## APPELLATE CIVIL.

*Before Mr. Justice Kemball and Mr. Justice Birdwood.*

1884
*April* 28.

DESA'I MA'NEKLA'L AMRATLA'L (ORIGINAL DEFENDANT), APPELLANT, *v.* DESA'I SHIVLA'L BHOGILA'L (ORIGINAL PLAINTIFF), RESPONDENT.*

*Desáigiri—Amín sukhdi—Suit to establish right to amín sukhdi and for arrears —Limitation—Act XV of* 1877, *Arts.* 132 *and* 62, *Sch. II.*

The parties, who were *desáis* of Mahudha, in addition to their '*desáigiri*' allowance enjoyed an allowance called '*amín sukhdi*'. In 1847 the plaintiff sued the defendant's father and the Collector of Kaira for a share of the allowance; but as the whole of it had been reserved by the Collector to the defendant's father as the officiating *desái*, the suit was rejected under Act XI of 1843. In 1866 an arrangement was come to, under which a sum of Rs. 40-2-0 was to be annually available over and above the remuneration of the officiator. On the 9th of July, 1867, the defendant received this sum for the first time. In 1873 a new arrangement was effected under which the service was abolished, the Government resuming half of the allowance, and giving up the other half freed from service unconditionally to the *desáis*.

On the 4th of October, 1878, the plaintiff brought this suit to establish his right to a share of the moiety of the *amín sukhdi* allowance given to the *desáis* by the Government, and to recover his share of the amount received by the defendant. The defendant contended that the allowance was impartible and in the nature of a personal gratuity exclusively enjoyable by himself.

*Held* that, independently of its origin and the light in which it was regarded by the Government and the parties, the *amín sukhdi* allowance having been actually included in and dealt with as part of the *desáigiri vatan* and a moiety of it having been subsequently freed from the obligation of service, the *desái* who happened to officiate at the time the allowance was freed from service had no right to hold the moiety exclusively as a personal allowance to himself.

That the plaintiff's cause of action in this suit arose on the day when the officiating *desái* received the surplus of the allowance freed from the condition of service and available for distribution amongst the *desáis* as alleged by the plaintiff, and the suit having been brought within twelve years of that day was not time-barred.

That the limitation of three years under article 62 of the Limitation Act XV of 1877, Sch. II, and not that of twelve years under article 132 was applicable to a claim by one sharer against another of an allowance attached to a hereditary office, and not more than three years' arrears to recover arrears of the *amín sukhdi* allowance could, therefore, be awarded.

*Harmukhgauri* v. *Harisukhprasad* (1) followed.

THIS was a second appeal from the decision of Sextus H. Phillpotts, Judge of Ahmedabad, amending the decree of Ráv

* Second Appeal, No. 24 of 1883

(1) I. L. R., 7 Bom., 191.

Sáheb Ranchhodlál Kapurchand Desái, Subordinate Judge (Second Class) at Nadiád.

The facts of the case are thus stated by the Subordinate Judge in his judgment as follows:—

"The parties are *desáis* of Mahudha, and they are admittedly descended from one common ancestor, Bhogilál Kishóredás, who was in enjoyment of the *desáigiri vatan* at the introduction of the British rule. It is said that the office of *desái* originated during the Mahomedan rule, *desáis* being mostly Bráhmins, Kshatris, Vánis, &c.; and *amíns*, who are *pátidárs*, were appointed by the Maráthás either in supersession of the original *desáis*, or to perform their duties where they did not exist (*vide* para. xi of the Report of the Vatan Commission in 1865). Though it was intended by Captain Robertson that the Collector should appoint as officiators those members of the *desáis'* families whom he judged fittest for the duties of the office, as the Vatan Commission admits, this useful rule has never been observed, the practice having long been that the next heir of an officiator should succeed him in the office; or should the heir be, from age, sex, or any other reason, incapable of performing the duties, that he should be allowed to appoint a *gumásta* (*vide* para. vi of the said report).

"In A. D. 1821, Government issued a circular order to the Collectors on the subject of hereditary officers. In this letter the Collectors were informed, that as the office of *desái* had lost much of its original use, and as the influence and power of *desáis* had been abused in revenue matters, their functions as agent between Government and the rayats when dormant, were not to be revived, and when existing, were to be allowed to fall gradually into disuse. Their local knowledge, however, was still to be made use of, and the Collector was to avail himself of their services in settling boundary disputes, in arbitrating disputes regarding succession to land, and in similar duties. The extent and nature of their emoluments having been ascertained, *sanads* were to be given and further exactions prohibited (*vide* para. ix of the said report); and in para. x of their report the Vatan Commissioners state 'that these *sanads* were never given, the Collector reporting two years later that the *desáis* did not wish to receive them, and preferred to trust to the right of long enjoyment.'

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"It appears, from para. xvii of the Vatan Commission Report, that *amín sukhdi* was entered like *todágirás* in the '*jyarut khata*' as a charge on the Government revenue of the village; and this continued at least up to A. D. 1849.

"This *amín sukhdi*, as has been stated above, was, at the time of the introduction of the British rule, enjoyed by the common ancestor of both parties, and it then on his death descended to his eldest son, the father of the defendant, and the defendant inherited it from him. It also appears from the defendant's own evidence (*vide* exhibits Nos. 29, 30, 31, 32, 33 and 34), that his father was rendering the service, though his father, the common ancestor of the parties, was recognized, and was treated as the holder of the *vatan*. In other words, the defendant's father officiated as the deputy of his and the plaintiff's father.

"Soon after the appointment of the defendant on his father's death, the plaintiff appears to have asserted his right as a sharer in the *vatan*. He filed suit No. 11000 of 1847 against the Collector of Kaira, and against the present defendant, to recover his share in the *amín sukhdi vatan*. The Collector being a party to the suit, it was instituted in the district. The Assistant Judge at first dismissed the suit for want of proper parties; but on remand he decided the case on the merits, and he threw it out, holding that the subject-matter of the suit was not a *vatan*, but a remuneration for service.

"The plaintiff being dissatisfied with this decision preferred an appeal (No. 329 of 1851) to the District Judge, who confirmed the decision of the Assistant Judge, on the grounds that the subject-matter of the suit was *amín sukhdi*, *i. e.*, fee or perquisite of an officer, though he may be a hereditary officer; that it is discretionary with the Collector to appoint any fit member of the family; and that he cannot, under Act XI of 1843, compel the Collector to leave any balance unappropriated for service for the non-officiating members to share.

"The plaintiff then filed a special appeal (No. 3935) to the Sadar Diváni Adálat, where the suit was disposed of on the ground that the whole allowance having admittedly been assigned to the defendant Máneklál by the Collector, there remained nothing

even under Act XI of 1843, which could be awarded to the plaintiff, even if the office of *amín* be held hereditary.

"Since the final decision in the Sadar Diváni Adálat the plaintiff seems to have remained quiet until the institution of this suit so far as the Courts of justice are concerned; and the defendant has enjoyed the same up to the service settlement in 1866, when almost the whole of the *amín sukhdi* was appropriated for service, and only a small sum of about Rs. 40 was left unappropriated. This service settlement did not continue long. In A. D. 1873 the non-service settlement was agreed to by the *vatandárs*. This settlement has made the allowance free from the charge of service by the deduction of eight annas in the rupee; and the amount, from which the plaintiff has now sued to recover his share, became due after the non-service settlement came into force.

"The facts stated above are beyond dispute in this case."

After disposing of certain points not material to the purposes of this report the Subordinate Judge considered the pleas of limitation and the impartibility of the *vatan*, and whether arrears for more than three years could be awarded. On the first point he was of opinion that, admitting that the plaintiff could have claimed a share from the balance of the *amín sukhdi* left unappropriated for service by the service settlement, the plaintiff's cause of action must be taken to have arisen when the defendant first received the payment under that settlement,—that is, 9th July, 1867 and this suit, brought on the 4th of October, 1878, was within twelve years of that day. The plea of impartibility of this *vatan* he held not proved, as he did not think there was sufficient evidence to prove the custom set up by the defendant that the *vatan* descended to the eldest member of the family. On the question of arrears the Subordinate Judge was of opinion that article 62 and not article 127 or 132 of the second schedule of Act XV of 1877 was applicable, according to the ruling in *Ratanshankar Reváshankar* v. *Gulábshankar Lalshankar*(1). He, therefore, awarded the plaintiff's claim with arrears for three years only.

(1) 10 Bom. H. C. Rep., 21.

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The District Judge agreed with the Subordinate Judge, except as to the period of limitation applicable to the claim as to arrears. He relied on the case of *Chhaganlál* v. *Bápubhái*(1), and held the limitation of twelve years to be applicable, and amended the decree of the Subordinate Judge accordingly.

The defendant appealed to the High Court.

*K. T. Telang* (with *Gokaldás Káhándás Párekh*) for the appellant.—The *amin sukhdi* allowance is not heritable. It is a mere gratuity or a personal allowance granted in addition to the remuneration for service, and is resumable at the pleasure of Government. The Government and its officers have so treated it, and declined to treat it as hereditary, or to pay it to any but the elder branch of the family. It formed no part of the family property. The claim is barred by limitation. On the 10th of January, 1846, the Secretary to Government informed the plaintiff that the allowance was not a *vatan*, but remuneration for service. The plaintiff's cause of action, if any, arose on that day, and this suit, brought on the 4th of October, 1878, is barred. The defendant's branch of the family has had uninterrupted enjoyment for three generations. As to the claim for arrears, no more than three years' arrears could under any circumstances be allowed. The case of *Chhaganlál* v. *Bápubhái*(1), relied on by the District Judge, has been overruled by the case of *Harmukhgauri* v. *Harisukhprasád*(2).

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the respondent.—The *amin sukhdi* allowance did certainly go to the officiator, but was not thereby rendered personal. It was attached to the performance of service, and when that ceased, it formed part of his entire *vatan*, and was family property subject to all the incidents attributed to it by the Hindu law. The service and non-service settlements which were effected, were effected with the whole family, not with the elder branch or officiator. As regards limitation, the plaintiff could not sue till there was an available surplus in the hands of the defendent, and that was in 1867. The suit is within twelve years, and not barred, and neither is the claim for arrears barred.

(1) I. L. R., 5 Bom., 68. (2) I. L. R., 7 Bom., 191.

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The judgment of the Court was delivered by

KEMBALL, J.—This is a second appeal in a suit brought to recover a certain share in an *amín sukhdi* allowance which defendant had received from the Government treasury.

Both the Courts below have held that plaintiff had established his right to the share claimed; but whereas the Court of first instance awarded only three years' arrears, the District Court allowed the full claim for twelve years.

The case for the appellant is that the allowance under consideration was merely a personal gratuity granted by way of additional remuneration to the officiator, and was not heritable: further, that the claim *in toto* was barred by the law of limitation, and that, under any circumstances, more than three years' arrears could not be claimed. In support of his first contention appellant relies on the view, formerly taken and expressed by the Government, of the character of the allowance and of their right to continue or withhold it at pleasure; but, assuming that view to be well-founded, it is clear that, in course of time, the allowance came to be included in, and dealt with as part of, the *vatan*, and that although it was stated to have been in its inception an additional grant, made later than the original *vatan*, for the remuneration of officiating members whose hereditary share had become insufficient, the whole of it was not subsequently appropriated for service. That being so, it is difficult to see upon what grounds the officiator at the time of the non-service settlement can claim to hold the portion, continued to the *desáis*, as a personal allowance to himself. A similar contention has frequently been disallowed in former suits relating to *amin sukhdi* allowances; and although, no doubt, the defendant is not precluded thereby from urging it here, it is for him to prove his case.

Both the Courts below have held that the defendant has failed to prove the impartibility of the allowance; and the *sanad*, on which the defendant also relies, reserves in express terms "the rights and interests of other parties."

With regard to the general question of limitation, it is contended that the cause of action dated from the refusal of the Government to recognize the claim; but it is obvious that that

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in itself furnished no ground of action, and that the plaintiff could not, as held by the lower Courts, have sued till some portion of the allowance was left for distribution over and above the amount reserved for the officiator. On this point also, we think, the decisions of the Courts below were right.

As regards the claim to arrears, the District Judge has relied upon a ruling of this Court in *Chhaganlál* v. *Bápubhái*(1), which, however, one of the learned Judges who took part in it has, in a more recent judgment—*Harmukhgauri* v. *Harisukhprasad*(2)—pronounced to be unsustainable. That the three years' rule of limitation is applicable, is also clear from a recent decision of the Judicial Committee of the Privy Council in *Ahmad Hossein Khán* v. *Nihal-ud-din Khán*(3).

We, therefore, amend the decree of the District Court by diminishing the amount awarded to the plaintiff to three years' arrears previous to the date on which the plaint was filed, with costs throughout on the defendant.

*Decree amended.*

(1) I. L. R., 5 Bom., 68. (2) I. L. R., 7 Bom., 191.
(3) I. L. R., 9 Calc., 945.

## ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

1883 *November* 19 *et seq.*, 1884 *June* 20.

THACKERSEY DEWRA'J AND OTHERS (PLAINTIFFS), *v.* HURBHUM NURSEY AND OTHERS (DEFENDANTS).*

*Caste—Suit by members of a caste and worshippers at caste temple against trustees of caste and temple property—Civil Procedure Code Act X of* 1877, *Secs.* 30 *and* 539—*Right to manage caste and temple funds—Public charity—Private charity—Parties—Trustees—Negligence—Wilful default—Acquiescence of majority of caste in unauthorised use of trust funds—Rights of minority—Express trust—Limitation Act XV of* 1877, *Sec.* 10—*Jains.*

In or about the year 1839 a temple to the god Shri Anantnáthji was erected in Bombay by the Dossa Oswall Bania caste, the religion of which caste is the Jain religion. A large portion of the funds required for building the temple was advanced by one Nursey Náthá, at that time the leading man in the caste; the rest

* Suit No. 424 of 1881.