

(1997) 01 KAR CK 0079

In the Karnataka High Court

Case No : Regular Second Appeal No. 557 of 1983

Toirabi

APPELLANT

Vs

Gouse Inam Patil by his L.R.s and Others

RESPONDENT

Date of Decision : 07-01-1997

Acts Referred:

Bombay Hereditary Offices (Amendment) Act, 1886 — Section 2, 5 (1)

Citation : (1998) ILR (Kar) 642 : (1997) 4 KarLJ 241

Hon'ble Judges : B. Padmaraj, J

Bench : Single Bench

Advocate : S.A. Mujeeb, for the Appellant; G.S. Kannur, for R-1(A) to (g), R-10(d) (ii) to (iv); K.S. Adyapak, for R-6(a) to R-6(d); and K.S. Desai, for R-8, 20, for the Respondent

Final Decision : Dismissed

Judgement

B. Padmaraj, J.—This Second Appeal arises out of a partition Suit. This Court, while admitting the Appeal has sated that the substantial question of law, which is involved in this Appeal is:-

Whether the First Appellate Court was justified in holding that the plaintiff has no right to claim share in respect of Suit schedule lands?

2. Therefore, untrammelled by the controversy which hinged in the Trial Court and the First Appellate Court, I confine my consideration only to this question.

3. The plaintiff (appellant herein) filed the Suit for partition and separate possession, claiming 204/57th share in the suit properties comprising of agricultural lands, house and open site. The Trial Court decreed the Suit of the plaintiff on 30.11.57., holding that the plaintiff is entitled to 27/48th share in the Suit schedule properties. Aggrieved by that judgment and decree of the Trial Court, the defendant No. 7 filed an Appeal before the First Appellate Court. The First Appellate Court by its judgment and decree dated 5.12.63, dismissed the suit of the plaintiff in respect of agricultural lands, and decreed the Suit in

respect of the house and open site. Thus, it modified the judgment and decree of the Trial Court to that extent. As against that, the plaintiff preferred a Second Appeal before this Court. This Court by a judgment and decree dated 26.8.71, set aside the judgment and decree of the First Appellate Court and remanded the matter to the First Appellate Court for fresh disposal of the Appeal in accordance with law and had also directed it to consider I.A.No.1 filed by the defendant No. 7 seeking permission of the Court to raise a preliminary point regarding the maintainability of the Appeal and Suit, in view of the regrant of the lands in favour of defendant No. 1 under the provisions of the Karnataka Village Offices Abolition Act, 1961. After the remand, the First Appellate Court reconsidered the matter and the Appeal of the defendant No. 7 was again partly allowed and partly dismissed. While it decreed the Suit of the plaintiff in respect of the house and open site, it dismissed the Suit of the plaintiff in respect of the agricultural lands. It also dismissed the I.A.No.1 of the defendant No. 7 filed before this Court and consequently dismissed the I.A.No.7 of the defendant No. 7 filed before the First Appellate Court seeking leave to file additional written statement to raise certain legal points regarding the regrant of lands. Hence, this Second Appeal.

4. During the pendency of the Second Appeal before this Court, in view of the Memo filed by the Advocate for Respondent No. 1(d) stating that the respondent Nos. 2 and 4 have died on 11.9.85, and on 8.10.85, respectively and the respondent No. 19 has died in the year 1984, this Court on 11.9.86, has ordered that the Appeal against the respondent Nos. 2, 4 and 9 has stood abated. There was an Order made by this Court on 11.4.88, allowing I.A.Nos. 3 and 4, thereby permitting the legal representatives of the deceased respondent Nos. 10 and 6 to be brought on record. On 31.10.90, I.A.No. 11 was filed to bring the legal representatives of the deceased respondent No. 15 on record and that application being unopposed, was allowed and the legal representatives of the deceased respondent No. 15 were permitted to come on record. On 12.9.91, this Court allowed I.A.No. 12 to bring the legal representatives of the deceased respondent No. 12(d) on record. On 22.11.91., a Memo was filed reporting the death of the deceased-respondent No. 8, and on 6.3.92, the appellant's Counsel filed a Memo for deleting the respondent No. 2 and accordingly the respondent No. 8 came to be deleted at the risk of the appellant. On 20.3.92, a submission was made by the appellant's Counsel that during the pendency of the Appeal, R-10(d-1) expired and her LRs.R-10(d-2 to 4) were brought on record, but subsequently he filed a Memo to the effect that since R-10(d-2 to 4) are already on record, no further application is needed to bring them on record. The said Memo filed by the appellant's Counsel was recorded. On 8.4.92, it was submitted to the Court by the Learned Counsel for the appellant that there are no legal representatives to R-12(d-1)and R-13 and R-20 who reported to have died during the pendency of the Appeal and hence it was ordered by this Court on the same day that the Appeal abates as against the Respondent Nos.12(d-1) 13 and 20 are concerned. On 23.9.96, this Court while rejecting I.A.No. 13 of the

legal representatives of the deceased respondent No. 8, has held that in view of the fact that the respondent No. 8 (defendant No. 8) before the Trial Court, had adopted the written statement of the defendant No. 3, who had no objection for the Suit being decreed, the Suit as against defendant No. 8 has not abated.

5. It appears that before the Trial Court, the Suit was filed by the sole plaintiff Smt. Toirabi W/o Mohammed Azim Patil against 22 defendants. Of them, the defendant No. 19 had remained absent. Of the remaining defendants, it appears that the defendant No. 3 had filed his written statement admitting the plaint allegations and stating that he has no objection for granting a decree in favour of the plaintiff. He also admitted that the suit properties are the patilki inam lands and that Abdul Qadir, the father of the plaintiff, has died on 25.7.42. He further stated that defendants 1 to 6 and 15 are entitled to a share under the Mohammedan Law and prayed for granting a partition and separate possession of their share for which they stated that they are ready and prepared to pay Court fee. The Defendants 1 to 6, 8 and 15 adopted the written statement of the defendant No. 3, by a Memo. Defendant No. 11 had filed the written statement denying the share of the plaintiff and he prayed for the dismissal of the Suit of the plaintiff. Defendant No. 7 had filed a detailed written statement and he had strongly resisted the Suit of the plaintiff by taking up several contentions. It appears that the defendant No. 7 was the only contesting defendant in the Suit.

6. The geneology table before me has not been disputed. It is stated that one Maktum Patil was common ancestor of the family of the plaintiff and defendants, who died in the year 1892. He had four sons and they were Dada Patil, Bava Sab, Baba Sab and Sultan Sab. Dada Sab had a wife by name Haiba Sahi who died on 4.3.1905, and two daughters by name Nasabi (died in 1903) and Toirabi(died in 1912). The said Dada Sab Patil died on 29.9.84. Bhava Sab died in the year 1888 and he had a son by name Mohammad Sab, who died in 1949. Baba Sab died in the year 1914. He had 3 sons. They were Qadir(died in 1903) and Mohammad Imam Patil (died in 1920). Qadir's wife Torabi was the daughter of Dada Sab and Abi Sahi, died in the year 1912. Sulthan Sab died in 1923. He had 3 sons. They were Mohiddeen Patil (died in 1947), Imam Patil and Abdul Razak Patil. Imam S/o Baba Sab had one son and 3 daughters who are defendants 7 to 10.

7. Mohammed, Patil, the second son of Bhava Sab, has two sons and 3 daughters, who were defendants 11 to 15.

8. Qadir Bhava Sab Patii, the third son of Baba Sab Patil. had one son, and one daughter and they were Abdui Khardir and Chandbi. The said Abdul Khardir died in 1942 and Chandbi's husband Bapu died in 1944. Chandbi has two sons, who are defendants 1 and 2.

9. Abdul Kadir S/o Qadir Patil had one son and one daughter who are Habib Sab and Tarabi, the plaintiff. Plaintiff's brother Habib Sab died in 1951 and her mother died in 1944.

10. Defendants 3 to 6 are the brothers and sisters of the deceased Kulsumbi, the widow of Abdul Khadir and the mother of the plaintiff.

11. Defendants 16 to 22 are stated to be the tenants in respect of the suit lands.

12. The case of the plaintiff was that the suit lands were and are Patilki Watan lands. Makthum Sab Patil was the common ancestor and Dad Sab Patil, was one of the sons of the said Makthum Sab Patil. Dada Sab Patil was the original watandar and he was holding the Suit properties as watan properties. He had 3 brothers and one of them was Bhava Sab. Qadir, who was one of the sons of Bhava Sab, was also the son-in-law of the above said watandar Dada Sab Patil. Her further case was that Dada Sab Patil, the original watander, gifted the said properties (watan properties) in favour of Qadir by a registered gift deed dated 10.6.80 and put Qadir, the donee, in possession of the suit lands. Qadir, the donee, was in possession of the suit lands as per the gift deed. The donor as well as the original watandar Dada Sab Patil died on 29.8.1894 and consequent upon his death, it is stated that the gift or the alienation made by the said Dada Sab Patil in favour of Qadir in respect of the watan properties had become void. Though the alienation became void on the death of Dada Sab, neither the heirs of Dada Sab nor Makthum Sab claimed back the suit lands as the real owners. On the other hand, the Qadir continued to be in possession of the suit lands adverse to the interests and knowledge of the real owners. Thus, it is stated that Qadir and his son Abdul Khadar and the plaintiff have perfected their title to the suit properties by adverse possession. But, it is stated that however the possession of the suit properties were forcibly taken by imam Patil, the brother of Qadir and the father of the defendant No. 7, on the death of Abdul Khadar on 25.7.1942. On the basis that Qadir was the owner of the suit lands, the plaintiff claimed 204/576th share in the suit properties.

13. Defendant No. 7's case about the suit lands is that they are the patilki watan lands and that Qadir succeeded to the suit lands as a member of patilki watan family and enjoyed them as a watandar. After the death of the said Qadir, his son Abdul Khadar succeeded to the Suit lands as a member of the patilki watan family and enjoyed them as a watandar. After the death of Abdul Khadar, Imam Patil (the father of the defendant No. 7) succeeded to the Suit lands as uncle of Abdul Khadar under the Bombay Hereditary Offices Act, 1874. The plaintiff is not entitled to succeed to the suit lands being a female family heir and the suit lands being vatan lands. The above said Imam Patil enjoyed the suit lands as watandar and after his death, the defendant No. 7 has succeeded to the suit lands under the above Act and has been in possession of the suit lands as watandar. His alternate case is that his father Imam Patil was in adverse possession of the suit lands and after his death, the defendant No. 7 has been in adverse possession of suit lands for more than 12 years and that therefore, he has perfected his title to the suit lands by adverse possession.

14. Learned Counsel for the appellant has contended before me that the facts so far as the lands or patilki watan lands and Dada Sab was the owner and that he

had gifted them to Qadir and that after his death, his son Abdul Kadar was in possession of the suit lands are not in dispute. It is however contended by the Learned Counsel for the appellant that since the properties were in the name of Defendant No. 7's father, he forcibly dispossessed Abdul Khadar on 25.7.42. He stated that even the Defendant No. 7 admits the facts upto the death of Abdul Khadar. However, it is his case that after the death of Abdul Khadar his father that the defendant No. 7's father succeeded to the suit lands and after him, he succeeded to the suit lands under the Bombay Hereditary Officers Act. The plaintiff as a female heir holder is not entitled to succeed to the Suit lands and alternatively the defendant No. 7 has also pleaded that he has perfected the title to the Suit properties by adverse possession. The First Appellate Court has recorded a finding that the suit lands are patilki watan lands and the relevant discussion in this regard is found in paragraphs 33, 34 and 35 of the judgment of the First Appellate Court. Learned Counsel for the appellant has contended that the findings recorded and the conclusions drawn by the First Appellate Court in paragraphs 33, 34 and 35 of its judgment are erroneous and hence, they are liable to be set aside. According to the learned Counsel for the appellant, as the Suit lands were gifted to non-watermarks and as the non-watermarks were in adverse possession of the suit lands for more than 12 years and when the Mysore Village Offices Abolition Act came into force in the year 1961, the suit lands have lost their character and nature as watan lands. He contended that the character of suit lands as watan lands were lost due to the fact that the properties were gifted to non-watermarks and non-watermarks having perfected their title to the suit properties by adverse possession. He also contended that there is no bar for a female to inherit watan properties. He therefore contended that Qadir and his son Abdul Khadar, who were both non-watermarks, had perfected their title to the suit lands by adverse possession and the plaintiff being the daughter of Abdul Khadar, she is entitled to succeed or to inherit the suit lands, which have lost their character as watan properties. He also contended that if a gift is made with a condition, the condition is void under the Mohammedan Law and the gift will take effect as if no conditions were attached to it. He therefore contended that upon the death of Dada Sab Patil, the gift made by him in favour of the above said Qadir did not become void. He also contended that Dada Sab Patil gifted the suit lands in 1890 and the possession was also delivered by him under the gift deed to the donee-Qadir. The said donee Qadir died in the year 1903, which is more than 12 years after the gift deed and that after the death of Qadir his son Abdul Khadar was in possession of the suit lands till 1942 and that therefore the finding of the First Appellate Court that Qadir has not perfected his title to the suit lands by adverse possession cannot be accepted.

15. Learned Counsel for the respondents-1(a) to (g) (defendant No. 7 in the Trial Court) has contended that the defendant No. 1 had contested the Suit of the plaintiff by filing a separate written statement before the Trial Court, who was arrayed as respondent No. 10 in this Appeal, has died during the pendency of the

Appeal and his LR. R-10(a) was brought on record, but subsequently R-10(a) was deleted by the appellant on the ground that he is not a necessary party. Further, respondent No. 8, who was defendant No. 8 before the Trial Court, came to be deleted by a Memo on the ground that he is not a necessary party. The said respondent No. 8 had however not filed his written statement. Respondent No. 13 was defendant No. 13 before the Trial Court and he has also died, but his L.Rs. have not been on record and hence the Appeal has abated against the respondent No. 13, Respondent No. 12(c), the L.R. of defendant No. 12, has died on 7.3.96 and no steps are taken so far to bring his legal representatives on record. R-10(a) who had contested the Suit before the Trial Court has been got deleted. In this context, he contended that the plaintiff's Suit was decreed by the Trial Court and that the Appeal filed by the respondent No. 1 was allowed in part in respect of agricultural lands and that therefore the Appeal allowed by the First Appellate Court against R-10(a) has become final and that therefore if the present Appeal in case if it were to be allowed, there will be two contrary decisions as against the same respondents. He also contended that when the Appeal has abated against R-10(a), the whole Appeal abates. He therefore contended that the Appeal abates in toto.

16. Learned Counsel for the respondent has then contended that the gift deed as long as the original watandar-Dada Patil was alive, it was valid. But after his death, it became void in view of Section 5 of the Bombay Hereditary Officers Act. He also contended that even if the title is perfected by adverse possession, the nature of the property as watan land will not be changed and they continued to be watan lands. In this connection he relied upon the decision reported in Volume 30, BLR PAGE 867. He therefore contended that the gift made in favour of Qadir became void after the death of Dada Patil and this was concurrently held by both the Courts below. Therefore, against the heirs of Dada Patil, they could have claimed adverse possession in respect of the suit lands only after the death of Watandar Dada Patil in 1894. But, the donee-Qadir died in 1903. Therefore, it will be only 9 years and not 12 years. Hence, the reasoning of the Lower Appellate Court under Para 49 is correct and it cannot be faulted. He further contended that in para 4 of the plaint, the plaintiff herself has pleaded that the suit lands are watan lands. Therefore, though the watan lands were gifted to non-watandar, they did not lose their character as watan lands and they continued to be watan lands. While inviting my attention to Section 59 of Mulla's Mohammedan Law, he argued that the daughter(plaintiff) is not entitled under the Act to any interest in the watan lands. He therefore urged that a female heir is not entitled to share in the watan lands. Learned Counsel for the respondents has therefore vehemently contended that the suit lands are patilki watan lands and the plaintiff being the daughter of the last male holder Abdul Khadar is excluded by Section 2 Act 5 of 1886, and the effect of such exclusion is that the plaintiff would take no share in the watan lands, more so when on the date of the Suit, the father of the defendant No. 7 had already taken possession of the suit lands after the death of the deceased-Abdul Khadar, as a watandar.

17. In reply, the Learned Counsel for appellant has contended that according to Mohammedan Law each and every heir has got a fixed share and that further when the other legal representatives of the deceased respondents being already on record, the Appeal will not abate in toto.

18. Learned Counsel for the appellant has relied on the following decisions:-

- (1) Fakirappa Bailappa Kambar Vs. Kristappa Bailappa Kambar,
- (2) State of Bihar Vs. Dr. Yogendra Singh Col (Retired) and Others,
- (3) 1983 (1) KarLJ 482 (Appanna and Ors. v. Lakkappa Devappa)
- (4) Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.,
- (5) Shivappa Fakirappa Shetsanadi Vs. Kannappa Mallappa Shetsanadi,
- (6) Narayan Bhondeo Pimputkar and Another Vs. Laxman Purshottam Pimputkar and Others,
- (7) Kanhaiyalal Vs. Rameshwar and Others,
- (8) JT 1989 (1) SC 295
- (9) Bhimappa Ramappa Ghasti Vs. Arjan Laxman Ghasti,
- (10) Janabai Ammal Vs. T.A.S. Palani Mudaliar,

19. Learned Counsel for the respondents has relied on the following decisions:-

- (1) Volume 30 B.L.R. 867 (Anna Nana Knot v. Gojra Dynanu Kavale)
- (2) Volume 33 B.L.R. 469 (Aminabi Mahmulal Patil v. Abasaheb Mirasaheb Patil)
- (3) Rangubai Kom Shankar Jagtap Vs. Sunderabai Bhratar Sakharam Jedhe and Others, (relevant page 1797)

20. Having heard the submissions on both sides and having carefully perused the decisions cited at the Bar, I shall now proceed to consider the above said substantial question of law arising for consideration in this Appeal.

21. The plaintiff-Toirabi was the daughter of Abdul Khadar, who died in 1942. His father Qadir died in 1903. The said Qadir was the son of Bhava Sab and he was also the son-in-law of the watandar-Dada Patil. Dada Sab Patil died in the year 1894. It is not in dispute that the said Dada Sab Patil was the original watandar and he was holding the suit lands as watan properties. The said watandar Dada Sab Patil, during his life time had gifted the suit lands in favour of his son-in-law Qadir under a registered gift deed dated 10.6.1880 and he also alleged to have put Qadir in possession of the suit lands, which were attached to a watan. It has to be mentioned here itself that the property when once attached to a watan remains so irrespective of the holder for the time being until its nature is changed either by resumption or in any other mode by the Government.

Therefore, I am unable to accept the contention of the Learned Counsel for the appellant that the watan lands being gifted by the watandar Dada Patil in favour of his son-in-law Qadir, will lose or lost their character as watan lands. Merely because the watandar Dada Patil had gifted the suit lands, which were admittedly attached to watan, to his son-in-law Qadir under a registered gift deed dated 10.6.1880, they did not lose their character as watan lands. Therefore even after the gift in favour of Qadir, the suit lands did not lose their character as watan lands and they did not cease to be watan lands. The watandar-Dada Patil who gifted the watan lands to Qadir under a registered gift dated 10.6.1880, had expired on 29.9.1894. Here itself, I will first deal with the question regarding the adverse possession of Qadir. It is stated that the watandar -donor Dada Patil, who had gifted the watan lands in favour of his son-in-law Qadir under a registered gift deed dated 10.6.1880, had also put Qadir, the donee, in possession of the suit lands and that the donor-Dada Patil died on 29.9.1894. Therefore, from 10.6.1880 to 29.9.1894, Qadir was in possession of the suit lands by virtue of the gift deed executed in his favour by the donor-watandar-Dada Patil. Article 65 of Schedule to the Limitation Act prescribes that for possession of immovable property or any interest therein based on title, the Limitation of 12 years begins to run from the date of the defendant's interest becomes adverse to the plaintiff. Adverse possession means a hostile assertion that is a possession which is expressly or impliedly in denial of title of the true owner. Under Article 65, the burden is on the person who bases his title on adverse possession and he must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. Therefore, the person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. Where possession could be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. Therefore, a person who enters into possession having lawful title cannot divest another of that title by pretending that he had no title at all. In the instant case, Qadir was admittedly put in possession of the suit lands under a registered gift deed dated 10.6.1880 by the original watandar-donee Dada Patil, who was holding the properties as a watandar. The said Dada Patil being a watandar and the suit lands held by him being the watan lands, he was entitled to alienate the said watan lands for the term of his natural life, and his children although not separate in interest had no right to object to such alienation until after his death. The meaning of alienation is transfer by ownership of beneficial enjoyment of property by its owner to another by way of sale, mortgage, lease, gift or in any other, manner object the beneficial interest in the property becomes vested in the transferee. Alienation in this case, was by way of gift. Therefore, the facts here would show that the watandar namely Dada Patil who was entitled to alienate watan lands (suit lands) for the term of his natural life, gifted the suit lands in favour of his son-in-law Qadir under a

registered gift deed dated 10.6.1880 and put him in possession thereof. Thus, the possession of Qadir was referred to the gift deed executed by the watandar Dada Patil. Therefore, it cannot be considered to be adverse. This is because the possession of Qadir can be referred to lawful possession namely the gift deed executed by the watandar and hence his possession under the gift deed cannot be considered to be hostile to the watandar-Dada Patil or to any of his heirs. Now advertent to the question of alienation made by the watandar Dada Patil during his life time, to Qadir in respect of the watan lands, none of his heirs could have objected to such alienation but after his death on 29.9.1894, the heirs of the watandar Dada Patil were entitled to succeed to the watan properties. The heirs of the watandar-Dada Patil thus became entitled to the watan lands gifted by the watandar in favour of Qadir under a gift deed dated 10.6.1880, only after the death of the donee watandar Dada Patil on 29.9.1894. This is very clear from Section 5(1)(a) of the Bombay Hereditary Officers Act. Therefore, as rightly held by the Lower Appellate Court in para 45 of its judgment, the gift that was valid during the life time of Dada Patil became void after the death of the watandar donor Dada Sab Patil on 29.9.1894. Therefore, the gift deed executed in favour of Qadir on 10.6.1880 became void from that day. In this case, it is not in dispute that Qadir obtained the properties under a gift deed, which were admittedly attached to a watan and such gift by virtue of Section 5(1)(a) of the above said Act becomes void after the death of the donor watandar. The said Section entitles watandar to alienate watan lands for a term of his natural life and not beyond that. Therefore, any alienation beyond the natural life of the watandar donor was null and void. In view of the special provision contained in Section 5 of the Bombay Hereditary Officers Act, gift made in favour of Qadir became void on the death of the watandar donor Dada Patil. A right created under a Statute must be exercised subject to the terms and conditions of the statute. The watandar donor Dada Patil was entitled to alienate or gift the watan lands only during his life time and on his death, the gift deed executed by him in favour of Qadir was at an end. On the death of the watandar donor, the possession of watan properties in the hands of the donee becomes that of a trespasser. Therefore, when the gift deed executed in favour of the donee-Qadir by the watandar donor comes to an end on the death of the Dada Patil on 29.9.1894. Therefore, his son Abdul Qadir acquires no right therein by way of inheritance. Hence, the finding of the First Appellate Court that the gift deed became void from 29.9.1894 cannot be faulted. Now, with regard to the question as to who were entitled to the suit lands, which were attached to a watan after the succession opened on the death of the watandar-Dada Patil on 29.9.1894, This is what the First Appellate Court has stated in para 48 of its judgment:

"Babasab was the male holder of the watan property. He died in 1894. And succession opened on his death. Now, the question is who were entitled to succeed to the suit lands and Dadasab died without male issues but left behind two daughters and his wife, and his two daughters are Masabi and Tarabi. Masabi died in 1903. Tarabi died in 1912. His wife Habib Sahi died on 4.3.1905. When he

died his two full brothers were alive. They were Bavasab (who died in 1914) and Sultansab (who died in 1923). In view of the provision of Section 2 Act V of 1886 and provisions of the Mohammedan Law (Section 2 of Act-V of 1886 contemplates that the except therein specially provided (page-32) watan should devolve by inheritance according to law of parties. Parties are Muslims and they are governed by Mohammedan Law. His wife Habib Sahi is entitled to succeed to the suit land as sharer and Babasab and Sultansab were entitled to succeed as residuaries. His daughter Nasabi and Tarabi are excluded. This being so, Habib Sahi Bavasab and Sultansab were the heirs of Dadasab or the real owners and were entitled to take back or claim back the possession of the suit land from Qadir of Abdul Khadar."

22. Now, it is to be seen here that Dada Sab Patil was the watandar and the suit lands, which were gifted by him during his life time, under a gift deed dated 10.6.1880 in favour of Qadir were patilki watan lands and they did not cease to be watan lands merely because they were gifted by him in favour of his son-in-law Qadir. Section 5 of the Bombay Hereditary Officers Act prohibited alienations of watan and watan rights. Clause(a) or Sub-Section (1) of Section 5 thereof, referred to a watandar in general and provided that it would not be competent to such a watandar to mortgage, charge, alienate or lease for a period beyond the term of his natural life, any watan, or any part thereof or interest therein, too or for the benefit of any person, who is not a watandar of the same watan without the requisite sanction. The prohibition contained in this Section together with the power of the Collector to recover back the watandar property to the watandars under Sections 8 to 13 show that the properties when once attached to a watan remains so irrespective of the holder for the time being until its nature is changed either by resumption or in any other made by the Government. Therefore, the watan properties though gifted to Qadir, son-in-law of the watandar, they did not lose their character as watan properties, and on the other hand, they continued to be watan lands even in the hands of the donee-Qadir. In other words they did not cease to be watan lands. Therefore even in the hands of Qadir, the suit lands retained their character as watan lands. The said Qadir was in possession of the watan lands by virtue of the gift deed executed in his favour by the watandar Dada Patil and hence his possession under the gift deed cannot become adverse because his possession was traced to the gift deed executed by the watandar. Therefore, there is no question of his acquiring title by adverse possession would arise as his possession was traced to the gift deed executed by the watandar. Then the watandar-Dada Patil, died in 1894. Upon his death the gift deed executed by him in favour of his son-in-law Qadir came to an end in view of Section 5(1)(a) of the Act. That is to say the gift deed, became void upon the death of the donor watandar Dada Patil. Therefore, the said Qadir did not acquire any title to the suit lands under the gift deed as it became void upon the death of the donor watandar Dada Patil. After the death of the donor-watandar Dada Patil, the possession of Qadir could not of course be attributed to the gift deed and he could only be held to be in possession of the suit lands either as a

trespasser or as a member of the watan family. Therefore, his possession over the suit lands after the death of the watandar Dada Patil in 1892 cannot be attributed to the gift deed. Qadir remained in possession of the watan land till his death in 1903. I have held that the possession of Qadir till the death of the donor-watandar Dada Patil was by virtue of the gift deed and hence, traceable to the gift deed and so it was not hostile and he cannot be held to have perfected his title to the suit property by adverse possession. This is because till the death of Dada Patil in the year 1894, the possession of Qadir was by virtue of the gift deed and hence it was not hostile to the interest of the real owners. It is only after the death of Dada Patil in the year 1894 when the gift deed became void, the possession of Qadir could be termed as hostile or adverse to the interest of the real owners. But then, he remained in such possession of the watan lands only for a period of 9 years i.e., from 1894 to 1903. Hence, Qadir did not perfect his title to the watan lands by adverse possession. Therefore, the above said Qadir died without acquiring any title in the Suit watan lands by prescription. Hence, the plaintiff cannot acquire any right in the suit lands through the said Qadir as he himself did not acquire any right in the watan lands at the time of his death. Now, it is not in dispute that after the death of Qadir, his son Abdul Khadar came to be in possession of the suit lands and he continued to be in possession thereof till his death in the year 1942. True, as rightly held by both the Courts below Abdul Khadar being in possession of the watan lands from 1903 to 1942, he acquired right by prescription. But it is to be remembered that even then the suit lands did not cease to be watan properties. In other words, though Abdul Khadar, presumed to have acquired right in the suit properties by adverse possession, they did not lose their identity or character as watan lands. Or the other hand they continued to be watan lands. Abdul Khadar was in possession of watan lands and there was nothing to show that watan property lost their character by adverse possession by Abdul Khadar. Therefore, by reason of mere adverse possession, the character of the suit lands is not changed and they continue to be watan properties. In this connection, a reference may be made to a decision of the Privy Council in the case of PADAPA v. SWAMIRAO ILR (1990) Bom 556. Following this decision, it has been held in ANNA NANA KHOT v. GOJRA DYNANU KAVALE, Volume XXX. Bombay Law Reporter 867 as under:-

"We think, therefore, that the property did not lose its character of watan property, and after the death of Rakhma the property would go to the present plaintiffs as the next male reversioners in preference to defendant No. 1 who is a grand-daughter of Rakhma."

23. The relevant discussion in this regard which is found at page 871 reads thus:-

"We have to consider whether by reason of adverse possession the character of the property is changed. The point, however, was considered by the Privy Council in PADAPA v. SWAMIRAO Their Lordships say:-

"Assuming that the appellant was barred by limitation from recovering the lands as heir of his father from those claiming under Kalova, and consequently his title

as vatandar from his own birth was extinguished, that circumstance did not alter the tenure. The lands remained watan and Kalova was watandar de facto with all the rights and subject to all the restrictions incident to that tenure. In the order of Mr. Gordon, under which Kalova obtained possession, it was conferred on her as watan and in the mortgage made by her the lands are described as watan. And in all the proceedings in the Collector's office she is recognised as vatandar. It is clear, therefore, that she held possession as vatandar and in no other character. Consequently she could not make any alienation which would be valid against her own heir whether that heir were the appellant or another. And on the assumption that the appellant's earlier title is extinguished by limitation, there is nothing to preclude him from asserting his title as Kalava's heir. The argument seems to give greater right to possession as watandar by wrong or usurpation than would be enjoyed by a rightful watandar."

We think, therefore, that the property did not lose its character of watan property, and after the death of Rakhma the property would go to the present plaintiffs as the next male reversioners in preference to defendant No. 1 who is a grand-daughter of Rakhma."

24. Therefore, the suit lands did not cease to be watan properties and after the death of Abdul Khadar, it is not in dispute that Imam Patil (the father of defendant No. 7) came to be in possession of these properties. No doubt, the plaintiff would contend that Imam Patil forcibly took the possession of the suit lands while the defendant No. 7 would content that after the death of Abdul Khadar, his father i.e., the father of the defendant No. 7, Imam Patil succeeded to the watan lands. But the fact remains that the Imam Patil took possession of the watan lands after the death of the deceased Abdul Khadar. There is no dispute that the said Imam Patil was none other than the senior uncle of the deceased Abdul Khadar. Admittedly, Abdul Khadar died in 1942 and the suit lands which were in the possession of Abdul Khadar at the time of his death were watan lands. The question that would arise now is whether the plaintiff, the daughter of Abdul Khadar will get any right in such lands. It was held by the First Appellate Court that in this case Section 2 of the Act 5 of 1886 is also applicable, apart from the personal law of the parties because the suit lands were watan lands and Abdul Khadar was the last male holder. Section 59 in Chapter VI of the Mulla's Principles of Mahomedan law, edited by Sri M. Hidayathulla, the former Chief Justice of India postulates where daughters are excluded from inheritance either by custom or by Statute, they should be treated as non-existent and the shares of the other heirs should be calculated as they would be in default of daughters. Here, it is not in dispute the petitioner was the daughter of Abdul Khadar, the last male holder. The properties that were in possession of Abdul Khadar were watan lands. As on the date of the death of Abdul Khadar, he has left behind him his wife, his son, his daughter, the plaintiff and Imam Patil, who admittedly took possession of the suit lands after the death, of Abdul Khadar, was the paternal uncle of Abdul Khadar. Dealing with almost a similar situation, this is what the learned author Mulla in his above said book has observed at page

64 below Section 59, which reads thus:-

"Watan Act. 1886(Bombay):- If a Mahomedan watandar dies leaving a widow, a daughter, and a paternal uncle, the daughter is not entitled under the Act to any interest in the watan lands, she being postponed in the order of succession. The lands are divisible between the widow and the paternal uncle as if the daughter were non-existent so that the widow will take 1/4 and the uncle the residue 3/4. The widow will take only a life-interest in her share. If the daughter were not excluded, she would have taken 1/2, the widow 1/8, and the uncle the residue 3/8. The rule of Mahomedan Law stated in the note to ill.(3) to Section 63 does not apply to such a case."

25. Therefore, the plaintiff, the daughter, of Abdul Khadar was not entitled under the Act to any interest in the watan lands, she being postponed in the order of succession, when the succession opened after the death of her father Abdul Khadar. There is another aspect of the case. The Suit lands were watan properties even in the hands of Abdul Khadar, the father of the plaintiff and they did not cease to be watan properties. The watan properties attached to the office of the patilki watan by rule of primogeniture became impartible. Therefore, as on the date of the filing of the Suit by the plaintiff, they were impartible. As I have already stated, upon the death of the watandar Dada Patil, the gift deed executed by him in favour of Qadir in Respect of the watan lands came to an end by virtue of Section 5 of the Act. True, even after the death of the watandar Dada Patil Qadir and his son Abdul Khadar continued to be in possession of the watan lands till the death of Abdul Khadar, in 1942, when according to the plaintiff, Imam Patil, the father of defendant No. 7, forcibly took possession of the suit lands. The possession of Abdul Khadar, as has been rightly held by both the Courts below was hostile to the heirs of the watandar-Dada Patil and hence, it could be treated that Abdul Khader had perfected his title by adverse possession, before of course there was a dispossession of by the above said Imam Patil, the father of defendant No. 7. But then, the suit lands continued to be watan lands and they did not cease to be watan properties. Therefore, the suit lands that were possessed by Abdul Khader after the death of his father Qadir were watan lands and the said properties did not devolve upon him by virtue of any inheritance rights. Therefore, he did not succeed to those properties as a legal heir of the deceased Qadir. But, on the other hand, he came to be in possession of the said watan properties after the death of his father Qadir, who had obtained the same under the gift deed from the watandar-Dada Patil and that the said gift deed became void upon the death of Dada Patil in 1894 by virtue of Section 5 of the Act. Therefore, the father of the plaintiff namely Abdul Khadar was in possession of the suit lands which were attached to patilki watan. The said properties being watan properties in their origin, they did not loss their character as watan lands. It is also not in dispute that upon the death of Abdul Qadar, the said watan properties came to be possessed by Imam Patil, the father of the defendant No. 7. The contention of the plaintiff that Imam Patil took forcible possession of the suit properties cannot be accepted in view of the fact

that they were watan properties and Imam Patil was a member of the watan family. Hence, the said contention has no basis, in fact, it has been contended before me that since the properties were in the name of the father of the defendant No. 7, he forcibly dispossessed Abdul Khadar on 25.7.42. That means, the properties were entered in the name of Imam Patil, the father of defendant No. 7. It is to be remembered that the said Imam Patil was none other than the brother of Qadir and the paternal uncle of Abdul Khadar. In this context, a reference may be made to the provisions of Sections 24 and 25 of the Bombay Act No. III of 1874 which says that the duties appurtenant to any hereditary office shall be performed by the representative watandars or by deputies or substitutes as hereinafter provided and by no other persons and it shall be the duty of the Collector to determine, as hereinafter provided, the custom of the watan is to service and what persons shall be recognised as representative watandars for the purpose of this Act, and to register their names. It is obvious therefore that the name of the father of the defendant No. 7 appears to have been registered as representative watandar by virtue of Sections 24 and 25 of the Act and accordingly he took possession of the suit lands which were attached to watan after the death of the last male holder in the family, the deceased Qadir. Therefore, it appears to me that it is not by virtue of any force, Imam Patil came into possession of those lands, but because the suit lands were watan lands and the said Imam Patil being the paternal uncle of the last male holder Abdul Khadar, took possession of the watan lands as a representative watandar. Thus, the suit lands which were attached to a watan were accordingly taken over by the said Imam Patil after the death of the last male holder Abdul Khadar. The watan was impartible and succession to it was governed by the rule of primogeniture, in case of impartible estate, the right of partition and the right of joint enjoyment from the very nature of the property incapable of existence and therefore, the Lower Appellate Court was justified in dismissing the Suit of the plaintiff for partition in respect of watan lands. It has to be stated that impartibility of the estate or the rule of primogeniture regulating succession were incidents of watan properties. Following the decision, this Court in the case of Bhimappa Ramappa Ghasti Vs. Arjan Laxman Ghasti, has held that after the abolition of the village office and resumption of the land, it becomes a ryotwari land only on regrant and as such, it would be released from the nature of its impartibility and becomes available for partition. Therefore, it is only on regrant, if the watan lands are joint family properties, could be released from the nature of impartibility and become available for partition. Admittedly, as on the date of the filing of the suit by the plaintiff claiming partition of her alleged share in the watan lands, they were in the possession of the defendant No. 7 and he was the holder of the watan lands. The said watan lands were not regranted to the defendant No. 7 or to his father as on the date when the Suit was filed by the plaintiff and hence the plaintiff could not have filed a suit for partition in respect of watan lands, more so when these watan lands which were attached to patilki watan were taken over by the father of the defendant No. 7 after the death of the deceased Abdul Khadar. Further, there is nothing to indicate that the plaintiff

was entitled to share in the suit lands as on the date of their regrant. That being so, the plaintiff's suit for partition of the watan lands was clearly not maintainable. Further, the impediment to inheritance was created by a Statute and Section 2 Act 5 of 1886, though in terms did not exclude the female heir absolutely and postponed her in the Order of succession practically creates an impediment to inheritance. The plaintiff being the daughter of Abdul Khadar was incapable of inheriting the watan lands on account of the impediment created by the Statute, in the presence of her paternal uncle, who was admittedly in possession of the suit lands after the death of her father. By Section 2, Act 5 of 1886, the daughter is postponed in the Order of Succession of the paternal uncle and the effect of such postponement was that she is for all practical purposes excluded and was incapable of inheriting watan lands. In this context, a reference may be made to the following observations made in the case of AMINABI MAHMULAL PATIL v. ABASAHEB MIRASAHEB PATIL ILR 1931 Bom 2266 , 229 which reads as under:-

"Moreover, the Mahomedan law itself, furnishes a principle which without unreasonable extension may be applied here. Certain persons are excluded from inheritance on the ground of incapacity, e.g., infidels, homicides and slaves. The legislature has removed some of the grounds of exclusion, such a apostasy and slavery, and it can presumably impose fresh ones, as it has done in effect by Section 2 Act 5 of 1886, so far as some females in watan families are concerned. The important thing to notice is that persons excluded from inheritance on the ground of incapacity do not exclude others. So far as the other heirs are concerned they are as if they were dead; see Ramsey's Sirajivva, 27 and 28. It has been argued that female heirs are not excluded from inheritance or rendered incapable of inheriting by Section 2 of the Act of 1886 but merely postponed in the order of succession to other male members of the family qualified to inherit. But though this distinction may be important for some purposes, it appears to me to have no real substance when applied to the facts of a case like the present. To say that if there happened to be no male heir in the family the daughter would inherit is to say no more than that she would intermit if the bar did not operate. But what we have to decide is what is the effect of the bar when it does operate, and as I understand the matter, the effect here is tantamount to complete exclusion. The share which the paternal uncle now takes becomes his property and ceases to from any part of the estate of Mahmual. As regards the succession to it therefore on the death of the plaintiff, Mahmual's daughter would come in among the distant kindred, and would be a somewhat remote member even of that class. Moreover, if there was any male member of the family, even more remote, he would under the statute be preferred to her."

In the case on hand, it appears that after the death of the deceased Abdul Khadar, the name of the father of the defendant No. 7 was registered as representative inamdar and pursuant to that, he appears to have taken possession of the lands which were attached to a watan, and as on the date of the filing of the Suit by the plaintiff, it is the farther of the defendant No. 7 who

was in possession of the lands as a watandar and under the circumstances, therefore, the plaintiff was not entitled to seek a share in the watan lands basing her title as her fathehr's heiress, the succession opening on the death of her father in 1942 or as a heiress of her grandfather Qadir. Therefore, the plaintiff was not entitled to seek petition of watan lands. It therefore follows that the suit of the plaintiff in respect of watan lands was rightly dismissed by the Lower Appellate Court."

26. Therefore, looking from any angle, I am of the view that the judgment and decree passed by the Lower Appellate Court does not call for any interference by this Court. Hence, I find no merit in this Second Appeal filed by the appellants. In this view of the matter, it may not be necessary for me to refer to any other contentions raised by the respondents.

27. In the result, therefore, the Appeal filed by the appellant is dismissed. But, in the circumstances of the case, there is no order as to costs.