

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Adrishappa bin Gadgiappa v. Gurushidappa bin Gadgiappa, from the High Court of Judicature, at Bombay: delivered Friday, 5th March 1880.*

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Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

IN this case a suit was instituted by two younger brothers against their elder brother, all being members of a joint Hindoo family, whereby the younger brothers claimed two-thirds of the Inam village of Konoor, which is admitted to be that part of a Deshgat Watan, or property held as appertaining to the office of Desai, which lies within what is, strictly speaking, British territory; the rest of the Watan being within the territory of the feudal chief of Jamkhandi, in the Southern Mahratta country. The elder brother insisted that, inasmuch as he held the office of Desai, and this property belonged to his office, he was entitled to hold it as impartible, subject to the customary right of his brothers to receive allowances by way of maintenance. The action was brought in the year 1861, in the Court of the Political Agent, and through a lamentable delay, as their Lordships cannot help thinking it, of successive political agents, was not decided in first instance until the year 1874. The effect of the decision of the political agent, whose judgment was for the Defendant, may be stated to be this: that the property appertaining to a Desaiship must be

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assumed *prima facie* to be impartible, and that sufficient evidence had not been given of its partibility. This judgment on appeal was reversed by the High Court, who laid down a different rule or rather presumption of law. The effect of the judgment of the High Court was, that there is no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof in the manner which the political agent supposed; that in such cases the burden of proof is upon the Desai, who seeks to show that the property devolves upon him alone, in contravention of the ordinary rule of succession, according to the Hindoo law. The High Court further came to the conclusion that no sufficient evidence had been given by the Defendant either of family custom or of district custom to prevent the operation of the ordinary rule of law whereby the property would be partible. The question in the cause, in a great measure, depends upon which of these two views of the law is right. Their Lordships are of opinion that the High Court was right; that there is no general presumption, as has been contended for on the part of the Appellants, which shifts the burden of proof; and that it lies upon the Defendant, who seeks to show that the estate is impartible, to give evidence of the special tenure of the Watan, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the general law. Their Lordships have also come to the conclusion that the High Court was right in the opinion which they formed that the evidence given in this case was insufficient.

The High Court intimate that the contention with respect to a family custom was abandoned in the argument before them; but be that as it may, their Lordships are of opinion

that no such family custom has been proved. A pedigree has been put in whereby it appears that, as far back as the year 1780, the Watan, which had been resumed at that time by the Native Government, was conferred on or restored to one Gurushidappa; but inasmuch as Gurushidappa appears to have been an only son, that devolution of the property throws no light upon the question in dispute. From Gurushidappa it appears to have devolved, in 1814, upon his only son Gadgiappa. Subsequently, in 1836, the Desaiship devolved upon Adrishappa, the present Defendant. It would appear that his family, consisting of himself and his two brothers, remained joint, until the year 1854, when, for the first time, a dispute arose, and the younger brothers claimed the shares which they claimed subsequently in this suit. It appears to their Lordships that this state of things throws very little light upon the controversy; it certainly does not support the contention of the Defendant that he was entitled to the possession of the property as impartible, giving his brothers only maintenance.

An official document has been put in, bearing date 1800, being an official account of certain Desaiships then under sequestration by the Government, whereby it would appear that a sum of Rs. 150 per annum, payable out of the Watan, had been allotted to one Kadappa, who seems to have been a distant cousin of Gurushidappa. It further appears that that allowance has continued up to the present day to be enjoyed by a descendant of this Kadappa; and that a similar allowance is enjoyed by another member of the family, descended from a common ancestor with the parties to this cause. That circumstance, however, of itself, and without further explanation, does not appear to their Lordships sufficient to maintain

the contention of the Defendant. These two members of the family, who are said to be still living and to receive the allowances, might have been called, and they might, if the case of the Defendant is correct, have shown the origin of their allowances, and possibly that there had been some previous custom in the family whereby the eldest son took the property, subject to allowances to his younger brothers, or to other members of the family. Even such evidence, it may be remarked, if forthcoming, would presumably have related to a period anterior to the re-grant of the Watan to Gurushidappa in 1780. But, in the absence of any such evidence, their Lordships are not disposed to attach much weight to this mere entry in the account. Beyond that there is no evidence.

Their Lordships, therefore, are of opinion that the High Court was right in determining that there was no evidence in this case of family custom one way or the other.

With respect to the custom of the district, although the evidence may show that tenures of this kind are more frequently impartible than partible, it is not, in their Lordships' opinion, of that conclusive character which is necessary to establish a general district custom. They are of opinion that the High Court was justified in finding that no sufficient evidence of such a district custom had been given.

Their Lordships may observe that in the year 1854, upon the brothers quarrelling, the case came before the chieftain of Jamkhandi in respect of that part of the Watan which is in his territory. He, in the first instance, decided in favour of the Defendant; but subsequently, some years after, upon receiving evidence, which he appears not to have done before, decided in favour of the Plaintiffs. That decision, although

it was subsequently set aside by the Secretary of State on the ground that, for the special reason stated in his despatch, the chief had no jurisdiction in the matter, may be invoked by the Plaintiffs as, at all events, some evidence in their favour.

On the whole, therefore, their Lordships have come to the conclusion that the High Court was right in the view which they took of the law and of the burden of proof, and of the proof itself, and that their decision *quoad* the partibility of this property should be confirmed.

A difficulty which their Lordships have felt in the case, and to which the High Court have not adverted, is the following: The Defendant held the hereditary office of Desai, and the Watan is admittedly property appertaining to the office; and it appears to have been the policy of the Indian Government that Desaiships should be maintained, and that the Desai himself should be enabled to perform the functions of his office, be they greater or less, properly and in a manner suitable to his position as a subordinate officer, and to some extent a representative, of the Government. This policy has been recognised and enforced by various Acts of the Legislature, the latest being apparently Act No. III. of 1874 of the Legislative Council of Bombay. The provisions of that Statute seem to be in some degree retrospective.

Hence, although the decision of the High Court is in substance right, their Lordships think that it should be accompanied by a declaration that the decree is to be without prejudice to the Defendant's right to such emoluments or allowances for the performance of the duties of the Desaiship as he may be entitled to under any law in force. And, accordingly, they will humbly recommend to Her Majesty that such a declaration be added to the decree of the High

Court; but that, subject thereto, the said decree be affirmed. They also direct that the costs of this Appeal be taxed; that the amount of such costs, when taxed, be added to the costs of the cause, and paid with them out of the estate.