APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886. *April 7.*

GOPA'LRA'V, (ORIGINAL PLAINTIFF), APPELLANT, *v.* TRIMBAKRA'V AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Deshmukhi vatan, impartibility of—Partition, suit for, of such vatan—Custom of primogeniture.

In the middle of the seventeenth century one Veḍuji, the ancestor and founder of the family of the parties to the suit, then called the Mhaske family, acquired a *deshmukhi vatan* originally consisting of eight *chávurs* of *inám* land, which was afterwards equally divided between the two sons of Veḍuji, who became the heads of separate branches of the family, called, respectively, the Pimparne and the Jakhorikar branches, of which the former was the elder. In the latter part of the seventeenth or early part of the eighteenth century the elder branch further acquired six *chávurs* of land. The parties to the suit were brothers, and belonged to the elder branch. In the middle of the eighteenth century disputes arose between the Jakhorikar branch and Trimbakráv, the then eldest representative of the Pimparne branch, in respect of the liability to partition of the emoluments, dignities and property appertaining to the said *vatan*, and a decree was passed by the Peishwá, Raghunáth Bájiráv, to the effect that the representatives of the Jakhorikar branch should keep the *inám* lands they had, and continue to receive, as before, money for defraying the expenses of weddings and other household matters, but should have nothing further to do with the *vatan*, which, with the "right of eldership," was to be enjoyed by the sons, grandsons and descendants of Trimbakráv in succession.

The subsequently acquired six *chávurs* of land, two of which were situated at Pimparne and the remaining four at Ambhora, described as *sádhnákh*, had been always spoken of and dealt with as connected with the *vatan* and the original eight *chávurs*, and had been enjoyed for a hundred or hundred and fifty years by Trimbakráv and his ancestors free from any right of the *bháubands*, and this mode of enjoyment was recognized and affirmed by the authorities in the *sanads*, and also subsequently by the British Government. The plaintiff, who was one of the three sons of Gopálráv, now deceased, sued his eldest brother, Trimbakráv *alias* Bájiráv, and his second brother, Balvantráv, for partition into three equal shares of the property appertaining to the *deshmukhi* and *páṭelki vatan*. Trimbakráv, the first defendant, resisted the suit on the ground that by the custom of the family he, as the eldest son, took the *vatan* and the property appertaining to it, subject only to allotments for maintenance of the younger brothers. The Court of first instance found the alleged custom proved, but with the consent of the first defendant awarded Rs. 700 to the plaintiff as his third share of the immoveable property.

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The plaintiff appealed to the High Court, and contended *(inter alia)* that the Peishwa's decree related to the original eight *chávurs* only, and not to the subsequently acquired six *chávurs*, and that the younger members of the Pimparne branch were not bound by that decree.

Held, that the plaintiff's claim to partition of the *deshmukhi vatan*, including the six *chávurs*, should be disallowed, the existence of the "custom of eldership," as alleged by the first defendant, being satisfactorily established by the documentary as well as other evidence—a custom which the Jakhorikar branch unsuccessfully endeavoured to repudiate, but which the younger members of the Pimparne branch had throughout recognized until the present suit; and the fact that the assessment and other dues, as well as all the allotments, had been always paid by the eldest member of the Mhaske family was a strong circumstance in corroboration of the first defendant's allegation. The circumstance, that services incidental to the *vatan* had been abolished, could not affect the title of eldership of the first defendant as established by custom.

Held, also, that plaintiff's claim to the *mirás* land and the *pátelki vatan* should be allowed, there being no evidence of a custom of primogeniture, as regards them, nor were they connected with the *deshmukhi vatan*.

Decree varied by directing partition of the *mirás* land and *pátelki vatan*.

THIS was an appeal from the decision of Khán Bahádur E. M. Modi, First Class Subordinate Judge of Ahmednagar.

The facts are fully stated in the judgment of the Court.

Dáji Abáji Khare (*Gangárám B. Rele* with him) for the appellant:—The custom of impartibility set up by the defendant is not such a one as can be upheld. The original eight *chávurs* were divided between the two sons of the acquirer. The right of primogeniture consists only in the collection, by the eldest member, of the cash allowances, and that is only an arrangement for convenience. If a custom of primogeniture is to be established, it must be so established to the entire property. The decree of the Peishwa is not binding on the appellant, who was no party to it. It related to the original eight *chávurs*; but, as to the subsequently acquired six *chavurs*, they are partible: so also is the *mirás* land and the *pátelki vatan*. So long as services were attached to the cash allowance it was inalienable, but now they are abolished it is partible: see *Rádhábái* v. *Anantráv*[1].

Shántárám Náráyan for the respondents:—The *vatan* property is impartible, and has been so held for a number of years unin-

(1) I. L. R., 9 Bom., 198.

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terruptedly till the institution of the present suit. The existence of the eldership has been always observed, and has the confirmation of the highest tribunal—the Peishwa. The general usage of impartibility varies in each family: see *Shidhojirâv* v. *Náikojirâv*[1]

The six *chávurs* were always spoken of and treated as connected with the original eight *chávurs*; and were enjoyed for over a century or a century and a half as part and parcel of the original *vatan* and without any right by, or disturbance from, the *bháubands*. The fact of payment of cash allowance to the younger members out of the *vatan* was not an arrangement so much as a custom submitted to and recognized by the younger members for nearly two hundred years. The abolition of services would not affect the established custom of impartibility of the *vatan*: see *Rámrâv Trimbak* v. *Yeshvantrâv Mádhavrâv*[2].

SARGENT, C. J.:—This is a suit for the partition into three shares of the cash allowance, *inám* and *mirási* lands, houses, and vacant spaces appertaining to an ancestral *deshmukhi* and *pátelki vatan*. The parties to the suit are three brothers, of whom the first defendant is the eldest, and resists the partition, on the ground that, by the custom of the family, the eldest son takes the *vatan* and property appertaining to it, and provides the younger members of the family with allotments by way of maintenance. The First Class Subordinate Judge found the custom, as alleged by the first defendant, proved, and rejected the plaintiff's claim for the division of the immoveable property, but with the first defendant's consent awarded Rs. 700 to the plaintiff as his one-third share of the moveable property.

It is not in dispute that the *vatan* was originally acquired by a common ancestor, Veduji, in the middle of the seventeenth century, the family being then known as the Mhaske family; and that Veduji had two sons, Nágoji and Bhivji, who respectively became the heads of two branches of the family, called, respectively, the Pimparne and Jakhorikar branches, of which the former was the elder. A genealogy of the two branches has been put in and

(1) 10 Bom. H. C. Rep., 282. (2) I. L. R., 10 Bom., 327.

treated by both parties as correct. It is not in dispute that the *vatan* immoveable property originally consisted of eight *chávurs* of *inám* land, which were divided equally between the two above-named branches, and that, subsequently, six *chávurs* of *inám* land, of which four were situated at the village of Ambhora and two at Pimparne, were acquired by the elder branch in the latter part of the seventeenth or early part of the eighteenth century.

In the middle of the last century, serious disputes commenced between the Jakhorikar branch and the eldest representative of the Pimparne branch, in which the question in issue was whether the former were entitled to a partition of the *vatan*, including in that term the dignities, emoluments and property. This appears from the recitals in exhibit 108, which was a decree passed, in 1773, by the Minister Raghunáth Bájiráv to Trimbakráv, the then eldest representative of the Mhaske family. In that document, Trimbakráv, after setting out the pedigree of the Mhaske family, alleged that the "custom in that family, as regards the succession to the *vatan*, had been uninterruptedly by the eldest, whose business it was to affix the seal and signature and conduct all the business;" that the eight *chávurs* of *inám* land had been divided between the two branches, tracing from the two sons of Veduji; and that the descendants of the younger son received, in addition, money for defraying the expenses of weddings and other household matters; that Lakshman and Durgoji, members of the Jakhorikar branch, nevertheless, desired partition; and finally prayed that the *Sáheb* would continue security to his "right of eldership, one seal and the whole business." Upon this representation, the decree was that "Lakshman and Durgoji should keep the *inám* lands they had, and receive money for the above expenses, but "should have nothing further to do with the *vatan*," and that the petitioner, his sons, grandsons and descendants, in succession, "should enjoy the *vatan* and eldership and the whole business." This document is, therefore, a recognition, by the highest official authority, of the claim of the eldest member of the Mhaske family to the *vatan*, free from any claim of partition, as such, by the other members of the family, as having been the uninterrupted custom of the Mhaske family from the time of their ancestors.

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It was urged, however, for the appellant that this decree only relates to the eight *chávurs*, originally granted with the *vatan*, and not to the six *chávurs* which are described in exhibits 17 and 18 as regards the two *chávurs* at Pimparne, and in exhibits 109, 19 and 114, as regards the four *chávurs* at the village of Ambhora, as having been subsequently acquired; and, secondly, that the members of the Pimparne branch were not bound by it, having taken no part in the dispute which led to its being passed.

As to the first of these objections, it is true that the above decree, which deals with the *vatan*, makes only mention of the eight *chávurs* originally granted, and that the six *chávurs* are described as "*sádhnákh*" in the above exhibits, which particularly relate to them; but, in all those documents, they are spoken of in connection with the *vatan* and the original eight *chávurs*, and as having been enjoyed for one hundred or one hundred and fifty years by Trimbakráv and his ancestors free from any right on the part of the "*bháubands*;" and this mode of enjoyment was recognized and affirmed by the authorities in the *sanads*, exhibits 17, 18, and 19, by the direction that the applicant Trimbakráv, his sons, and other descendants were to enjoy them "as they had been enjoying them from former times." It was argued, that by the "*bháubands*," in these documents, are meant the Jakhorikar *bháubands* only, who were at that time actively opposing Trimbakráv. But in the early part of exhibit 18, Trimbakrav, speaking of the original eight *chávurs*, says: "We, *bháubands*, having enjoyed the same from generation to generation according to our shares," where the *bháubands* must clearly mean the whole family, including both the Jakhorikar and Pimparne branches, as it appears that the division had been amongst them all,—two hundred and forty *bighás* having been allotted to Khimáji, the head of the younger branch of the Pimparne branch. Again, when he afterwards says as to the two *chávurs* "which have been held by us for one hundred years in which the *bháubands* have no share," he must be taken to be contrasting the right of himself and his lineal ancestors with that of the rest of the family. The close connection between the six *chávurs* and the *vritti* itself comes out even more clearly in the award made in

1821, on the directions of Captain Pottinger, in the dispute as to the four *chávurs* at the village of Ambhora, which concludes with saying : "According thereto, Trimbakji, his son Gomáji, and his son, the present Trimbakráv, have been carrying on the *vahivát* of the whole *vritti* under one name, signature, and seal, and have been paying their kinsmen Lakshman, his son Keshavráv, and his son the present Yashvantráv, and others, money for their expenses up to 1817. Taking into consideration this *vahivát*, the enjoyment that is going on is very strong. The parties should act in future in accordance therewith. * * * * *Deshmukh* should not raise the dispute for a fresh partition; he should act according to the custom hitherto prevailing," by which custom is clearly meant, as alleged by Trimbakráv in all the documents, the custom of the elder member of the entire family taking the *vritti* and making allotments to the younger members.

With respect to the objection that the younger members of the Pimparne branch were not bound by these decisions, it is to be remarked that the history of the *vatan* and property since the separation of the two branches can leave no doubt that, from the beginning of the last century, the right of eldership of the senior member has been practically recognized by the younger members of the Pimparne branch until the present dispute. The allotment of the two hundred and forty *bighás* to Khimáji, the younger son of Nágoji,—that of the one hundred and twenty *bighás* by Trimbak quite recently to Yashvant, to which his elder brother Ganpat added thirty *bighás* of the Pimparne *inám* land, are all consistent with the custom as alleged by first defendant. Lastly, the fact that the assessment and other dues on those and, indeed, all the allotments have been always paid by the eldest member of the Mhaske family is a strong circumstance in corroboration of the first defendant's case.

Upon the whole of the evidence, we think that the documentary and other evidence establishes satisfactorily, as regards the *vatan*, including the six *sádhnákh inám* lands, the existence of a custom of eldership, as alleged by the first defendant, and not a mere arrangement for the convenient performance of the services of the *vatan*,—a custom which had been long in force when

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the Jakhorikar branch unsuccessfully endeavoured to repudiate it in the latter half of the last century, but which the Pimparne branch has throughout recognized until quite recently. If this be so, the fact that the services incidental to the *vatan* have been abolished, cannot affect the title of the first defendant as established by such custom.

With respect to the *pátelki vatan* and the *mirás* lands, the only evidence in the case is the first defendant's statement, that they are ancestral; but they are in no way connected with the *deshmukhi vatan*, and there is no evidence of a custom of primogeniture, except with respect to that *vatan*. We think, therefore, the general law must prevail, and that the plaintiff and other younger brothers are entitled to a partition as to that property.

The decree must, therefore, be varied by directing a partition as to the *pátelki vatan* and *mirás* lands. Appellant to pay respondents their costs of this appeal.

Decree varied.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1886. *April* 20.

BA'I JAMNA' (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I ICHHA', (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, *Sec.* 14—*Civil Procedure Code* (*Act VIII of* 1859), *Sec.* 269, *summary proceedings under—Neglect to set aside order passed in such proceedings within one year by purchaser at a Court sale—Suit to establish title to property by such purchaser.*

At a Court sale held on the 15th November, 1871, in execution of a decree, the plaintiff's deceased husband purchased a house, but neglected to register his sale certificate. In attempting to recover possession he was obstructed by the defendant, who claimed the property as her own. Summary proceedings under section 269 of Act VIII of 1859 were thereupon instituted against the defendant, and the defendant's claim was upheld by an order passed on the 7th November, 1872. In the meantime the plaintiff's husband having died, plaintiff filed, on the 31st March, 1873, a regular suit to establish her title. On the 8th July, 1873, she obtained a second certificate, and registered it. The Court of first instance awarded her claim, but on appeal by the defendant the lower Appellate Court reversed that decree, on the ground that, at the institution of the suit, plaintiff had not a registered certificate of sale. That decree was confirmed on the 17th November, 1879,

* Second Appeal, No. 290 of 1884.