgment in favour of the plaintiffs. The grounds, on which the lower Appellate Court mainly relied, were these, viz., that although the original cash allowance was the exclusive property of the representative watandars and was impartible during the period when the representative watandars were liable to give service, still when those services

were no longer required, the cash allowance thereby became ordinary joint Hindu family property which had never originally been partitioned, and which accordingly must be treated as being held in suspense, as it were, pending the performance of these hereditary duties. On the other hand, the defendants argue that the other members of the family are no more entitled to the commuted cash allowance than they were to the original cash allowance, and that neither the one nor the other has in any sense been or become joint family property. They in particular rely on various sections of the Watan Act, such as the definitions of assigned property in Section 4 and Section 5(2) and the prohibition against assignment in Section 7.

7. As regards the authorities, *Bhau v. Ramchandrarao* 20 B. 423 was a case of a commutation of a Deshmukhi service watandar under the Gordon settlement, and there the Court held that Section 10 of the Watan Act which enabled the Court in effect to set aside attachments, etc., in respect of unauthorised alienations under the Act, applied alike to these watandars, even though the liability to serve had been commuted. In particular Mr. Justice Candy, in referring the point for the Full Bench, stated (page 426 Page of 20 Bom. [Ed.]);-

The settlements made by Gordon's Committee, unless it was otherwise specially provided by any particular settlement, were not intended by either party to those settlements to convert the watan lands into the private property of the watandars with the necessary incident of alienability, but to leave them attached to the hereditary offices, which, although freed from the performance of service, remained intact, as shown by the definition of hereditary office in the declaratory Act III of 1874.

8. On the other hand, in *Vaman Balvant Pophale v. Jagannath Govind Pophale* 95 I.C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36 it was held by Sir Norman Macleod and Mr. Justice Crump that "a cash allowance granted by Government, in commutation of kulkarni watan services, belongs, like the watan, to the whole family. It cannot be claimed exclusively by the representative watandars and members of his family." There, however, it appears from the report that the defendant remained absent throughout the trial, and no evidence was led on his behalf. Moreover, the original commutation order directing the payment of Rs. 111 a year was not before the Court.

9. We have not heard, as I have already said, Mr. Shingne, but it is pointed out by Mr. Kelkar that in *Desai Maneklal Amritlal v. Desai Shivilal Bhogilal* 8 B. 42 which was relied on by Sir Norman Macleod, the settlement there in question was effected before the date of the Watan Act.

10. I have only stated the above in order to indicate what is the general nature of the controversy between the parties in the present case. We have not heard Counsel fully, and we in no way prejudge what eventually the findings may be. We may add that as at present advised, we do not propose to hear further arguments on this case, when the matter comes back from the lower Appellate

Court, but will merely proceed to settle the precise questions for the Full Bench with the aid of Counsel and in the light of the reply to be given by the lower Appellate Court. Costs of the present hearing will be costs in the appeal.

11. There was one further point which my brother Percival has suggested, viz., that notice might be given to Government of this remand to the lower Appellate Court, and also of the remand to the Full Bench when it is granted. The reason is this. We understand that the decision in this case is likely to affect a large number of cases where similar commutations have been arrived at by agreement between the representative watandars and Government. On the other hand, it would seem probable that, if the representative watandars had had any suspicion that the contention now taken by the plaintiffs was even arguable, they would never have arrived at the settlements which they in fact did come to with Government. In other words, the decision of the lower Appellate Court will be likely to impose a substantial obstacle in the way of any future agreements of a similar nature as regards those holdings where the cash allowances have not so far been commuted. It may be, therefore, that Government as amicus curiae, or otherwise would like to have an opportunity of being heard on the points in dispute. Whether they wish to do so, it will be for them to decide. Similarly, it will be for the lower Appellate Court or for this Court when the respective cases are before us to decide in what particular way we will allow the Government Pleader to address the Court. But that some such facility should be given to Government, to have the case presented to this Court on their behalf is, we think only reasonable and fair, provided Government wishes to take that course.

12. Accordingly, so far as the lower Appellate Court is concerned, we think that that Court should give notice to the Collector of the remand we have directed before the lower Appellate Court. As regards this Court there will be directions to the Registrar that when the proposed remand to the Full-Bench is made, notice of the fact is to be given to Government, and of the date for the hearing of the Full Bench case.

13. The findings as recorded by the lower Courts on remand were:

(1) the original cash allowance was drawn wholly from Government Treasury, no part of it being drawn from the watan land before commutation; (2) that there had been an increase in the assessment of the watan in the second Revision Settlement of 1917-18 which, however, was not in consequence of or as a result of the commutation.

14. The above findings were certified and the Bench referred the following questions to a Full Bench:]

Marten, C.J.

15. The questions for the Full Bench will be:

(1) Whether the kulkarni cash allowance in dispute ceased to be the exclusive property of the Hindu officiating kulkarni by reason of the commutation of the

kulkarni service and became from the date thereof the property of the joint family to which such officiator belonged?

(2) Whether u/s 15 of the Bombay Hereditary Offices Act the Collector is competent to introduce a condition in the settlement deed laying down a particular line of devolution of the commuted cash allowance?

16. As regards question (2), that arises under Clause (1) of the Settlement, Ex. No. 77, but we give no decision on the present occasion as to what is the true construction of that particular clause. The learned Pleader for the defendant wishes this point of law to be raised so that, he may, if necessary, utilise it in connection with that document. Costs, costs in the appeal.

17. [The reference was heard by a Full Bench consisting of Madgavkar, Patkar and Wild, JJ.]

OPINION

Madgavkar, J.

18. The facts upon which this reference arises are stated in the referring judgment of the learned Chief Justice.

19. The genealogy of the watan family is given in the judgment of the trial Court. Venkaji had two sons Bapu and Vithal. The plaintiffs respondents are the sons of Vithal. The defendants-appellants are the grandsons and descendants of Bapu. Venkaji was the sole representative watandar and enjoyed the cash allowance from Government now in question. On his death that allowance was enjoyed in the first instance by his elder son's son Nathu and on Nathu's death by the present defendants appellants. The plaintiffs respondents and their father never enjoyed it at any time. For the purpose of this reference we accept the finding of the District Court that the plaintiffs are never proved to have expressly surrendered any claim they might have had. In the year 1914, this allowance was commuted by the Collector, presumably u/s 15 of the Watan Act, to one-third of the original allowance, the services ceasing. The respondents filed this suit on the ground that the allowance appertained to the family of Venkaji and that when the services ceased, with them the appointment of the representative watandar ceased and the allowance reverted to the family, and they were entitled to one half. The trial Court held that they had given up their right and dismissed the suit. The District Court held that they had not given up their right, and, accepting the view of Macleod, C.J., in Vaman Balvant Pophale v. Jagannath Govind Pophale 95 I C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36, held that as the services had ceased and the representative watandar no longer existed, the allowance reverted to the family of Venkaji and allowed the plaintiffs' claim to one-half.

20. The defendants have appealed, and the questions referred to us by the Appellate Bench are as follows:

(1) Whether the kulkarni cash allowance in dispute ceased to be the exclusive property of the Hindu officiating kulkarni by reason of the commutation of the kulkarni service and became from the date thereof the property of the joint family to which such officiator belonged?

(2) Whether u/s 15 of the Bombay Hereditary Offices Act the Collector is competent to introduce a condition in the settlement deed laying down a particular line of devolution of the commuted cash allowance?

21. As regards the first question, all the learned Pleaders, to whom we are indebted for a very complete argument, agree that there is no question of a joint Hindu family in the legal sense, and that the first question is rather concerned with the " family " meaning thereby the descendants of Venkaji. Government is represented before us by Mr. A. G. Desai, as amicus curiae and supports the appellants.

22. Shortly put, the argument for the appellants is that the cash allowance now in question falls under the third part of Section 4 of the Watan Act (Bom. Act III of 1874); it is made voluntarily by Government and is subject periodically to modification or withdrawal; it is payable to the person chosen by the Collector as the officiating watandar and by reason of the commutation u/s 15 and cessation of the services the plaintiffs are not entitled to claim any share; and it was never in fact the family property of Venkaji personally, or property in which his descendants had ever a vested interest. The respondents rely on the decisions of this Court, *Desai Maneklal Amratlal v. Desai Shivilal Bhogilal* 8 B. 426 and *Vaman Balvant Pophale v. Jagannath Govind Paphale* 95 Ind. Cas. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36, and contend that the watan property belongs to the watandar family and as the respondents are members of that family being descendants of Venkaji, they are holders within the meaning of Section 15, and with the cessation of the service and of the representative watandar the appellants cannot claim the sole right to the commuted allowance.

23. It appears to us that the claim is really based on three assumptions, none of which is proved. These assumptions are as follows : Firstly, the cash allowance was the personal property of Venkaji in which his descendants had a vested interest from birth in the same manner as they would have had in the ancestral property of Venkaji governed by Hindu Law. Secondly, this interest ceased temporarily by reason of the selection by the Collector of one member of the family as representative watandar. Thirdly, but with the cessation of these services and of the representative watandar, this vested interest revives, and the respondents can claim a half share.

24. This property was never joint family property but was a cash allowance made voluntarily by Government based on certain calculations according to a sale framed by Government and subject to modification and withdrawal by Government. It was commuted u/s 15 and fell within the purview of Section 23 under which the Collector is entitled to fix the annual emoluments of officiators.

The mere fact that the choice of the Collector of the representative watandar is confined to a certain family does not mean that each and every member of that family singly or collectively, had a vested interest in that property. To put it shortly the legal limitation of selection on the part of the Collector is not equivalent to a vested interest in the members of the family. The second proposition, therefore, equally fails, and the third cannot follow.

25. The history of the legislation has been stated in *Radhabai v. Anantrav Bhagwant Deshpande* 9 B. 198 and it is not necessary for the purpose of this reference to consider the main provisions of Regulation XVI of 1827 or Act XI of 1843 or Act III of 1874 as now modified. It was not property belonging to the entire family of which the Collector reserved a part u/s 13 of Act XI of 1843 but was from the outset an allowance from Government payable at their option to the representative watandar. In this view it is not in our opinion necessary to consider the question of inalienability or even im-partibility. The expression "joint family" is not to be found in the Watan Act nor does it deal directly with impartibility. Inalienability is not in law synonymous with impartibility.

26. The commutation in question was made between the Collector as representing Government on the one side and Gangadhar defendant No. 1, the son of Nathu, on the other. The respondents were not parties to it. For such a commutation to give the respondents a claim is only possible in one of two ways, either by the agreement or as a necessary legal consequence of the agreement. As regards the parties to the agreement the appellant No. 1 did not desire or intend to benefit the respondents. He gave up his two-thirds share as Government gave up their services. The same was the case with Government as appears from the terms of the agreement (Ex. 77) that the cash allowance was to continue to the direct descendants of the person who got it first, in other words, excluding the respondents. No provision of the watan or other law has been shown whereby, as a legal consequence of the cessation of the service and the giving up of two-thirds, the plaintiffs respondents have necessarily obtained a legal right to the other one-third.

27. There are, however, two decisions of this Court on which the respondents can fairly rely in support of the present claim. In *Desai Maneklal Amritlal v. Desai Shivilal Bhogilal* 8 B. 426 a certain amin sukhdi in addition to the desaigiri allowance in the Kaira District was held, on commutation, to be partible amongst all the co-sharers. That case, however, can be distinguished on three grounds. The commutation was made in 1873 before the passing of Act III of 1874. The sanad, as appears from page 431 Page of 8 B.- [Ed] of the judgment, reserved in express terms the rights and interests of other parties. Thirdly, to the agreement of commutation not merely the representative watandar but all the others were parties.

28. The other case in favour of the respondents is *Vaman Balvant Pophale v. Jagannath Govind Pophale* 95 I C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36 in which it was held that "a cash allowance granted by Government, in

commutation of kulkarni watan services belongs, like the watan, to the whole family. It cannot be claimed exclusively by the representative watandars and members of the family." This decision purports to follow the decision in *Desai Maneklal Amritlal v. Desai Shivilal Bhogilal* 8 B. 426 referred to above and was further based on the ground that when the service ceased the watandar's family would continue as such, and any allowance paid by Government as compensation should be considered to belong to the whole family. This ground, if I may say so with respect, is a consideration more appropriate for the Legislature than for the Courts. The absence of any enactment can hardly suffice as the foundation of a legal right such as the plaintiffs-respondents assert. Moreover, in that case except for the written statement the case was undefended, the sanad was not before the Court, nor the order directing commutation. For the reasons stated above, and confining our observations expressly to this cash allowance from Government and not necessarily to other species of watan property, we think that the inference of Macleod, C.J., does not follow. The allowance from its inception was a matter between two parties and two parties only-Government on the one hand and the representative watandar chosen by them on the other-and except that the selection was confined by law to the watandar family on which undoubtedly the plaintiffs respondents are members, no other person in the family has a right, vested or other, to the allowance. If in 1914 Government on the one hand gave up their right to the service and the officiating kulkarni gave up two-thirds of that allowance, such an agreement was one which u/s 15 of the Act it was perfectly competent for them to make. It is not shown how such an agreement between these persons can found a cause of action for a suit such as the present. We do not think that there is any conflict between the case of *Bhau v. Ramchandrarao* 20 B. 423 where the question was of alienation and attachment u/s 10 of the Act, and the case of *Vaman Balwant Pophale v. Jagannath Govind Pophale* 95 I.C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36. But we differ from the view of the Division Bench of this Court in *Vaman Balwant Pophale v. Jagannath Govind Pophale* 95 I. C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36 and in respect of this species of watan property we agree rather with Westropp, C.J., in *Savitriava v. Anandrav* 12 B.H.C.R. 224 (page 226 Page of 12 B.H.C.R. [Ed.]) that "there is not any authority for holding that a cessation of the performance of the duties of the office, even though sanctioned by Government, would alter the nature of the estates appendant to them." We are of opinion that the argument for the respondents fails.

29. On the second question as regards the Collector's power, in effect the Collector agreed that the allowance should be divided between the direct descendants of the person who got it first. He has not departed from the rule of devolution of Hindu Law, and such a clause, we think, was within his competence.

30. The answers to the questions referred to are, therefore, as follows:

(1) The kulkarni cash allowance in dispute did not cease to be the exclusive property of the officiating kulkarni by reason of the commutation of the kulkarni

service and did not become from the date thereof the property of the joint family and descendant of Venkaji.

(2) u/s 15 of the Bombay Hereditary Offices Act the Collector was competent to introduce a condition in the settlement deed laying down a particular line of devolution for the direct descendants of the person who enjoy the allowance first.

Patkar, J.

31. I agree. I desire to add that we are concerned in this case with a watan which consists of a cash allowance paid from the Treasury to the officiating kulkarni belonging to the watan family. It comes within the last clause of the definition of the watan property u/s 4,- " cash payments in addition to the original watan property made voluntarily by Government and subject periodically to modification or withdrawal." We are not concerned in this case with watan property which consists of land from the income and profits of which the officiator is paid. In the latter case it might be contended that the lands being the ancestral property of the family, as soon as the services are dispensed with, the entire profits or the income of the property would be divisible among all the members of the family. In the present case we are concerned with a cash allowance payable by the Treasury and subject to modification or withdrawal.

32. Several cases have been cited before us and the provisions of the Regulation XVI of 1827, Acts XI of 1843 and III of 1874 have been brought to our notice. The cases cited mostly refer to the power of alienation with regard to the property in respect of which there has been a commutation u/s 15 of the Watan Act. In *Radhabai v. Anantrav Bhagwant Deshpande* 9 B.198 the settlement was made under Act II of 1863. In the present case we are concerned with the settlement u/s 15 of the Watan Act. The effect of the decisions in *Appaji Bappuji v. Keshav Shamrao* 15 B. 13 and *Bhau v. Ramchandrarao* 20 B. 423 is that in spite of the cessation of the service on account of any commutation or settlement u/s 15 of the Watan Act, the property continues to be watan and would, therefore, be inalienable outside the family of the watan-dar. The Gordon Settlement of 1864 was not intended by either party to the settlement to convert the watan lands into the private property of the watandar with the necessary incident of alienability. According to the definition of "hereditary office" in Section 4 of the Watan Act, the expression includes such office when the services originally appertaining to it have ceased to be demanded. The position is made clear by Clause 2 of Section 5 of the Watan Act. The question, however, of the inalienability of the watan property is quite different from the question, which we have to consider, viz., whether, after the cessation of the services, the commutation allowance reverts to the family, and other members of the family not entitled to the privilege of being appointed as officiating kulkarnis are entitled to a share in the commuted allowance. The case of *Savitriava v. Anandrav* 12 B.H.C.R. 224 lends some support to the appellants' contention. But it appears that it was proved in that case that there was a custom of impartibility in the family. The only cases in favour of the respondents are *Desai Maneklal Amritlal v.*

Desai Shivilal Bhogilal 8 B. 426 and Vaman Balvant Pophale v. Jagdnnath Govind Pophale 95 I.C. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36. In Desai Maneklal Amritlal v. Desai Shivilal Bhogilal 8 B. 426 the whole of the allowance was not appropriated for service. the rights of the other members of the family entitled to amin sukhdi were reserved in the sanad, and Government dealt with the whole family, and the commutation was before the passing of the Act III of 1874. In Vaman Balwant Pophale v. Jagannath Govind Pophale 95 Ind. Cas. 528 : 28 Bom. L.R. 556 : AIR 1926 Bom. 36 the sanad was not before the Court, and reliance was placed on the decision in Desai Maneklal Amritlal Desai v. Shivilal Bhogilal 8 B. 426. There is nothing in the Watan Act which would support the contention that cessation of the service would resuscitate the rights of the other members of the family who had no right to officiate as kulkarnis. The commutation in this case was the result of an agreement entered into between Government and Gangadhar belonging to the branch of Nathu. It was Gangadhar who was all along appointed as officiator. It is not contended on behalf of the plaintiffs that the commutation was illegal on the ground that it was arrived at behind their back. Gangadhar was a holder of the watan under Clause 4 of Section 15 of the Watan Act. The commutation, therefore, being presumably binding on the persons who entered into the contract, i. e., Government and the holder of the watan and his heirs and successors, it is not shown by the plaintiffs that they are entitled in this suit to disregard the terms of that contract. It is not shown that the plaintiffs have any interest by birth in the cash allowance which was given by Government voluntarily for remuneration of the officiator and which was subject to modification or withdrawal. No sanad or other evidence has been produced to show that the cash allowance was joint family property or was an appanage of the watan in which other members of the family were interested, and was not the remuneration of the officiator only. I, therefore, agree that the answer to the first question is that the kulkarni cash allowance does not cease to be the exclusive property of the officiating kulkarni by reason of the commutation of the kulkarni service.

33. With regard to the second question, the condition in Ex. 77 is that the cash allowance is to be continued to the direct descendants of the watandar who was appointed to officiate in the kulkarni office, and there has been no introduction of a line of devolution of the estate inconsistent with or repugnant to Hindu Law. I think, therefore, that the condition 4 (1) of the settlement (Ex. 77) in this case was one which the Collector was competent to introduce.

Wild, J.

34. I have nothing to add.