
(1929) 06 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 473 of 1925

Gangadhar Nathu

APPELLANT

Vs

Vishnu Vitthal

RESPONDENT

Date of Decision : 10-06-1929

Acts Referred:

Bombay Watan Act, 1886 — Section 15

Citation : (1929) 31 BOMLR 935 : (1929) ILR (Bom) 739

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

Bench : Full Bench

Judgement

Amberson Marten, Kt., 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 I.L.R(1895) . 20 Bom. 423 a decision of Sir Charles Sargent and Mr. Justice Candy, and Vaman Balvant Pophale Vs. Jagannath Govind Pophale, 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 case 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 (1) 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, Exhibit 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 u/s 15 of the Watan Act, Government relieved them of their liability for service on the conditions referred to in Exhibit 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 and 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 Vishnu 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 p. 541, Form VIII. 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.

6. As regards the authorities, *Bhau v. Ramehandraro* 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 (p. 426):?

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 vatan lands into the private property of the vatandara 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.

7. On the other hand, in *Vaman v. Jagannath*, 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 can not 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 year was not before the Court.

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

9. 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 to the appeal.

10. 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 watandare 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.

11. 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.

12. The findings recorded by the lower Courts on the remanded issues 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) 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.

13. When the above findings were certified, the bench (Marten C.J. and Cramp J.), on March 12, 1928, referred the following questions to a Full Bench :?

Amberson Marten, Kt., C.J.

14. The questions for the Full Bench will be :?

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

15. As regards question (2), that arises under Clause 4 (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.

16. The reference was heard by a Full Bench consisting of Mad gavkar, Patkar and Wild JJ,, on June 10, 1929.

17. W.B. Pradhan, with Ramnath Shivilal, for the appellants. I submit that the commutation of the cash allowance does not change the character of the allowance. As regards the income of a watan, different enactments have been made from time to time. Before the year 1827, the whole income of the watan property, whether it was land or cash allowance, went to the man who rendered services; and the right of rendering services was in every member of the family. The watan was then partible and alienable. In 1827, Regulation XVI was passed, which enacted that "the allowances so derived by a sole proprietor or occupant of a hereditary District or Village Revenue Office, shall in future be considered strictly as the Official remuneration of the person filling the office, and as such, shall not be subject to alienation by an incumbent" (Section 20). The Legislature thus impressed a new character on the watan property, which became inalienable, Next, Regulation 5 of 1833 gave more effective control to the Collector over the watandars. Then came Act XI of 1843. The right of rendering services, which was open to all the members of the watandar family, was by Section 4 of the Act confined to a particular branch of the family, and generally to the elder branch. Section 13 divided the watan property into two parts; one portion was set apart as " the fit maintenance of the Officiating Hereditary Officer," and the remainder of " the rents and profits of any hereditary office " was divisible among all the members of the watandar family. Section 14 enabled the Collector to assign " a fit remuneration from the rents and profits of the said office " to a deputy appointed " to conduct the duties of an hereditary office." From this time onwards, the " remuneration" assigned to an officiating watandar came under the control of the Collector, It was inalienable. The rest of the watandar family lost all rights over it. In 1874 the Bombay legislature enacted the Hereditary Offices Act (Bom. III of 1874). Section 5 of the Act, as it originally stood, prohibited a watandar from alienating his watan " to any person not a watandar of the same watan." The section was amended in 1886, and the watandar was disabled from alienating his watan to " any person who is not a watandar of the same watan" "beyond the term of his natural life." The definitions of " watan property " and " hereditary office " contained in the Act are suggestive. The former expression means " the moveable or immovable property

held, acquired or assigned for providing remuneration of the duty appertaining to an hereditary office "; and the latter expression means "every office held hereditarily for the performance of duties, etc.," and V.B. includes "such office even where the services originally appertaining to it have ceased to be demanded. u/s 7 "watan property assigned...as remuneration of an officiator, and the profits of watan property so assigned, shall not be alienated or assigned to any person whatever." Where watan property passes into possession of a person other than the officiator, it is liable to contribution for remuneration of the officiator (Section 8). The Collector may declare alienation of watan property to be under certain circumstances null and void (a. 9), Where attachment is levied by a civil Court on watan property assigned as remuneration to an officiator, it is to be removed on receipt of the Collector's certificate (8.30). The Collector has the power to resume the property under certain circumstances (Section 11 A) The above provisions show that the watan assigned to an officiating watandar is inalienable, and is a personal perquisite. The Collector may, with the consent of the holder of a watan, relieve him and his successors of their liability to perform" service (Section 15.) Section 23 empowers the Collector to fix "the annual emoluments of officiator" There were three ways of remunerating watandars: (1) grant of the soil; (2) grant of the soil at a reduced assessment; and (3) cash allowance. The income of a kulkarni depended on the collections which he actually made in a particular village. A portion of it was set apart as the remuneration for the officiating kulkarni; and the remainder was divisible among the members of the watandar family. The portion set apart remained the personal property of the officiator, whatever form it chanced to take. Commutation of service does not change the character of the property.

18. The earliest case on the subject is *Krishnarav Ganesh v. Rangrav* (1867) 4 B.H.C.R. I, II where the whole law of inams is discussed. In *Radhabai and Ramohandra Konher v. Anantrav Bhagvant Deshpande* I.L.R.(1885) . 9 Bom. 198 f. b. the Judges were only dealing with commutation effected under Acts II and VII of 1863. The settlement in the present case is not under those Acts. In *Appaji Bapuji v. Keshav Shamrav* I.L.R.(1890) Bom. 13 the settlement was the Gordon settlement. The case of *Bhau v. Ramchandrarao* I.L.R(1895) . 423 f. b. extends Section 10 to deshmukhi service watan the liability to serve under which has been commuted under the Gordon settlement. It is also laid down that cessation of the performance of the duties attached to an impartible watan does not alter the nature of the estate and make it partible: *Savitriava v. Anandrav* (1875) 12 B.H.C.R. 224 and *Forbes v. Meer Mahomed Tuquee* (1870) 13 M.I.A. 438,.

19. The cases of *Demi Mansklal Amratlal v. Deeai Shivilal Bhogilal* (1884) ILR 8 Bom. 426 and *Vaman Balvant Pophale Vs. Jagannath Govind Pophale*, are against me. The first case, which comes from Gujarat, is distinguishable, because the "amin sukhadi" allowance which was in dispute there was over and above the desaigiri allowance. In the second case, the judgment is halting and goes upon the first case.

20. A.G. Desai, for the Secretary of State. It is important to ascertain in the first place the real nature of the original cash allowance before the commutation of the kulkarniki service. That cash allowance may be treated as "watan property" within the meaning of Section 4 of the Watan Act. But it falls under the third category of the definition of that term. In other words, it is a cash payment "made voluntarily by Government and subject periodically to modification or withdrawal"

21. This is clear from the Potgi Allowance Patrak, Ex. 91, page 38. The cash allowance, referred to in columns 13 and 14 of the Patrak, was being originally paid to the officiator under Rules 7 and 8 of what are called "the English Rules" in that Patrak. These rules, framed for the determination of the amount of remuneration of the officiator, will be found published in Phadnis' Watan Act, 4th Edition, page 230. The lower Courts find that this cash allowance of Rs. 273-4-0 was "wholly assigned" for the remuneration of the officiator and was payable exclusively from the Government Treasury. This amount of Rs. 273-4-0 was made up of what is called the Akarni Allowance, i. e., a certain percentage allowed to the officiator on the gross revenue of the village determined under Rule 7 and entered in column 13 and of the fixed Potgi allowance determined under Rule 8 and entered in column 14 of the Patrak, Exhibit 91.

22. The payment of this amount was being made to the officiator personally?and not to the family to which he belonged?for the extra work done by such officiator, The cash allowance, therefore, was in its origin the exclusive property of the officiator. Did it cease to be so on the commutation of service?

23. Under the commutation service was dispensed with and Government agreed to pay permanently one-third share "of the remuneration and the Potgi (allowance)" to defendant No. 1 and his (defendant No. 1's) direct descendants (vide the Sanad, Exhibit 75), i. e. one-third of Rs. 273-4-0 equal to Rs. 91-1-4. This 1829 is really an entirely new grant, Government may have allowed one-third or more or less. Even without following the procedure as laid down in Section 15, Government could have "modified" or "withdrawn" the original allowance, u/s 4 of the Act, as it was being "voluntarily" paid by Government and that too exclusively from Government treasury. It was thus entirely within the discretion of Government to determine to whom and under what conditions the commuted cash allowance was to be continued. The original cash allowance thus by its very nature never was "family property" and it could not naturally assume that character by the commutation of service.

24. Further, the allowance was "wholly assigned" for the remuneration of the officiator and could not leave the hands of the officiator even if he willed it. Vide Bom. Regulation XVI of 1827, Section 20, Clause (1), and Bom. Act XI of 1843, Section 13. Cf. also Sections 5, 7, 10, 13 and 23 of the Watan Act.

25. In Vaman Balvant Pophale Vs. Jagannath Govind Pophale, the sanad was not before the Court. The judgment only relies on Desai Maneklal Amratlal v. Desai

Shivlal Bhogilal (1884) ILR 8 Bom. 426. But in the latter case the commutation was effected before 1879 (page 429) and the settlement was made with the whole family (p. 430). Moreover, the rights of the other members were expressly reserved (p. 481). In the present case, the sanad (Exhibit 75) is before the Court; the commutation was with one particular member of the family, i. e., with defendant No. 1 who alone, not even his brother defendant No. 2, gets the benefit of the settlement.

26. The answer to question No. 2 depends on the answer to question No. 1. If the Collector can at any time validly "withdraw" the whole of the allowance before settlement he can equally validly introduce a condition in the settlement laying down a particular line of devolution of the commuted cash allowance.

27. R.W. Desai, for the respondent. I do not for a moment dispute the Collector's right to assign property as remuneration to an officiator, u/s 13 of the Hereditary Offices Act 1874 as long as the officiator's services were required. Those services have now been discontinued. The Collector has already exercised his discretion and assigned certain cash allowance, The concrete fact is that that cash allowance was fixed in the time of Venkaji so that the lands as well as the cash allowance formed the watan property, In its inception, the property, viz., the cash allowance, was watan property; and so the commutation allowance and which stood in its place remains watan property.

28. Alienation is distinguishable from partition. The two terms are not convertible. The sanad itself does not prevent the property from being partitioned. The only question is whether the property in suit has become impartible. Even if partition means alienation, then Sections 7, 8 and 9 do not come in the way. The term "joint family property" is not known to the Act, It only knows watan property and watandar family. See Ramangavda v. Shivapagavda (1896) ILR 22 Bom. 601 and Bai Laxmi v. Maganlal (1917) ILR 41 Bom. 677, s. c. 19 Bom. L.R. 730. In spite of partition the watan still remains the same. My right to the property is not lost, only by reason of the fact, that the name of the representative watandar is entered.

29. The cases of Desai Maneklal Amratlal v. Desai Shivlal Bhogilal I.L.R.(1884) 8 Bom. 426 and Vaman Balvant Pophale Vs. Jagannath Govind Pophale, decide that where there is family property the right of succession will not be prejudiced if there is a statutory bar to its enjoyment for a certain time. Here, the property which was originally watan property belonging to the family could not be enjoyed by all members of the family on account of the statutory bar. On the removal of the bar the right of the members of the watandar family to enjoy the watan property is revived.

30. The present reference to a full bench is made on the supposition that there is a conflict between Bhau v. Ramchandrarao I.L.R.(1895) . 20 Bom. 423 f. b. and Vaman Balvant Pophale Vs. Jagannath Govind Pophale, . But there is no conflict at all between the two cases. The cases of Bhau v. Ramchandrarao and Appaji

Bapuji v. Keshav Shamrav I.L.R(1890) . 15 Bom. 13 are cases of alienation to an outsider.

31. The prohibition in Section 5(a) does not apply to an alienation to a watandar of the same watan, The services having come to an end the representative watandar has also ceased to exist. The bar of Section 5(a) does not apply to watans which have been commuted or settled. Sections 7 and 8 apply to existing service watans.

32. The commutation by the Collector u/s 15 was made with the representative holder. He represented the whole watandar family to which I belong. I am entitled to stand in the shoes of the representative holder.

Patkar, J.

33. Would you have any ground of complaint if the Government had withdrawn the whole allowance?

34. No such commutation, i. e., commutation amounting to a complete withdrawal, would have been possible without the consent of the representative holder, and if he had consented I could not complain.

35. I submit that Vaman v. Jagannath is correctly decided. Vishnu

36. Question No. 2 is based on the assumption that there is a new grant here. There is none in the present case. What is done is that a one-third is given as compensation for the kulkarni watandar's right and the remaining two-thirds are taken away as being the equivalent for the services dispensed with. Clause 4 of Section 15 does not mean that the grantee is absolved from liability to his coparceners. It is not correct to say that it defines the rights of the members of the family. The question assumes that the rights of coparceners are destroyed by the clause. My rights are safeguarded by Section 15(4).

37. Pradhan, in reply. Section 15, Clause (4), is an enabling clause which authorises the Collector to open negotiations with any member of the family. if there is no particular member available, then the negotiations can be carried on with all members of the family. Under Article 5 (2) it is for the Collector to give any line of devolution to the watan property. If he does not do so, then Section 5(1)(a) applies. The Collector has a complete hold on the property; and that idea is carried out by Section 5(2). Sections 7, 8 and 9 are not meant to apply to a watan for which services are being rendered. The Collector has recognized me alone as a representative watandar. Venkaji himself got the watan not in his personal capacity, but only as a representative watandar.

Madgavkar, J.

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

39. 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 jash 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 respondent 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 Mackod C.J. in Vaman Balvant Pophale Vs. Jagannath Govind Pophale, 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.

40. 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?

41. 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.

42. 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 under Article 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

hia descendants had ever a vested interest. The respondents rely on the decisions of this Court, *Desai Manelclal Amratlal v. Desai Shivilal Bhogilal* (1884) ILR 8 Bom. 426 and *Vaman v. Jagannath*, 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.

43. 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.

44. This property was never joint family property but was a cash allowance made voluntarily by Government based on certain calculations according to a scale 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 was 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.

45. The history of the legislation has been stated in *Radhabai and Ramchandra Konher v. Anantrav Bhagvant Deshpande* I.L.R.(1885) . 9 Bom. 198 and it is not necessary for the purpose of this reference to consider the main provisions of Reg. 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 impartibility. 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.

46. The commutation in question was made between the Collector as representing Government on the one side and Gaugadhar 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 (Exhibit 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.

47. There are, however, two decisions of this Court on which the respondents can fairly rely in support of the present claim. In *Desai Maneldal v. Desai Shivilal* 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 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.

48. The other case in favour of the respondents is *Vaman v. Jagannath*, in which it was held that "a cash allowance granted by Government in commutation of *kulkarni wataD* 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 Maneldal v. Desai Shivilal*, referred to above, and was further based on the ground that when the services ceased the *watandar*"a 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 (B nor the order directing commutation. For the reasons stated 1929 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 of 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 Bhay, v. Rarnohandrarao I.L.R.(1895) 20 Bom. 423 f. b. where the question was of alienation and attachment u/s 10 of the Act, and the case of Vaman v. Jagannath, But we differ from the view of the Division Bench of this Court in Vaman v. Jagannath, and in respect of this species of watan property we agree rather with Westropp C.J. in Savitriava v. Anandrav (1875) 12 B.H.C.R. 224 "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.

49. 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.

50. 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 descendants 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 enjoyed the allowance first.

Patkar, J.

51. 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 payment 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.

52. Several cases have been cited before us and the provisions of Reg. 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 Radhdbai and Ramchandra Konher v. Anantrav Bhagvant Deshpande I.L.R.(1885) 9 Bom. 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 Bapuji v. Keshav Shamrav I.L.R.(1890) . Bom. 13 and Bhau v. Ram-chandraro (1895) ILR 20 Bom. 42, f. b. 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 watandar. 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 Article 5 of the Watan Act. The question, however, of the inalienability of the 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 Paikarj, the commuted allowance. The case of Saviiriava v. Anandrava (1875) 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 Maneldal Amratlal v. Desai Shivilal Bhogilal (1884) ILR 8 Bom. 426 and Vaman Balvant Pophale Vs. Jagannath Govind Pophale, . In Desai Manehlal v. Desai Shivilal the whole of the allowance was not appropriated for service, the rights of the other members of the family entitled to atnin 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 v. Jagannath the sanad was not before the Court, and reliance was placed on the decision in Desai Manehlal v. Desai Shivilal, 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.

With regard to the second question, the condition in Exhibit 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 (Exhibit 77) in this case was one which the Collector was competent to introduce.

Wild, J.

53. I have nothing to add.