BOMBAY HIGH COURT

Kadappa Bapurao Desai

Vs

Krishtappa Bachappa Desai

(Rangnekar, C.J. Divatia, J.)

16.04.1935

JUDGMENT

Divatia, J.

1. This appeal is preferred by the plaintiff in a suit to recover possession of certain property with mesne profits from the defendants. The plaintiff's case was that the defendants were his distant bhaubands, that the family owned two watans, viz., patilki and deshgat watans, that according to the ancient custom of the family of the parties these watans were impartible, that the watan property descended according to the rule of lineal primogeniture, that only the deshgat lands were given for maintenance to the bhaubands but no part of patilki watan was to be given to them for such maintenance, that in spite of that custom, one Rayappa, who, along with the plaintiff, belonged to the eldest branch of the family, gave certain property in 1878 to one Tatya and others of the third branch of the family to which the defendants belong,, that the property included some lands of the patilki watan for their maintenance, that this grant would be valid only during the lifetime of Rayappa but that it was not binding against the plaintiff who succeeded to this watan after the death of Rayappa in 1914 and the death of his brother Mallappa in 1917, under Section 5 of the Bombay Hereditary Offices Act, that there was also another alienation of patilki land made in 1886 by the said Rayappa to the members of the defendants' branch which grant was not in the nature of a gift but of the nature of a sale for consideration to the members of the defendants' branch and that also offended against the provisions of Section 5 of the said Act, and that therefore the plaintiffs have a right to recover possession of these patilki lands from the defendants.

2. The defendants' answer to the suit was that according to the long prevailing; custom in the family, the patilki watan, although impartible and governed by the rule of lineal primogeniture, was not governed by the custom alleged by the plaintiff, but that, on the other hand, from a very long time members of the defendants' branch were given certain patilki watan lands for their maintenance. It was further contended that the defendants were watandars of the patilki watan in

suit, and that, therefore, whether the grants to the defendants' family were by way of maintenance or were alienation or both, they were not void under Section 5 of the Act, after Rayappa's death, and that the plaintiff had therefore no right to recover possession of the suit property.

3. The main issues in the case, therefore, were, first, as to whether the alienations of the suit property by Rayappa to the members of the defendants' branch were valid and binding on the plaintiff after Rayappa's death, and, secondly, whether the defendants were entitled to maintenance out of the patilki watan lands, With regard to the custom alleged by the plaintiff that the bhaubands were entitled to maintenance only out of deshgat lands and not patilki lands, the lower Court found against the plaintiff that no such custom had been proved by him. It was admitted by the plaintiff in his deposition that deshgat as well as patilki watans were originally acquired by the ancestor of all the three branches, and although those watans were impartible, the bhaubands had a right of maintenance, and he admitted further that there was no writing to the effect that maintenance should not be given to them from the patilki watan lands. It will thus be seen that the defendants' right to maintenance is not denied, and as it is admitted that the defendants had a right to maintenance out of the deshgat watan lands, it is for the plaintiff to prove by definite and reliable evidence that the patilki watans stood on a different footing altogether and were not also liable for the defendants' maintenance. Apart from the word of the plaintiff, there is no evidence of any ancient, definite and valid custom from which it can be held that the defendants were not entitled to get patilki lands for their maintenance. The lower Court, therefore, had no difficulty in repelling the plaintiff's contention and in holding that this unusual custom had not been proved. It is further in evidence that the plaintiff's other bhaubands, that is to say, the members of the second branch, were still in possession of three patilki lands given to them for maintenance. We see no reason, therefore, to differ from this finding, and we hold that the plaintiff has not succeeded in proving the special custom pleaded by him.

4. But then it is contended that the grant of patilki lands in 1886 was not a grant for maintenance but was an alienation for consideration, and as the defendants were not watandars of the same watan, such an alienation would not be binding on the plaintiff. It is true that the second alienation of 1886 is not a simple grant for maintenance but purports to be for some consideration, and must, therefore, be taken to be a transaction of the nature of a sale, and that alienation would be good and binding on the plaintiff if the defendants are the watandars of the same watan. The plaintiff's contention is that the defendants are not such watandars, because a "watandar" is denned in Section 4 of the Bombay Hereditary Offices Act as "a person having an hereditary interest in a watan", and "watan" consisted of "watan property, if any, and the hereditary office and the rights and privileges attached to them", while "watan property" meant "the property held, acquired or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office". The argument is that the members of the plaintiff's

branch" were the only persons who Were entitled to the patilki watan property because it is they who were entitled to do service, and as they held that hereditary office, they alone were the owners of the watan and had an hereditary interest in it, and that the defendants cannot be said to have any hereditary interest in this property. For this proposition reliance has been placed on behalf of the plaintiff on the case of *Chinava v. Bhimangauda* [1]There one Giriappa by his will had devised his watan property to one Venkangauda, his distant cousin. The plaintiff as the nearest heir of Giriappa claimed the property on the ground that Venkangauda had no hereditary interest in that property, and was not, therefore, a Watandar capable of taking the property under Giriappa's will, and that, therefore, the said will was inoperative, and it was held that Venkangauda had no hereditary interest in the watan, but that his interest was only in the nature of a spes successionis, and, therefore, the devise to him was inoperative and not binding against the plaintiff. It may be noted that Venkangauda was a distant cousin of the then plaintiff, and it does not appear that his family was entitled as of right to get any maintenance from the plaintiff out of the watan lands. It appears from the report that the share of the ancestor of Venkangauda in the watan was formerly confiscated, and it was therefore that he had no hereditary interest in the property. It was held that his interest to succeed to this watan on certain remote contingencies was only in the nature of a spes successionis and that would not make his interest in the watan hereditary. In the present case, however, the facts are different. Under the custom prevailing in this family, which in our opinion has been established on the evidence, the plaintiff's bhaubands are entitled to maintenance out of these patilki lands, and must, therefore, be said to have interest of an hereditary nature in this property. Besides, even though this watan property may be impartible and governed by the rule of lineal primogeniture, the family of the plaintiff and the defendants did not for that reason necessarily cease to be a joint Hindu family, and the defendants, therefore, have a right by survivorship to this property even apart from the right of maintenance. This proposition is supported by the recent decision of the Privy Council in the case of *Shiba Prasad Singh v. Prayag Kumari Debi*[2]

5. We think, therefore, that the lower Court was right in holding that the defendants are watandars of the same watan within the meaning of that expression in Section 5 of the Bombay Hereditary Offices Act, and that the grants of 1878 and 1886 were not merely operative during the lifetime of Rayappa but were valid and binding beyond his lifetime as against the plaintiff and all holders of this watan property.

6. The lower Court is, therefore, right in finding in the affirmative on the two issues mentioned above and in dismissing the suit. The result is that the decree of the lower Court being correct, the appeal is dismissed with costs.

Rangnekar, J.

7. I agree.

Cases Referred.

1(1896) I.L.R. 21 Bom. 787
2(1932) L.R. 59 I.A. 331 : S.C. 34 Bom. L.R. 1567