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statements, which on this point of identity are contradicted by Bhági. Now, it is an established rule of practice that the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches. In the present case there is no such corroboration. The accomplice may know every circumstance of the crime, and while relating all the other facts truly may, in order to save a friend or gratify an animosity, as is alleged in this case, name some person as one of the criminals who was innocent of the crime. Hence the value of the well-understood rule, which we think ought to have been applied to this case. Similar principles have been applied by this Court in *Reg.* v. *Málápá*(1) and *Reg.* v. *Budhu Nánku*(2). We now reverse the conviction and sentence.

Conviction and sentence reversed.

(1) 11 Bom. H. C. Rep., 196. (2) I. L. R., 1 Bom., 475.

APPELLATE CIVIL.

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

1885. *December* 14.

RA'MRA'O TRIMBAK DESHPA'NDE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* YESHVANTRA'O MA'DHAVRA'O DESHPA'NDE AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition of deshpánde vatan—Custom of primogeniture—Presumption as to impartibility of vatan—Cessation of duties attached to a vatan.

It had been the practice in a *deshpánde vatandár's* family, extending over a century and a half without interruption or dispute of any kind whatever, to leave the performance of the services of the *vatan* and the bulk of the property in the hands of the elder branch, and to provide the younger branches with maintenance only.

Held, that such practice, being more probably due in its origin to a family or local usage than to a mere arrangement determinable at the will of any members of the family, ought to be recognised and acted upon as a legal and valid custom.

Discontinuance of services attached to an impartible *vatan* does not alter the nature of the estate, and make it partible(1).

*Cross Appeals, Nos. 77 and 91 of 1884.

(1) *Vide Sávitribái* v. *A'nandrão*, 12 Bom. H. C. Rep., 224; and *Rádhábhái* v. *A'nantrão*, I. L. R., 9 Bom., 198.

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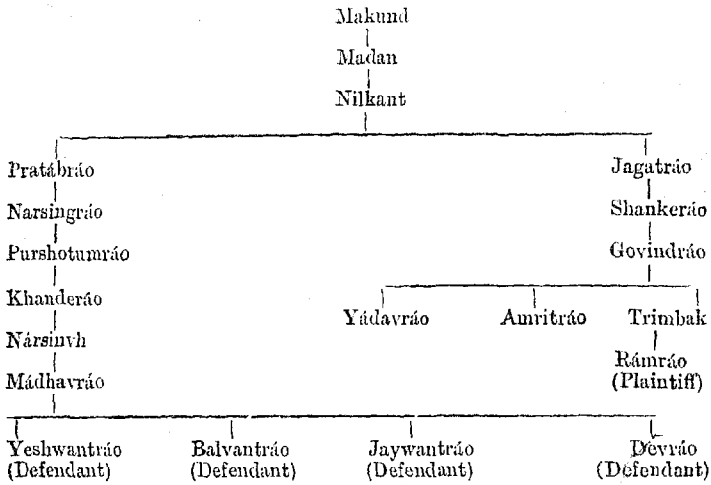
THIS was a suit for partition of the *deshpánde vatan*. The following genealogical tree will show the relationship of the parties to the suit :—



The original acquirer of the *vatan* was Makund. On the death of his grandson, Nilkant, a small portion of the *vatan* property, called Varse *máhál*, consisting of a few villages, was assigned to the younger son, Jagatráo, in lieu of maintenance. All the rest of the property, together with the services attached to the *vatan*, were entrusted to the eldest son, Pratábráo. From that time the descendants of the elder branch continued to perform the duties and enjoy the honours and emoluments of the office of *deshpánde* to the exclusion of the younger branch, who lived upon the income of Varse *máhál*. About the year 1814, Narsinvh Khanderáo, the defendants' grandfather, succeeded to the office of *deshpánde*. As he was then a minor, an agreement was entered into between his *gumásta*, Tuko Jagdish, and Govindráo, the plaintiff's grandfather, for the management of the *vatan*. It was in the following terms :—"Rájashri Narsinvh Khanderáo is a minor. So until he becomes a man of understanding, and is able to manage his affairs—(that is) until he attains the age of twenty-five years—we should both carry on the management unanimously. All affairs should be conducted by Tukopant. Therein there should be no hindrance from

Govindráv, (and) Tukopant should not practise any cunning towards the said (Govindráo). Marriages and *munj* and other ceremonies of Govindráo's children should be performed out of the expenses of the *sansthán* as the occasion may require. The income of Varse *máhál* is not sufficient for (defraying) the family expenses. So should any occasion require (us) to meet the shortcomings in the family expenses, we should provide for the same. In all matters relating to the management of affairs as the occasion may require, either for good or bad occasions, Govindráo should be favourable. He should not fail in the same. As the income of the Varse *máhál* is not sufficient to Govindráo, and as he is engaged in *dol* business, the said gentleman should be paid for expenses annually a separate sum of Rs. 125, one hundred and twenty-five, out of the profits of that *dol* in addition to the amount of the Varse *máhál*."

On Narsinvh's coming of age, he repudiated this arrangement, and refused to continue to Govindráo, or his family, the annual allowance of Rs. 125 which Tuko Jagdish had granted out of the profits of the *vatan*, in addition to the income of Varse *máhál*.

This repudiation by Narsinvh led to a suit in 1836 brought by the younger branch, represented by Govindráo's sons Yádhavráo, Amritráo and Trimbakráo, against Narsinvh Khanderáo. The precise nature of the suit, whether it was for partition or for an additional allowance by way of maintenance, did not clearly appear. The suit was referred to arbitration. The award of the arbitrators provided *(inter alia)* that the plaintiff's branch should receive an annual allowance of Rs. 401, (including the income of Varse *máhál*), out of the income of the *vatan*, and that the management of the *vatan* should remain, as it had *always* done, with the elder branch. This award appears to have been acted upon till 1864, when the services attached to the *vatan* were dispensed with by Government, and a summary settlement was made with the defendants' father, Mádhavráo Narsinvh, under which six annas in the rupee were to be deducted from the income of the *vatan*, leaving the *vatan* holders with ten annas in the rupee free from all services. Thereupon the elder

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branch claimed to make a similar deduction of six annas in the rupee from the allowance of Rs. 401 to which the younger branch were entitled under the award of 1836. This claim was resisted by the plaintiff. He filed a suit in 1877 to enforce the award. In that suit the High Court held, in 1882, that no effect could be given to the award till after the death of the parties, who were bound by it[1].

The plaintiff then filed the present suit, claiming either a partition of the *vatan*, or, at any rate, a reasonable allowance in lieu of maintenance. The defence set up was that, according to the custom of the *deshpánde's* family, the *vatan* was impartible and subject to the law of primogeniture, that the plaintiff's branch had been separated from the defendants' for several generations, and that the suit was barred by limitation.

The First Class Subordinate Judge of Násik, Ráv Bahádur Náro Mahádev, rejected the plaintiff's claim to partition, but decreed that the plaintiff was entitled to an annual allowance of Rs. 200 on account of maintenance out of the income of the *vatan*.

Against this decree both parties appealed.

Shántárám Náráyan for plaintiff (appellant):—The family arrangement made on the death of the common ancestor, Nilkant, by which the management of the *vatan* was given to the eldest son of Nilkant, was dependent on the will and pleasure of the family, and can be put an end to at any time by the parties.

It does not deprive the co-parceners of their right to demand partition. The mere fact of its having continued for a long period of time does not affect the rights of the parties, or alter the nature of the *vatan*. Being a purely voluntary arrangement, it cannot ripen into a binding custom, such as is set up by the defendants—*Bháu Nánáji Utpat* v. *Sundrábái*[2]; *Sivananja* v. *Muttu Rámálingá*[3].

In the present case there is no evidence whatever to show that the elder branch has the exclusive right to hold and enjoy the entire *vatan*. They only rely upon their long enjoyment. But

(1) *Vide* I. L. R., 7 Bom., 151. (2) 11 Bom. H. C. Rep., 249.
(3) 3 Mad. H. C. Rep., 75.

such enjoyment is not a clear unequivocal proof of usage—*Tárá Chund* v. *Reeb Rám*[1]; *Madhavráo Rághvendra* v. *Bálkrishna Rághvendra*[2]. *Thákur Durryao Singh* v. *Thákur Dári Singh*[3] is an authority. It lays down that the mere fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family, to which it jointly belongs, of their right to partition; and, further, that a custom of impartibility must be strictly proved, in order to control the operation of the ordinary Hindu law of partition.

So long as the *deshpánde's vatan* was a service *vatan*, there was sufficient reason why the *vatan* property should be held by the person who performed the service. The income of the property was enjoyed as a remuneration by the officiating *vatandár*. The property could not, therefore, be detached from the office. But as the *vatan* services are now dispensed with, there is no longer any reason for the continuance of the estate in the exclusive possession of the elder branch. The estate, even if it were originally inalienable or impartible, can no longer bear that character—*Rádhábái* v. *A'nantráo*[4].

Latham, Advocate General, (with him *Pándurang Balibhadra* and *Ganpat Sadáshiv Rív*), for defendants (respondents):—There is no evidence of any family arrangement or compact under which the elder branch was entrusted with the entire management of the *vatan* for the convenience of the *deshpánde's* family. If any such arrangement had existed, it would not have continued without any interruption or dispute for so many generations. The younger branch would not have quietly submitted to it for more than a century and a half, and remained satisfied with the small income of Varse *máhál*, which seldom exceeded Rs. 80 per year, while the elder branch was in enjoyment of Rs. 3,000 a year, in addition to the honours and emoluments of the office of *deshpánde*. It is clear, therefore, that there must be something more than a mere arrangement to account for the long uninterrupted practice in this family to leave the *vatan* undivided in the hands of the elder branch, with a suitable provision for the support

(1) 3 Mad. H. C. Rep., 50.
(2) 4 Bom. H. C. Rep., 113, A. C. J.
(3) 13 Beng. L. R., 165.
(4) I. L. R., 9 Bom., 198.

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of the younger scions. This practice is based upon a custom which we find prevalent in all the great Marátha families of the Deccan, who had large estates assigned to them for the maintenance of their rank and dignity, and for the proper performance of the public duties—Steele on Custom, p. 229. Steele shows that the practice is very common, among them, of providing for the support of the entire family without actual partition: see West and Bühler (3rd ed.), p. 263; *Shidhojiráo* v. *Naikojiráo*(1). In the present case the award of 1836 is the best proof of the custom. It shows that Makund, the founder of the family, held both the *deshpánde* and *deshmukhi vatans*. He gave the *deshmukhi vatan* to his son by his first wife and the *deshpánde vatan* to his issue by his second wife. Both the *vatans* have since been in the exclusive possession of the representatives of the eldest branch. If this has been the invariable practice extending over several generations past, it ought to be recognised and acted upon as a valid custom. The arbitrators recognised this practice as a binding custom. It has all the attributes of a valid custom. It is ancient, uniform and submitted to by all parties concerned. This practice or usage was not affected by the summary settlement of 1864. The abolition of the public duty did not, and could not, alter the nature of the estate. If it was impartible before, it did not cease to be such after that event—*Sávitríáva* v. *Anandráv*(2); *Rádhábái* v. *A'nandráo*(3). Independently of this practice there was a complete division between the two branches. That division took place many generations ago. At that division Varse *máhál* was assigned to the plaintiff's ancestors, and the rest of the *vatan* to the elder branch. Since then each has been in separate and exclusive enjoyment of his own portion. We find all the *indicia* of separation in this case—separate residence, separate worship, separate dealings, separate enjoyment of separate parcels of property, and the parties have never rendered any account of profits and expenses to each other. All these circumstances point to an actual parti-

(1) 10 Bom. H. C. Rep., 228. (2) 12 Bom. H. C. Rep., 224, A. C. J.
(3) I. L. R., 9 Bom., 198.

tion at some remote period. The Hindu law no doubt presumes every family to be joint. But that presumption becomes weaker and weaker as you go further from the common stock—*Moro Vishvanáth* v. *Ganesh Vithal*[1]. This case further lays down that partition once effected is final, and cannot be re-opened on the ground of the inequality of shares. The plaintiff cannot, therefore, claim a fresh partition, merely because the income of Varse *máhál* is trifling when compared with the income of the rest of the *vatan*.

Assuming that there was no separation, still the plaintiff's claim for partition is barred by limitation, both under Regulation V of 1827 and Act XIV of 1859, cl. 13—*B. G. Guravi* v. *V. L. Guravi*[2]; *Rane* v. *Rane*[3]; *Sitárám Vásudev* v. *Khanderáo Bálkrishna*[4]; *Subbaiya* v. *Rájeshvara Sástrula*[5]. If the claim was barred under those enactments, it cannot be revived by either Act IX of 1871 or Act XV of 1877—*Vináyak Govind* v. *Bábáji*[6]. As to the claim for maintenance, the plaintiff himself admits that he received no allowance for sixteen years before the institution of this suit. That claim, too, is time-barred under article 129 of Act XV of 1877.

Shántárám Náráyan in reply:—The suit is not barred either under Regulation V of 1827 or Act XIV of 1859, because the plaintiff was not *totally* excluded from all participation in the family property. His branch has been up to this day in enjoyment of a portion of the *vatan*—*Sakho Náráyan* v. *Náráyan Bhikáji*[7]. Regulation V of 1827 cannot bar a suit for partition. Nor can Act XIV of 1859, cl. 13, bar such a suit—see *Sookh Lall Bhoojwálla* v. *Goolzar Bhoojwálla*[8]; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*[9]; *Virasvámi* v. *Ayyasvámi*[10].

With respect to maintenance, the cause of action accrued in 1882, when the High Court dismissed the plaintiff's suit upon the award—see *Madhavráo Narsinvh* v. *Rámráo Trimbak*[11].

(1) 10 Bom. H. C. Rep., 444, 468.
(2) 3 Bom. H. C. Rep., 170, A. C. J.
(3) 3 Bom. H. C. Rep., 173, A. C. J.
(4) I. L. R., 1 Bom., 286.
(5) 4 Mad. H. C. Rep., 354.
(6) I. L. R., 4 Bom., 230.
(7) 6 Bom. H. C. Rep., 239, A. C. J.
(8) 14 Calc. W. R., Civ. Rul., 228.
(9) I. L. R., 5 Bom., 48.
(10) 1 Mad. H. C. Rep., 471.
(11) I. L. R., 7 Bom., 151.

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SARGENT, C. J.—This is a suit to obtain partition of an ancestral *deshpánde vatan*, which, it was not disputed, was originally acquired by one Madan between two and three centuries ago. It is further not in dispute that the entire *vatan*, including in that term the service of the *deshpánde* office and the lands appurtenant to it, with the exception of some five or six villages, which were in the possession of a younger branch of the family, called the *deshpándes* of Bhej, ultimately became vested by lineal descent in one Nilkant, who is the common ancestor of the parties to the suit, the plaintiff being the representative of Nilkant's younger son, Jagatráv, and the defendants the representatives of his eldest son, Pratábráv.

The genealogical tree in the case—as to which the parties are agreed—and the internal evidence afforded by exhibit 142 can leave but little doubt that this common ancestor, Nilkant, must have lived in the early part of the last century. Further, it is not in dispute that, very early in the present century, the *vatan*, which, excepting the portion in the possession of the Bhej branch, had become vested in Nilkant, was then vested in one Narsinvh, who at that time represented the elder branch, tracing its descent from Nilkant's eldest son, with the exception of certain villages constituting the Varse *máhál*, which were in the enjoyment of the younger branch, through whom plaintiff claims, then represented by Govindráv, the plaintiff's grandfather. From exhibit 142 it appears that, in 1814, Narsinvh being then a minor, an agreement was entered into between Tuko Jagdish, a *gumásta* of the family, and Govindráv [illegible] grándraulér, which was in the following terms:—

"Rájashri Narsinvh Khanderáv is a minor. So until he becomes a man of understanding and is able to manage his affairs —(that is) until he attains the age of twenty-five years—we should both carry on the management unanimously. All affairs should be conducted by Tukopant. Therein there should be no hindrance from Govindrávji, (and) Tukopant should not practise any cunning towards the said (other gentleman). Marriages and *munj* and other ceremonies of Govindrávji's children should be performed out of the expenses of the *sansthán* as the occasion

may require. The amount of the Varse *máhál* is not sufficient for (defraying) the family expenses. So should any occasion require (us) to meet the shortcomings in the family expenses, we should provide for the same. In all matters relating to the management of affairs as the occasion may require, either for good or bad occasions, Govindráv should be favourable. He should not fail in the same. As the income of the Varse *máhál* is not sufficient to Govindrávji, and as he is engaged in *dol* business, the said gentleman should be paid for expenses annually a separate sum of Rs. 125, one hundred and twenty-five, out of the profits of that *dol* in addition to the amount of the Varse *máhál*."

It further appears that the Bhej branch also availed themselves of the opportunity afforded by Narsinvh's minority to take possession of two additional villages. However, on Narsinvh coming of age, he repudiated the arrangement entered into with Govindráv by his *gumásta* Tuko, and succeeded in recovering back, by suit, from the Bhej branch the two villages.

This repudiation by Narsinvh led to a suit being brought by the younger branch, represented by Govindráv's sons, in 1836 against Narsinvh, which was referred to arbitration. From the award made by the arbitrators, it appears that the principal object of that suit was to obtain a further allowance, and if the defendant would not agree to it, then a partition. The decision of the arbitrators was that the plaintiff's branch should receive 401 rupees, (including the income derived from the Varse *máhál*), out of the revenue of the *vatan*, and that the management of the *vatan* should remain at least for the present, as it always had done, with the elder branch.

On the 1st August, 1864, the services of the *vatan* holder were dispensed with by Government, and six annas in the rupee were deducted from the income of the *vatan*, leaving the *vatan* holders with ten annas in the rupee free from all expenses. In consequence of this, the elder branch claimed to make a deduction of six annas in the rupee from the allowance of Rs. 401 of the younger branch. This claim was resisted by the plaintiff, who brought a suit in January, 1877, to enforce the award. This

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suit was dismissed by the High Court in 1882, on the ground that the award was only for the lives of the parties.

The plaintiff has now brought the present suit, claiming a partition of the *vatan*, or, at any rate, maintenance. His contention is that the services and greater portion of the *vatan* were entrusted to the defendants' ancestors for convenience sake, with the consent of all, maintenance being allotted to the younger branches; but that, now that the services have been abolished, there is no longer any necessity for that arrangement, and that the property should be partitioned. The defendants by their written statement say:—

"As my ancestors were the elder branch of our *deshpánde* family, I have an absolute right to, and worship in, the enjoyment of the whole of the *deshpánde vatan*, the *gádi*, the *sardárship*, the *mánpán*, &c., and also to receive the income of the same, and carry on the whole of the management thereof according to law and the custom of the country and the practice hitherto obtained in that behalf.

"Agreeably to the rule mentioned above, when the plaintiff's ancestors and my ancestors and the ancestors of a third *bháu-band*, Raghupatráv Bájikar, were divided about 200, two hundred, years ago, the income of Varse *máhál* was absolutely made over to the plaintiff's ancestors as their share, and the income of the four villages of the other *máháls* was made over to the ancestors of Bájikar Deshpánde as their share; but the whole of the *vatan*, the *kárbhár*, the *gádi*, the *sardárship*, *mánpán*, &c., and all other rights, together with the estate, came down to our ancestors in absolute ownership, and, accordingly, each branch has been managing its own share in absolute ownership independently of the other. We have no connection whatever with one another in that regard. Therefore, the plaintiff has no right to demand a share out of the estate in our possession or of the *deshpánde vatan*, the *gádi*, the *sardárship*, *mánpán*, &c."

Now, we think that the evidence in the case leaves little or no doubt that it had been the practice in this family, extending over a century and more before any dispute arose between the

elder and younger branches, to leave the performance of the services of the *vatan* and the major part of the property in the hands of the elder branch, and to provide the younger branches with maintenance only, which, by its very nature, is not fixed and permanent. Such is stated by the arbitrators in 1838 to have been the case with regard to the younger branch represented by plaintiffs. They say: "The income of the Varse *máhál* had been continued to them from the time of their ancestors for the maintenance of the family;" and on that basis they proceed to consider whether it was sufficient for the family in its actual condition, and, in conclusion, direct Rs. 401, including the income of the Varse *máhál*, to be paid to them by the elder branch.

This conclusion, arrived at by persons who may be presumed to have been specially fitted to deal with such a question, and after hearing the statements of both the parties, is, in our opinion, one which we may safely accept as correct. Indeed, from the tone of the award, it would scarcely appear to have been disputed.

The question, therefore, remains, whether this practice was the result of an established custom, as stated by defendants, or was only an arrangement, as Mr. Justice West says in *Bháu Nánáji* v. *Sundrábái*[1], "by mutual assent for peace and convenience." There is no direct evidence on the subject, nor do the arbitrators in their award throw any light on the subject beyond—as we think is to be gathered from an indistinct passage in it—expressing an opinion that it would require the mutual assent of all concerned to disturb the established practice. However, we think, that this practice, which has been undoubtedly in force during a very long period extending over probably a century and a half without interruption or dispute of any kind is more probably due in its origin to a custom, such as is alleged by the defendants, than to a mere arrangement determinable at the will of any members of the family, more especially when it is remembered that such a custom is of general usage in the Deccan, as shown by the passage in Steele's work on the Laws and Customs of Hindu Castes in the Dekkhan Provinces, p. 229, referred to in the judgment in *Shidhojiráv* v. *Náikojiráv*[2].

(1) 11 Bom. H. C. Rep., 249. (2) 10 Bom. H. C. Rep., at p. 232.

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We think, therefore, that the Subordinate Judge was right in holding that the plaintiff could only claim maintenance. If such was the legal relationship between the parties when the services of the *vatan* were dispensed with on 1st August, 1864, it would not be altered by that event, although the amount of maintenance, which the defendants could be expected to pay, might possibly be influenced by the reduction in the income of the *vatan*.

The defendants' objection, that the claim for maintenance is barred by the Statute of Limitations, is, in our opinion, not sustainable. The necessity for bringing the suit, regarded as one for maintenance, did not arise until the award of the arbitrators was held by this Court in 1882 to be in force only during the life-time of the parties. From 1864 up to that time the question between the parties had been exclusively whether the sum awarded for maintenance by arbitrators should be reduced by reason of the six annas' reduction on the income of the *vatan*. The defendants have not objected before us to the amount of the maintenance awarded by the Subordinate Judge. We must, therefore, confirm his decree. Parties to pay their own costs of the two appeals.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1885. *December* 16.

BHIMA'JI GOVIND KULKARNI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAKMA'BA'I KOM GOVIND KULKARNI AND ANOTHER, (ORIGINAL DEFENDANTS), OPPONENTS.*

Decree—Fraud—Effect of setting aside a decree on the ground of fraud and collusion.

A. filed a suit against B., in which a consent decree was passed. This decree was set aside in a subsequent suit brought by B., on the ground that it had been obtained by fraud and collusion between A. and B.'s agent, who had no authority to consent. Thereupon A. applied to have his suit restored to the file and reheard on the merits, contending that, the decree having been set aside, the suit remained undecided.

* Application under Extraordinary Jurisdiction, No. 103 of 1885.