

(1923) 02 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 31 of 1921

Mahadevappa Chansomappa Desai

APPELLANT

Vs

Kashirao Somappa

RESPONDENT

Date of Decision : 21-02-1923

Acts Referred:

Bombay Revenue Jurisdiction Act, 1876 — Section 4(a)

Citation : AIR 1923 Bom 467 : (1923) 25 BOMLR 797

Hon'ble Judges : Norman Macleod, J; Crump, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—The plaintiff filed Suit No. 4 of 1918 in the Court of the First Class Subordinate Judge of Bijapur to recover his one-third share by partition of the property specified in Schedules A to E to the plaint, to get a declaration that the alienation of the property in Schedule D by his father by an award decree in Suit No. 2 of 1906 in the Bijapur District Court was null and void after his father's death and to get a declaration that he was entitled to a one-third share in the property in Schedule E after the death of defendant No. 6 together with past and future mesne profits.

2. Somappa his father had three sons, Krishnarao defendant No. 1, Krishnappa defendant No. 2, and Mahadevappa, the plaintiff. During his life-time he divided the plaint property into four shares and gave each of his sons one share, keeping one for himself. Subsequently he willed away his own share in favour of his sons. In Suit No. 221 of 1913 filed by the plaintiff in the Court of the First Class Subordinate Judge of Bijapur to recover his share under the partition and under his father's will, it was held that the partition was unequal and unfair, so the Court dismissed the suit. It was contended by the present defendant No. 1 in that suit that the property in suit was impartible, but no finding was recorded on that issue.

3. With regard to the property in Schedule D, an award decree was passed in Suit No. 2 of the 1906 filed by the plaintiffs father whereby it was decided that defendants Nos. 3, 4 and 5 should get possession of the property and remain in possession until March 2, 1926. Defendant No. 6 was the mother of Somappa and the property in Schedule D was held by her for her life-time only. The plaintiff claimed that all these properties were joint family properties, to a share in which he was entitled by partition.

4. The first defendant pleaded that the property in suit was impartible, that there was a custom in the Gani Deshgat that the property descended by primogeniture, the junior members or the family being entitled to maintenance only, and this is the main issue in the case. It was also contended that the plaintiff's claim for partition was barred by res judicata by reason of Suit No. 221 of 1913 in which the plaintiff might and ought to have asked as an alternative for partition.

5. The second defendant in his written statement admitted the plaintiff's claim and asked that his one-third share should be awarded on the partition. Defendant No. 5 claimed to be in possession of the lands in Schedule D under a lease from defendant No. 4 and that he was entitled to enjoy them in pursuance of the decree in Suit No. 2 of 1906. Moreover, the plaintiff's claim was barred by Section 4(a) of the Bombay Revenue Jurisdiction Act as the Collector refused to restore the lands to the plaintiff when he applied u/s 5 of the Watan Act.

6. Defendant No. 6 claimed the property in Schedule E as her absolute property.

7. I cannot agree with the learned Judge that the plaintiff's suit is barred by res judicata.

8. The cause of action in Suit No. 221 of 1913 was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint family property. He certainly might have done so and he even asked the Court for leave to amend his plaint at a late stage but his application was rejected by the Court. In the first place, I do not see myself why the plaintiff was bound to claim equal partition. He may very well have been content, if the Court declined to give effect to the partition made by the father, which was extremely favourable to him, to remain joint with his father. Secondly, if the Court refused to allow his amendment and referred him to a separate suit for partition, it is difficult to see how it can be said that the omission to have the question of equal partition decided was not due to the action of the Court. If a plaintiff realises his mistake before the record is closed and asks for leave to amend, though the omission of the claim from the plaint was due to the plaintiff, the rejection of the prayer for amendment would be the direct cause of the omission from the suit. On the question of the impartiality of the property as Deshgat Vatan, we had recently in Sidraj v. Bhojraj First Appeal No. 3 of 1920 to consider the same question with regard to a Deshgat Vatan in the District of Belgaum. My learned brother, as he stated in his judgment in that case, has

considerable familiarity with the Vatan of these hereditary offices in the Southern Maratha Country and apart from that there is the experience acquired in the cases which have come before this Court that the evidence is generally conclusive in each case that the Deshvat Vatan descends according to the rule of primogeniture. Though, as pointed out by the Privy Council in *Adrishappa v. Gurushidappa* I L.R.(1880) 4 Bom. 494. the question must be determined in each case whether the Deshvat is impartible, it is impossible to exclude from one's mind the fact that impartibility is the rule rather than the exception, and as pointed out by this Court in *Timangavda v. Rangangavda* (1878) P.J. 240 evidence is admissible to show that the custom exists in other families, not as being in any way conclusive by itself, but as assisting to show that the custom set up in the particular case before the Court was not an unusual one in the District in which the parties resided. The evidence in this case is all on the side of the first defendant. As plaintiff was unable to prove any previous partition in the family, he could only rely on the fact that his father had attempted to divide the property. But considering the inequality of the division he made, it would appear as if he had attempted to divide the property before his death as if it were his own instead of dividing it as if all were equally entitled as members of a joint family.

9. The first defendant relies on the various exhibits which have been put in from the Records of the Inam Committee. Exhibit 148 is the statement made by Kasappa, father of Somappa. The earliest Sanad he produced was granted in 1077 Hijri, 1666 A.D. and as in 1855 the whole of the Vatan was entered in Kasappa's name that is evidence that the Vatan had never been divided. That of course would not be sufficient to prove impartibility, but there is a considerable body of evidence to show that when there were opportunities for division no division was made, and that at various times lands were given to the Kumars or members of the junior branches of the family for maintenance and not as representing their shares. Exhibit 149 is the pedigree of the family produced from the records of the Inam Committee. The first defendant detailed in his evidence how lands were given to Bhaubands for maintenance, and what lands were in the possession of living Bhaubanda. He said in cross-examination that such lands were to be continued to the Bhaubands till the line of male descendants became extinct when they reverted to the Desai. He was willing to give lands to the plaintiff and defendant No. 2 for maintenance. Witnesses (Exhibits 119 and 120) Kshatriya Desai of Achali and Patalkal State deposed as to the custom of impartibility existing in their families. Exhibits 121 and 122 were acquainted with the family in suit and deposed to the fact that lands were given to the Kumars for maintenance. Exhibit 181 was Bhimrao one of the Kumars. He was the great-grandson of Kallappa, brother of Narsappa Naik in Exhibit 149, and had four lands in his possession which had been given to his ancestors, though in cross-examination he said they were given to his father by Somappa. This witness name appears in Exhibit 116 which was a list of Survey Numbers given for enjoyment to Kumars purporting to have been written by one Venkaji Krishna

and was Exhibit 105 in Suit No. 221 of 1913. Venkaji, who is now dead, was examined in that case and his evidence has been put in as Exhibit 139 u/s 32 of the Indian Evidence Act.

10. That evidence was very important as Venkaji was the Mukhtyar of Somappa. Appellant's counsel contended very strongly that his statement and the list were inadmissible in evidence, but it is difficult to see how they can be excluded. Venkaji was called by the plaintiff in Suit No. 221 of 1913 to prove the will made by Somappa, and was apparently hostile to defendant No. 1. He had to admit, however, in cross-examination that lands were given to the Kumars and that he had written the list Exhibit 105.

11. I think that as the suit property is very ancient Deshगत Vatan in the Southern Mahratha Country which has never been divided, lands being given to the Kumars for maintenance and a reverting to the eldest branch when their lines of descendants became extinct, the learned Judge was justified in holding that it was impartible. I think that the appeal fails and should be dismissed with costs.

Crump, J.

12. The parties to this suit are the three sons of one Somappa, and the plaintiff seeks for partition of the family property claiming to be entitled to a share of one-third. The property in question forms part of a Deshmukhi Vatan, and defendant No. 1, who is the eldest son, claims that the succession is by lineal primogeniture. The only substantial question in the appeal is whether defendant No. 1 has established the defence which he sets up.

13. There is no possible doubt as to the nature of the estate. It was suggested in argument that this was not a service-tenure, but the evidence is conclusive to the contrary. Though the Sanad is not produced, it is clear from Exhibit 148 that Kasappa, the grandfather of the parties, appeared before the Inam Committee in 1855 when proceedings were being taken for the commutation of the Vatan. From his statement it would appear that the original grant was made in the sixteenth century and that it was as remuneration for services to be rendered as hereditary Deshmukhs of the Chimalgi Pargana. The word "Chawrat" (vide Exhibit 116) shows at once the nature of the property. The matter is not open to any doubt. It is common ground that the lands were held by plaintiff's ancestor in the capacity of Deaais or Deshmukhs and a Desai or Deshmukh in the Southern Maratha Country is a hereditary District Officer. Their duties were to collect the revenue in the "Pargana" or revenue division, and as every one knows, the British Government introduced a settlement whereby these services were dispensed with on payment of a "Judi" or quit rent amounting to four to six annas in the every rupee of the assessment. These settlements received legislative sanction by Clause (2) of Section 15 of Bombay Act III of 1874. The property continues to be Vatan property within the meaning of Section 4 of the Act, and subject to the restrictions which that Act or Act II of 1886 enacts as to succession or alienation. Those restrictions do not, however, touch the point

before us but I have thought it well to preface my judgment by these remarks in view of what was said in argument.

14. For the purposes of the present question there is, I apprehend, no distinction between the various classes of District Hereditary Officers. Whether it be a case of a Desai, a Deshmukh, a Nadgowda, or a Deshpande, the general rule must be taken to be that such Vatan are ordinarily partible and impartibility is an exception which may be established by evidence. It has been so decided by the Privy Council (1880) L.R. 7 I.A. 162 (Privy Council) . A custom of primogeniture, if clearly proved, supersedes the general Hindu law of descent: *Shidhojirav v. Naikojirav* (1873) 10 B.H.C.R. 228. There can, however, be little doubt that such a custom is not an unusual feature of these Vatan: it has indeed been judicially recognized by the Court in more than one instance?the latest in the case of the *Deshgat*, which came before us in *Sidraj v. Bhojraj*. It is not indeed surprising that this should be so if it is remembered that the lands were originally the emoluments of an hereditary office. Nevertheless, it is for the party who sets up the custom to establish it in each case.

15. The best evidence of impartibility is that over a long period of years there has been no partition. If at the same time it appears that the eldest member has succeeded to the bulk of the property, and that comparatively trifling portions have been assigned to the younger members, then we have an ordinary feature of these Vatan. There may be a practice in a Vatan family of long standing to lease the performance of the services of the Vatan in the hands of the elder branch and to provide the younger branches with maintenance only. When the practice is the result of an established custom, it will not be affected even if the services of the Vatan are dispensed with: *Savitriava v. Anandrav* (1875) 12 B.H.C.R. 224 and *Ramrao Trimbak v. Yeshvantrao Madhavrao* ILR (1885) 10 Bom. 327.

16. The pedigree of the family was produced by Kasappa in 1855. He was the tenth holder from the original grantee Kenchappa, and the heir by lineal primogeniture. At that date there were many branches in the family but the bulk of the estate was with Kasappa and he says "The vahivat came into my hands because I was the heir." The plaintiff admits that so far as he knows there has never been any partition in the family, and there is evidence that distant collateral members are in possession of small grants of land "for maintenance" which are far less than would have fallen to their shares, had the ordinary Hindu law of succession been applicable. One of these, Bhimraya, is a witness. He is the grandson of Basappa, son of Kallappa, who is shown as living in the pedigree of 1855. He says "I have four lands in my possession: they have been given to me for maintenance. I do not know if I have any share in the *Deshgat Vatan*." In a previous suit between the parties one Venkaji was called as a witness for the plaintiff. He is dead and his evidence has been placed on the record in this suit (Exhibit 139). He was the agent of Somappa the father of the parties and was instrumental in drafting the partition deed which led to this litigation. He stated

that defendant No. 1 objected on the ground that the property was impartible. He was hostile to defendant No. 1. He said "I do not know whether the Deshgat property in dispute is partible or not. If Achutappa and Somappa (these are collateral members) were to get lands according to their shares they would have obtained more than this," that is to say, more than they actually hold. This witness was constrained to admit that Exhibit 105 (now 116) was a statement in his handwriting. It appears that the members of the junior branches are styled "Kumars", and this statement is entitled "List showing the survey numbers given for enjoyment to the Kumars" the statement shows that if any "Kumar" dies without an heir the lands revert to the Desai. It also shows that the lands are given for maintenance.

17. This evidence affords, in my opinion, prima facie proof that there is a family usage whereby the lands of this Deshgat are held by the eldest male member alone. There is evidence further that this is a local usage in the case of such tenures. The plaintiff has adduced no evidence whatever to the contrary and in my opinion the finding of the lower Court on the point is undoubtedly correct.