

(1990) 10 BOM CK 0025
In the Bombay High Court
Case No : First Appeal No. 700 of 1987

Mohamad Hussen Mujawar and Another	APPELLANT
Vs	
Adam Ibrahim Mujawar and Others	RESPONDENT

Date of Decision : 11-10-1990

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 72

Citation : (1991) 2 BomCR 11 : (1991) 93 BOMLR 243

Hon'ble Judges : C. Mookerjee, C.J; M.L. Dudhat, J

Bench : Division Bench

Advocate : Bhimrao N. Naik, for the Appellant; M.A. Rane, for respondent Nos. 1 to 3, 4(A) to 4(C), R.M. Kadam, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

M.L. Dudhat, J.—This first appeal arises from the judgment and order passed by the Second Extra Assistant Judge, Kolhapur, dated 30th of July, 1982, in Misc. Application No. 43 of 1982 filed u/s 72 of the Bombay Public Trust Act, 1950. The dispute relates to the management of Deosthan Inam viz., Hazrat Peer Malik Rehan Dargah, Kille Vishalgad, Taluka Shahuwadi, District Kolhapur, Commonly known a Vishalgad Dargah (hereinafter for brevity sake referred to as "the said Dargah"). The facts lie within a narrow compass. For the maintenance of the said Dargah two lands were given, one at village Gajapur in Shahuwadi Taluka, District Kolhapur, and the other at village Adhisthi in Sangameshwar Taluka, District-Ratnagiri. Both these lands are Deosthan Inam lands and the income derived from these two lands is spent for the upkeep of the said Dargah. It appears that in 1952 two separate applications were made by one Hussen Mujawar, father of the present appellants, and Usman Kadir for the registration of the two trusts in respect of both the lands at Gajapur and Adhisthi. After the inquiry u/s 18 of the Bombay Public Trust Act, on 9th February, 1954, Assistant Charity Commissioner, Kolhapur, registered both the trusts under Registration nos. B-68 and B-69 respectively in respect of the above two lands. Accordingly,

the said land at Adhisthi was being managed by Usman Kadir, Cousin of Hussen Mujawar. On 8th September, 1966. Hussen Mujawar died and thereafter his eldest son Ibrahim filed the change report showing himself as the trustee being the heir and also as the manager of the joint family after the death of his father, Hussen Mujawar. The other two sons of Hussen viz., Mohamed and Ahmed also filed change report bearing Change Report No. 954 of 1974 on 1st of October, 1974, for the inclusion of their names as trustees of the said Dargah along with the name of their eldest brother, Ibrahim. During the pendency of the said report before the Assistant Charity Commissioner, Ibrahim died on 4th of November, 1981. The Assistant Charity Commissioner by his order dated 5th of January, 1982, allowed the said Change Report No. 954 of 1974 and included the names of Mohamed and Ahmed as trustees of the said Dargah. Adam Ibrahim Mujawar, respondent no. 1 herein who is the son of the deceased Ibrahim preferred appeal against the said order before the Charity Commissioner. The said appeal was dismissed by the Joint Charity Commissioner on 30th of March, 1982, confirming the order of the Assistant Charity Commissioner. Subsequently, the said Adam along with the other heirs of Ibrahim filed application u/s 72 of the Bombay Public Trust Act before the District Court at Kolhapur being Misc. Civil Application No. 43 of 1982. The said application was allowed by the Second Extra Assistant Judge, Kolhapur, by his judgment and order dated 30th of July, 1982, and both the orders passed in the change report by the Assistant Charity Commissioner and confirmed by the Joint Charity Commissioner were set aside.

2. Aggrieved by the aforesaid decision of the Second Extra Assistant Judge, Kolhapur, the said Mohamed and Ahmed preferred this first appeal before this Court adding the heirs of Ibrahim as respondents. This appeal came up before Sharad Manohar, J., on 13th of November, 1986, who referred the same to the Division Bench. Accordingly, the appeal came up before a Division Bench (Shah and Tated, JJ.) wherein it was contended by the respondents that since respondent Nos. 1 to 4 were not on record as the heirs of Ibrahim in the proceedings before the learned Assistant Charity Commissioner, Joint Charity Commissioner and the Extra Assistant judge, Kolhapur, they had no opportunity to adduce oral and documentary evidence to disprove the claim of the appellants. The Division Bench after hearing both the sides by its order dated 17th of March, 1987 framed two issues viz.

(1) Whether Sarsubhe Vat Hukum No. 44 of 1913 issued by Kolhapur Darbar was applicable or was made applicable to Devasthan inam in Vishalgad Jehagir?

(2) Whether the rule of Primogeniture was applicable to Devasthan inam in Vishalgad Jehagir under any other law in force in that jehagir?

Accordingly, the matter was remanded back to the District Court, Kolhapur, for giving its findings on the said two issues after giving opportunity to the respondents to adduce oral and documentary evidence to prove that the rule of primogeniture was applicable to Devasthan inam in Vishalgad Jehagir. After remand, the matter was tried by the Third Additional District Judge, Kolhapur,

who after giving opportunity to the respondents to lead evidence and after hearing the arguments on both the sides, by his judgment and order dated 23rd of February, 1988, Negatived both the issues referred to him. This appeal has, therefore, come up before us for final hearing along with the findings of the learned Third Additional District Judge and the objections filed by the respondents against the said findings.

3. Shri Bhimrao Naik, learned Counsel appearing on behalf of the appellant, supported the findings given by the learned Third Additional District Judge at Kolhapur and contended that the respondents have led no evidence whatsoever to show that Sarsubhe Vat Hukum No. 44 of 1913 issued by Kolhapur Darbar was applicable to the Deosthan Inam in Vishalgad Jahagir and/or also failed to show that the rule of primogeniture was applicable to the Deosthan in Vishalgad Jahagir under any other law in force in the said Jahagir. According to Shri Bhimrao Naik, the learned Third Additional District Judge was, therefore, justified in giving negative findings in respect of the two issues referred to him for his decision. On the other hand, Shri Rane, learned Counsel appearing on behalf of the respondents, strongly contended that the learned Third Additional District Judge was wrong in coming to the conclusion that Sarsubhe Vat Hukum No. 44 of 1913 issued By Kolhapur Darbar was inapplicable to Deosthan Inam in Vishalgad Jahagir, though there is sufficient documentary evidence to that effect and further also contended that the lower Court failed to take into consideration several documents filed by the respondents vide list, Exh. 40, though they were relevant documents more particularly from the point of view of deciding the second issue framed by the High Court and referred to the lower Court.

4. The only limited question before us in this appeal is as to whether the rule of primogeniture and impartibility was and is applicable to the Deosthan Inam in Vishalgad Jahagir or the law of inheritance is applicable to the Deosthan Inam in Vishalgad Jahagir.

5. In order to support his contention, Shri Bhimrao Naik led emphasis on the fact that the question to be decided in this appeal is as to the applicability of the rule of primogeniture and impartible nature is to be decided with reference to the administration of the Trust, more particularly in this case about the worship, upkeep of the Dargah and the management of the Dargah. He further contended that at the time of the registration of the present Trust an application was made by the father of the present appellants Hussain Mohmad Mujawar before the Charity Commissioner. The said application was made on 21-1-1954 and in the said application he has specifically stated :---

"This Trust is in our family from generation to generations continued till today and the same is to be continued further for generation to generations by succession by sons."

This itself clearly goes to show that the management of the Trust was not developed upon by application of rule of primogeniture but was devolved upon

and was to be devolved upon by the law of succession. He further pointed out that at the time of the registration of the present Trust at No. B-68 on 9-2-1954 the other Trust was also registered on the same day being Trust No. B-69 which was looked after and managed by Usman Kadir Mujawar who was cousin of Hussien Mohamad Mujawar, the father of the present appellants. If the rule of primogeniture was applicable to the said Deosthan Inam, then in that event two Trusts B-68 and B-69 could not have been registered in the name of Hussien Mohamad Mujawar, the father of the present appellants and Usman Kadir Mujawar.

6. Shri Bhimrao Naik further referred to another document dated 6-5-1967 in which Ibrahim Husain Mujawar, the father of the present respondents Nos. 1 and 2 made an application to the Charity Commissioner after the death of Hussien Mohamad Mujawar, his father as well as the father of the present appellants, to effect the change as per the Bombay Public Trusts Act, 1950. In the said application Ibrahim Hussain Mujawar informed the Charity Commissioner that Husain Mohamad Mujawar, his father the trustee of the Dargah had expired and in the place of the said deceased Husain Mohamad Mujawar his name as the son of the deceased and the manager of the joint family be included as trustee. Accordingly to the appellants this clearly shows that from the inception of the registration of the Trust on 9-2-1954 till 1973 even the father of the present respondents accepted the position that the management of the dargah was by inheritance and not by the rule of primogeniture.

7. Shri Bhimrao Naik, learned Counsel appearing on behalf of the appellants, further contended that from the year 1973 the appellants started living separately from the deceased Ibrahim and, therefore, they filed an application to the Charity Commissioner's office to effect the change in the record by including their names along with Ibrahim Husain. The said application was made by the appellants on 1st October 1974 and was accepted by the learned Assistant Charity Commissioner at Kolhapur by his order dated 26-11-1974. After going through the aforesaid documents we are of the opinion that from the date of the registration of the Trust on 9-2-1954 till the dispute started between the appellants and Ibrahim in 1973-74 the Trust property was managed by the law of succession and not by the rule of primogeniture.

8. Shri Rane, learned Counsel appearing on behalf of the respondents, argued that the statement made by Husain Mohamad Mujawar before the Charity Commissioner on 4-6-1952 that "This Trust is in our family from generation to generations continued till today and the same is to be continued further for generation to generations by succession by sons" means that the succession must be hereditary in the family of the applicant and the succession must be by the sons of the generations in the family and since the applicant at that time was referring to generations he was bound to use the word "mulage" (sons) in plural and, therefore, merely because in the application reference is made as "generation to generations by succession by sons" it does not mean that the

original applicant intended the succession of the Trust by all the sons. We do not agree with the submissions made on behalf of the respondents. According to us the clear interpretation of the statement in the application made by Hussien Mohamad Mujawar dated 4-6-1952 is that the management of the Trust to continue from generation to generations by succession by sons and not by rule of primogeniture. This is further reiterated from the fact that the property at Sangameshwar was managed by the other branch, while the property at Gajapur was managed by Hussien Mohamad Mujawar. After the death of Hussien Mohamad Mujawar, Ibrahim the father of respondents Nos. 1 and 2 while effecting the change also described himself in the application filed by him on 6-5-1967 before the Charity Commissioner as a son of the deceased Mohamad Mujawar, the deceased Trustee and the manager of the joint family. From the aforesaid facts, according to us, there is no substance in the contention of the respondents that the rule of primogeniture was applicable to the Trust property of the Dargah.

9. The next question is since admittedly the Dargah was in the Jahagir of Vishalgad within the then Kolhapur princely state, whether the Vat Hukum more particularly Sarsubhe Vat Hukum No. 44 of 1913 issued by the Kolhapur Darbar was applicable to the Deosthan Inam in Vishalgad Jahagir. According to the respondents the said Dargah in Vishalgad Jahagir was managed from the time immemorial by the eldest male member in the senior most branches of the family of both the parties and the succession to the management of the said Dargah was being governed by the rule of primogeniture. (This contention we have already discarded in the earlier part of this judgment.) According to the respondents prior to the merger of the princely states Vishalgad Jahagir was feudatory Jahagir under the control of the princely State of Kolhapur and the Laws of the Kolhapur State were applicable to these Jahagirs Such as Vishalgad Jahagir where the present Dargah is situated. On 23rd May 1913 Kolhapur State Promulgated Sarsubhe Vat Hukum No. 44 of 1913 and as per the said Vat Hukum the Inam properties were governed by the rule of primogeniture and the Inams were impartible. According to the respondents, the said Vat Hukum did not make any exceptions. The said Vat Hukum, according to the respondents, was applicable to the Dargah which was a Deosthan Inam. The power to make enquiry as regards the succession of Deosthan Inam was entrusted to the Chief of Vishalgad Jahagir and was governed by the rule of primogeniture as laid down by the Kolhapur State. Sarsubhe Vat Hukum No. 44 of 1913 is as under :---

"Inam property of every category is indivisible and impartible. It should be understood that it will be continued to the eldest son. Henceforth, if any partitions are privately effected by persons will not be accepted by Government.

No retrospective effect is to be given to the partition effected prior to this Vat-Hukum."

It is true that Vat Hukum No. 44 of 1913 spells out the rule of primogeniture in respect of Inam properties of every category. According to the appellants this Vat Hukum is not applicable to the present case. Alternatively it is argued on behalf

of the appellants that this Vat Hukum, presuming without admitting for the sake of the argument, was applicable to the Deosthan Inam properties, still it is not applicable in the present case as the appellants are not claiming any right over the property or are not claiming any right to divide the property belonging to the Dargah but only claiming right of management including worship of the Dargah.

10. Apart from the aforesaid argument it was strongly contended on behalf of the appellants that the said Vat Hukum No. 44 of 1913 has no binding force of law as no sanction of political agent was obtained to enforce the Vat Hukum. Shri Bhimrao Naik further contended that the Vat Hukum circular procedures issued by the Kolhapur Darbar were not to apply to Kadim Inams in the Jahagir unless there is prior approval by the political agent. To support his contention Shri Bhimrao Naik relied upon the Thaili letter from the political agent, Kolhapur and the Chief of Vishalgad approved by the Government. Clause 8 of that letter dated 24-11-1891 is as under :---

"8. All the laws and body of rules, introduced during your minority and now in force, must be respected, and not altered without the approval of the political Agent having been first obtained. Whenever in Kolhapur State enacts a new law applicable to the Feudatory Estates it will come into force in your Estate, if the Political Agent sanctions it, the permission of Government having been obtained."

The terms of the said Thaili letter makes it abundantly clear that when the Kolhapur State enacts new law for its application to the feudatory Jahagirs such as Vishalgad Jahagir where the present Inam is situated, it will come into force in the said Jahagir after the Political Agent Sanction with the previous permission of the British Government of India. Admittedly the said Thaili letter is dated 24-11-1891 and the Sarsubhe Vat Hukum No. 44 of 1913 was enacted by the Kolhapur Darbar and came into force with effect from 23rd May, 1913. The respondents could not show before the learned Third Additional District Judge at Kolhapur as well as before us any document which show that the said Vat Hukum No. 44 of 1913 was given sanction by the Political Agent with the prior permission of the British Government of India. From the judgment it appears that the learned Third Additional District Judge had gone through all the Vat Hukums given in Vol. 2 of Kolhapur Vat, Hukums, but he could not come across any provision of law showing that the Political Agent of the British Government had given sanction for the application of the said Sarsubhe Vat Hukum No. 44 of 1913 to the Deosthan Inam of Vishalgad Jahagir. In view of the aforesaid discussion, we are of the view that the learned Third Additional District Judge was right in coming to the conclusion that Sarsubhe Vat Hukum No. 44 of 1913 issued by the Kolhapur Darbar was not applicable or was not made applicable to the Deosthan Inam in Vishalgad jahagir.

11. The conclusion is also supported by the judgment given by the Supreme Court of His Highness The Chhatrapati Maharaja of Kolhapur at Kolhapur in Supreme Appeal No. 26 of 1946. In his opinion given in the said appeal (subsequently confirmed by the Maharaja of Kolhapur) Justice N.S. Lokur

observed in para 4 a under :---

"The contention urged on behalf of the appellant is more important and puzzling. It is not disputed that the land in suit is Khoti Inam and it is urged that being a service Inam land, it is impartible. Reliance is placed in support of this contention on Sarshubhe Vat No. 44 of 1913 which is to be found on page 893 of the Second Volume of Mulki Vat Hukums. According to that Vat Hukum every kind of Inam is impartible and is to be held by the eldest son and that any partition of such land would not be recognised by Government. It was, however, made clear that the Vat Hukum would not have a retrospective effect. But Mr. Ashtekar on behalf of the plaintiff contends that this Vat Hukum is not applicable to Ichalkaranji Jahagir from which this appeal comes. On the other hand, it is pointed out on behalf of the appellant that there is a notification (No. 16) issued by the Prime Minister on August 17, 1945 published on page 188 of the Kolhapur Government Gazette dated August 23, 1945, Part I. After referring to a circular issued by the Political Agent, Col. Par in 1881, the notification says that according to that circular all laws, rules, Vat Hukums, circular letters and procedure issued by the Durbar would automatically apply to all the Kadim Inams in the Jahagir. Interpreting that circular the Prime Minister further notified that all such laws, Vat Hukums etc. to be issued by the Durbar in future also would automatically apply to Jahagirs. This notification being merely an interpretation of the circular of the Political Agent of 1881 is not binding on this Court. The circular of 1881 is not on record and has not been shown to me. That circular was issued during the minority of the Jahagirdar of Ichalkaranji, but in the Thaili letter issued by the Kolhapur Durbar at the time of the investiture of the Jahagirdar with the powers of the Jahagir in 1892, it was stated :---

"All the laws and body of rules introduced during your minority and now in the force must be maintained; and all orders passed during your minority must be respected and not altered without the approval of the Political Agent having been first obtained. Whenever the Kolhapur State enacts a new law applicable to the Feudatory State, it will come into force in your State if the Political Agent sanctions it with the permission of Government previously obtained."

It follows from this that the Political Agent's circular of 1881 could extend all the existing laws, Vat Hukums etc. to the Jahagir. But any such law, circular or Vat Hukum issued after the Thaili letter was issued by the Durbar in 1892 would not automatically be applicable to the Jahagir, but would come into force only if the political Agent sanctioned it with the permission of the Government previously obtained. No such sanction of the political Agent or permission of the Government is forthcoming with regard to Sarsubhe Vat Hukum No. 44 of 1913. It must, therefore, be held that the said Vat No. 44 has not been extended to the Ichalkaranji Jahagir."

The said decision is also supported by the decision of the Supreme Court at Kolhapur given in 1942 Kolhapur Law reports, page 519, Shri Bhimrao Naik, learned Counsel appearing on behalf of the appellants, also relied on an

unreported decision of the Division Bench of our High Court consisting of Bavdekar and Dixit, J.J., dt. 11th March, 1952 in First. Appeal No. 229 of 1949 and First Appeal No. 231 of 1949. In the said appeals the plaintiff filed a suit against his brothers for partition and separate possession of certain Inam properties situated in Kagal Jahagir. Defendant No. 1 the eldest brother contended that the village sanadi lands, Kulkarni Inam lands and Devasthan Inam lands were impartible according to the law which prevailed in kagal jahagir. While deciding that even though the Inam lands were within kagal Jahagir forming part of the Kolhapur State, still the same laws in Kolhapur State proper are not applicable in Jahagirs. The Division Bench observed :---

"That certain of the higher Jahagirdars, such as the Pratinidhi of Vishalgad, the Prant Amatya of Bowra, the Chiefs of Kagal, Ichalkurunjee, Kapsee, Torgal, the Sirluskar, Narayan Rao of Kagul, Ruma Bai Walwa, Himmud Bahdoor, should be considered as still in some degree under the supervision of the Political Agent who should act, as far as circumstances will permit, in co-operation with the Rajah's Government; and that all criminal cases within the jurisdiction of these Sirdars, involving death or imprisonment beyond seven years, should be forwarded for trial before the political Agent, for submission to Government. The supervision proposed to be retained over these Sirdars, and the guardianship of such of them as may be minors, by the British Government acting in concert with the Rajah, are not intended in any way to infringe the seignorial rights of the Rajah, but merely to secure good government, and to prevent those disputes which in old days were frequently the cause of disturbance and bloodshed."

It was the case of defendant No. 1 that even though under this article the seignorial rights of the Rajah were not intended to be infringed, there was no power left in the Ruler of the Kolhapur State to legislate for the Jahagir, unless certain conditions were fulfilled. There have been in this regard from time to time changes in the legal position, because of the action of the paramount power. In the first period, which may roughly be said to begin with 1862, the date of the treaty, and ending with 1930, there was power in the Ruler of the State to make any law or rule having the force of law applicable to the Jahagir, but only with the consent of the political Agent, or the resident, who would act under the orders of Government".

To distinguish the ratio of the aforesaid case decided by the Division Bench of this Court, Shri Rane, learned Counsel appearing on behalf of the respondents, contended that the observations of the Division Bench are in respect of the Jahagir lands situated in Kagal Jahagir, while the present suit lands are in Vishalgad Jahagir. Secondly he also argued that the said Division Bench has not gone through the applicability of the said Vat Hukum to the Deosthan properties in the Jahagir. According to him it may be that in Kagal Jahagir Vat Hukum No. 44 of 1913 was not applicable to the Inam land but by the said decision it cannot be said that the ratio laid down in the said decision is also applicable in respect of the Inams in Vishalgad Jahagir as in the present case. According to us there is no

substance in the argument made on behalf of the respondents. While deciding the point in the said judgment the Division Bench referred to Article 8 of the treaty of 1862, which refers to the higher Jahagirdars such as Pant Pratinidhi of Vishalgad, the Pant Amatya of Bowra, the Chiefs of Kagal, Ichulkuranjee, Kapsee, Torgal---From this it is clear that Article 8 is common to Vishalgad as well as Kagal Jahagir and, therefore, the observation in the said judgment that from 1862 to 1930 there was no power with the ruler of the Kolhapur to make any law or rule applicable to the Jahagir. There was power in the ruler of the State to make any law of rule having the force of law applicable to the Jahagir, but only with the consent of the Political Agent or the Resident under the orders of the British Government. Admittedly in the present case no evidence is led on record to show that the consent of the political Agent or the resident acting under the orders of the British Government was obtained. The observations and the ratio of the case decided by the Division Bench are applicable to the facts of the present case and have a binding effect in the facts and the circumstances of the present case.

12. Shri Rane, learned Counsel appearing on behalf of the respondents, also relied on an unreported judgment of this High Court given by Nain and Gathe, JJ., dated 3rd March, 1970 in First Appeal No. 56 of 1967 with First Appeal No. 804 of 1957. Here in this case the dispute was as to whether the eldest son of the deceased Hyder Babaji or all the sons of the deceased Hyder Babaji were entitled to be the Manager and/or Trustees of the Deosthan Inam the Dargah of Pir Babu Jamal and in the said case the Division Bench of this High Court, by applying Vat Hukum No. 44 of 1913 dated 23rd May, 1913 to the said Dargah, came to the conclusion that the rule of primogeniture is applicable to the management of the said Dargah and the eldest son of the deceased Hyder Babaji became the sole Manager or the Trustee of the property of the said Dargah immediately after the death of Hyder Babaji. According to Shri Rane, in view of the ratio laid down in the aforesaid decision, in the present case the Deosthan property being a Dargah within the Kolhapur State, Vat Hukum No. 44 of 1913 should be made applicable. With respect, we do not agree with the argument of the learned Counsel on behalf of the respondents. According to us the facts and the circumstances in the case decided by the aforesaid Division Bench are different and clearly distinguishable from the facts and circumstances in the present case. Admittedly in the case decided by the said Division Bench the properties were situated with the Kolhapur State and were not part of any of the higher Jahagirs referred to in the treaty of 1862. In the present case the Dargah is situated in Vishalgad Jahagir and because of Article 8 of the treaty of 1862 the laws and rules of the Kolhapur State are not made applicable automatically to the Dargah situated in the Jahagir of Vishalgad unless the political Agent or the resident acting under the orders of the Government gives his consent to that effect. This being the position, in our opinion the ratio as laid down by Their Lordships in the Division Bench in First Appeal No. 56 of 1967 is not applicable to the facts of the present case. Therefore, the learned Third Additional District

Judge was right in coming to the conclusion that the respondents failed to prove that Sarsubhe Vat Hukum No. 44 of 1913 issued by the Kolhapur Darbar was applicable to the Deosthan Inam in Vishalgad Jahagir.

13. It was also argued on behalf of the respondents that even much prior to the enactment of Vat Hukum No. 44 of 1913 the Deosthan Inams at Vishalgad Jahagir were governed by the rule of primogeniture and the property of the Deosthan Inam was impartible in nature. Though it was strongly argued on behalf of the respondents that much prior to 1913 the rule of primogeniture was applicable to the Deosthan still Shri Rane, learned Counsel appearing on behalf of the respondents, could not show us a single Vat Hukum to that effect. Even the learned Third Additional District Judge had gone through the Volume of the Vat Hukum captioned as `Karvir Sarkarche Vat Hukum Vol. 2, and after going through all the Vat Hukum prior to 1913 the learned Judge came to the conclusion that in the said Vat Hukum there is no reference to the Deosthan Vat Hukum and, therefore, according to us there is no substance in the respondents' contention that even prior to the year 1913 the Deosthan Inams were governed by the rule of primogeniture.

14. Shri Rane, learned Counsel appearing on behalf of the respondents, further vehemently argued that the learned Third Additional District Judge failed to apply his mind on issue No. 2 referred to him by this High Court. According to him though the respondents led evidence before the lower Court, the learned Third Additional District Judge, Kolhapur failed to refer to that evidence and came to the conclusion that there is no other authority of law showing that the rule of primogeniture was applicable to the Deosthan Inam in Vishalgad Jahagir under other law in force in that Jahagir. He further contended that the respondents filed an application, Exh. 40 which was an application filing 21 documents to support a custom in Vishalgad Jahagir to the effect that the rule of primogeniture was applicable to the Deosthan Inams. In spite of this evidence, according to Shri Rane, the learned Third Additional District Judge failed even to refer to these documents in his judgment. On the other hand Shri Bhimrao Naik, learned Counsel appearing on behalf of the appellants, contended that when the application for filing the aforesaid 21 documents was made on behalf of the respondents, the appellants did not admit the contents thereof , and therefore, put the respondents to the strict proof thereof. In spite of this, the respondents failed to examine any witness to lead any evidence on Issue No. 2 referred to by the High Court and made no attempt to prove the said documents. He further contended that the respondents are not entitled to establish customs by relying on the aforesaid documents. According to him to establish a custom the party intending to establish such custom must make specific pleadings to that effect and lead the evidence. According to him there is no pleading to that effect and, therefore, the respondents are not entitled to argue their case on the basis of customary law. He further contended that issue No. 2 framed by this High Court at the time of remanding the matter to the Third Additional District Judge also does not refer to any custom showing applicability of the rule of primogeniture to

the Inams. According to him in view of this specific issue the respondents are not entitled to prove the applicability of the rule of primogeniture to the Dargah on the basis of custom. He further contended that if such opportunity is given at this stage to the respondents to prove their case on the basis of custom, the same will prejudicially affect the interest of the appellants as at no stage the opportunity to rebut the said contention.

15. Issue No. 2 framed by the High Court at the time of remand is as under :---

"(2) Whether the rule of primogeniture was applicable to the Deosthan inam in Vishalgad Jahagir under any other law in force in that Jahagir ?"

According to us the aforesaid issue is specifically framed by the Division Bench giving opportunity to the respondents to show that the rule of primogeniture was applicable to the present Dargah under any other law in force in Vishalgad Jahagir other than Vat Hukum No. 44 of 1913 which was referred to in Issue No. 1. It is pertinent to note that in fact the Division Bench referred the said two issues to the trial Court at the behest of respondents Nos. 1 and 2 who contended that during the enquiry of the disputed change report the heirs of Ibrahim respondents Nos. 1, 2, 3 and 4 were not brought on record after the death of Ibrahim before the learned Assistant Charity Commissioner, the learned Joint Charity Commissioner and the learned Extra Assistant Judge and, therefore, they had no opportunity to adduce the oral and documentary evidence to disprove the claim of the appellants. It was because of this contention made by the respondents, the Division Bench framed the said two issues and remanded the matter to the trial Court. If the respondents intended to lead evidence to establish their claim of the applicability of the rule of primogeniture to the suit Trust on the basis of customary law, they could have got the issue framed making special reference to the customary law also. Therefore, by the plain reading of Issue No. 2 framed by this High Court it appears that the respondents never intended to lead any evidence of custom at Vishalgad Jahagir to prove their case of applicability of the rule of primogeniture to the suit Dargah. It is also pertinent to note at this stage that right from the inception of this litigation before the learned Assistant Charity Commissioner, learned Joint Charity Commissioner, learned Extra Assistant Judge, learned Single Judge of the High Court in the first appeal the respondents never argued that as per the customary law the rule of primogeniture is applicable to the concerned Dargah at Vishalgad. In view of the aforesaid position we are of the opinion that the respondents were not entitled to lead evidence before the learned Third Additional District Judge or even before the High Court to establish the rule of primogeniture on the basis of customary law.

16. In spite of our aforesaid finding we have gone through the various documents filed before the trial Court. According to us unless proper oral evidence is led, it is very difficult to appreciate the said documents and the relevancy of the said documents with reference to the pending dispute. No oral evidence was led by the respondents when opportunity was given to them at their behest by the High

Court while remanding the matter. Further while scanning these documents we have come to the conclusion that no inference of application of the rule of the rule of primogeniture to the Dargah property at Vishalgad can be arrived at.

17. Shri Rane first referred to the documents which were produced at Exh. 40/1 relating to Vatan of Deshpande family. This documents and the concerning relevant documents referred to by the respondents does not refer to any custom. On the contrary the orders are passed on the said application in the facts and circumstances of that case without any reference to the custom and the orders are in the nature of personum and not in the nature of ream. The orders passed in the said proceedings do not come within the ambit of sections 40, 41, 42 or 43 of the Indian Evidence Act and are in fact irrelevant. Apart from the aforesaid legal position, on the basis of the said documents no inference of applicability of the rule of primogeniture to the Inam properties situated at Vishalgad at a relevant time can be arrived at.

18. Shri Rane also relied upon the documents Exh. 40/3 dated 12th November, 1912. In these proceedings after the death of Vasudeo Deshpande the name of Jankibai Deshpande was entered into in the Vatan Inam of Marimadevi at Malkapur since she belonged to the family of elder branch. Relying on this documents Shri Rane argued that for the Deosthan Inam land the rule of primogeniture was made applicable prior to 1913. Again by this instance no custom of applicability of the rule of primogeniture can be established. Apart from that it appears from the record relied upon by Shri Rane at the time of arguing this appeal that these lands are situated at Perid and Molvade which are beyond Vishalgad Jahagir in Kolhapur District. This being the position, this piece of evidence relied upon by Shri Rane is irrelevant from the point of view of deciding whether at Vishalgad Jahagir by any other law the rule of primogeniture is applicable or not. Though we have gone through all these documents, we are only referring to the documents strongly relied upon by Shri Rane at the time of the arguments. We are of the opinion that taking all these documents at the highest no inference of the rule of primogeniture applicable to the Dargah situated at Vishalgad can be drawn. We, therefore, reject the contentions made by Shri Rane on behalf of the respondents that by customary law the rule of primogeniture was applicable to the Dargah Trust at Vishalgad Jahagir in Kolhapur State at the relevant time. In the circumstances, we confirm the findings given by the learned Third Additional District Judge at Kolhapur in his judgement dated 23rd February, 1988 on both the issues framed by the High Court.

19. We, therefore, allow the appeal with no order as to costs and set aside the judgment and decree dated 30th July, 1982 passed by the learned II Extra Assistant Judge, Kolhapur in Miscellaneous Civil Application No. 43 of 1982 and confirm the order of the learned Assistant Charity Commissioner passed in Change Report No. 954 of 1974 as well as the judgement and order passed by the learned Joint Charity Commissioner in Appeal No. 2 of 1982 and also confirm

the findings given by the learned Third Additional District Judge at Kolhapur dated 23rd February, 1985.

20. The civil application is disposed of.