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In re HYDERBHAI HUSSENBHAI

contemplated is committed on the completion of the first twenty-one days.

That being so, it only remains to be ascertained whether this act of insolvency on which the present petition is grounded, "has occurred within three months before the presentation of the petition," as required by section 12 of the Presidency-Towns Insolvency Act. In reckoning the twenty-one days, the day on which the attachment is levied is not to be computed: see *In re North. Ex parte Hasluck.*[1] The act of insolvency in the present case, therefore, was committed on April 13, 1926, but the petition was not presented till February 22, 1927, therefore the act of insolvency did not occur within three months before the date of the petition and, therefore, under section 12 (*c*) the petition cannot be entertained.

I, therefore, dismiss the petition with costs.

Attorneys for debtor: Messrs. *Mulla & Mulla.*

Attorneys for petitioning creditors: Mr. *N. C. Dalal.*

Petition dismissed.

J. S. K.

APPELLATE CIVIL

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September 26

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump.

HUCHANGOUDA ADOPTIVE FATHER RUDRAGOUDA PATIL AND OTHERS (ORIGINAL DEFENDANTS NOS. 2 TO 4), APPELLANTS *v.* KALLAWA KOM KALLAPPA KITTURAWAR AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Bombay Hereditary Offices Act (Bom. Act III of 1874) section 4—Bom. Act No. V of 1886, section 2—Watan families—Family, definition of—Female heirs—Sisters of propositus—Succession—Common Ancestor—To exclude female heirs common ancestor must be original watandar.

Under section 2 of Bombay Act V of 1886, in order that the female heirs of one branch should be excluded by the male heirs in the other, it is not sufficient to show that there was a common ancestor from whom the two families are descended, but it must be shown that that common ancestor was a holder of the watan, that is to say, that he was an original watandar from whom the two families were descended.

Bai Laxmi v. *Maganlal*[2] and *Balai* v. *Subba*,[3] referred to.

*First Appeal No. 282 of 1926.

[1] [1895] 2 Q. B. 264. [2] (1917) 41 Bom. 677. [3] (1926) 29 Bom. L. R. 246.

The lands in suit were patilki inam lands. They were held half and half by two watandar families. One K succeeded to half share of one branch. On K's death, his widow held the property till her death in 1917. Thereafter the plaintiffs, as sisters of K, claimed to inherit the property. The defendants, who were the males in the other watan family, contended that the plaintiffs were postponed to them in the order of succession under section 2 of Bombay Act V of 1886.

Held, overruling the contention, that though it may be taken that there was a common ancestor of these two families, there was no evidence to show that that common ancestor was original watandar of the families within the meaning of the word "family" under section 4 of the Hereditary Offices Act, 1874.

FIRST APPEAL against the decision of V. R. Gutikar, Joint First Class Subordinate Judge at Dharwar.

Suit to recover possession.

The lands in suit were assigned for the remuneration of the office of Patil in the village of Kotbagi. There were two families holding the patilki inam lands in equal moiety. The half share of the property in the plaintiff's family was held by one Kallangouda. He died in 1885, leaving a widow, Yellawa, and Yellawa held the property till her death in 1917. In that year the defendants entered into possession of the suit lands by virtue of an order of the Mamlatdar. The plaintiffs, as the sisters of Kallangouda, sued to recover possession of the lands.

The defendants contended that, the suit property being watan property, the plaintiffs were not entitled to succeed Kallangouda ; that, after the death of Yellawa, the defendant No. 1 was the nearest male heir to Kallangouda ; that, in consequence, defendant No. 1 was entitled to succeed to the property ; that defendants Nos. 2 to 4 were the sons of defendant No. 1 but their rights would come into existence after death of defendant No. 1.

The Subordinate Judge held that in the year 1844 the representatives of the families of the plaintiffs and of the defendants were examined by the Inam Commission ; that the statements made by the then defendants and the pedigrees filed by them showed that each family acquired $8\frac{1}{2}$ mars of land and that in 1844, each family was in possession of the land acquired by its founder ; that there was not the remotest

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suggestion that the original acquirer acquired 17 mars assessed at Rs. 792 and that, as the result of a partition between the sons or more remote descendants of the original acquirer, the founders of the plaintiffs' and the defendants' families took each a half share. The learned Judge, therefore, found that the families of the plaintiffs and of the defendants were not branches of one family. The plaintiffs' right to succeed to Kallangouda was accordingly held established and the suit was decreed in their favour.

The defendants appealed to the High Court.

A. G. Desai, for the appellants.

G. N. Thakor, with *Nilkant Atmaram*, for the respondents.

CRUMP, J. :—The plaintiffs in this suit seek to recover possession of certain properties which are patilki inam lands assigned for the remuneration of the office of Patil in the village of Kotbagi. It is common ground that there are two families holding these patilki inam lands, and that they hold them half and half. The plaintiffs are the sisters of one Kallangouda who succeeded to the half share of the property in that family some thirty years ago. Kallangouda died in 1885 leaving a widow, Yellawa, and Yellawa held the property, having the ordinary Hindu widow's interest therein, till the date of her death in 1917, and upon that event the succession opened to the deceased Kallangouda. The two plaintiffs are the sisters of Kallangouda, and it is not disputed that under the Hindu law they would be entitled to succeed. But, the property being watan property, it is necessary to consider the provisions of section 2 of Bombay Act V of 1886 which lays down a special rule of succession in such cases. For the purposes of the present appeal that section runs as follows :

"Every female member of a watan family [I here omit certain exceptions which are not relevant to this case] shall be postponed in the order of succession to any watan or part thereof,.... devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such watan, or part thereof...."

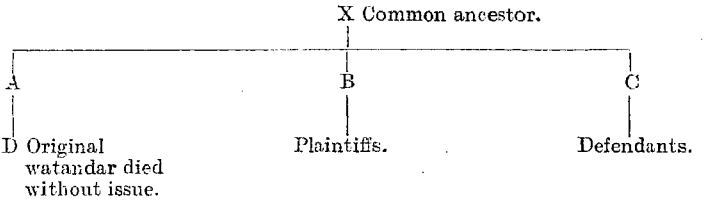
The question, therefore, is whether the plaintiffs are excluded by the operation of this statute. And that gives rise at once to the question whether the plaintiffs and defendants are members of a watan family. The word "family" is defined in section 4 of the Hereditary Offices Act, 1874, and the definition is as follows:

"'Family' includes each of the branches of the family descended from an original watandar."

The meaning to be attached to this definition has been explained in *Bai Laxmi* v. *Maganlal*.[1] The following passage from the judgment of Scott, C.J., may be cited:

"The learned District Judge in dealing with the definition of 'family' observes that it is inclusive and not exclusive, that is to say, that it does not exclude the application of the ordinary meaning of the word 'family.' Now the Dictionaries of Webster and Murray are both agreed in giving as one of the meanings of the word 'family,' (which would be an appropriate meaning in the present connection) 'those descended (really or putatively) from a common progenitor.' In the case of a 'Vatan family,' taking the expression family in the ordinary non-technical sense it does not appear to be unreasonable to assume that the common progenitor must be a Vatandar."

Thus in order that the defendants may show that the plaintiffs are postponed to them in the order of succession they must show that there was an original watandar from whom these two families were descended. It is not sufficient to show that there was a common ancestor. Let us assume that there is a family as in the subjoined pedigree :—



In that case on the death of D, the original watandar, the estate would go half and half to his uncles B and C from whom the two supposed existing branches are descended. And in such a case, as explained in the case cited, the female heirs in the one branch would not be

[1] (1917) 41 Bom. 677 at p. 684.

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excluded by the male heirs in the other. Many similar cases could be put, but of course they are all conjectural. I merely seek to illustrate the position that it is not sufficient for the defendants to show that there was a common ancestor from whom these two families are descended. They must also show that that common ancestor was a holder of this watan.

The first point, therefore, would be whether there is evidence going to show that these persons with whom we have to deal are descended from a common ancestor. Now we have here two families of the same caste living in the same village holding half and half patilki inam lands. And in the typical case those persons would in all probability be descended from the same person. Ordinarily the grant of a watan is to an individual, and it is held by his descendants, and may be divided between them in the course of family partitions. That, I say, is the typical case. There may be cases where a portion of the watan, before the date of the legislation prohibiting the alienation of watan, has gone out of the original family into another family. But that is a less common case. The evidence with which we have to deal must be considered in that light. It is impossible in matters of this kind, where the grant is an ancient one, and there have been many degrees in the family since the date of the grant, to expect direct evidence of the precise relationship. But if there is evidence, whether what is ordinarily called "hearsay" evidence or otherwise, that two families so holding a watan half and half are related to one another, and if that relationship shows that they are, to use a vernacular term, *bhaubands*, then it is by no means a violent inference that they are descended from a common ancestor. And there is evidence in the present case which points to some such conclusion.

First we have in 1844 two statements recorded before the Inam Commission. As is well known the object of the Inam Commission was to settle the question of claims

to hold lands free from Government assessment. And the ordinary procedure in the enquiries before the Inam Commission was to examine the holder of such land and to record his statement according to a certain recognised form, and dispose of the matter upon that and upon such other evidence as might be offered. That was the procedure followed in the present case. We have here the usual stereotyped questions with their answers. A member of each of these families was examined. In the defendants' family Kallangouda bin Rayangouda bin Ningangouda is the deponent, and his statement is Exhibit 86. In plaintiffs' family the deponent is Kalyangouda bin Giriyapgouda bin Kenchangouda, and his statement is Exhibit 87. The identity of these two individuals can be ascertained by a reference to the two pedigrees, Exhibits 92 and 93, which were produced at the same time.

Now as to these statements and these pedigrees there seems to be no obvious reason for declining to accept the accuracy of the information therein conveyed in so far as it was reasonably available to the deponents at that date.

[The judgment proceeded further to discuss evidence.]

Thus when all is said and done, we come back to this position. At some remote period there probably was a common ancestor of these two families. At some unknown period some member of the family acquired the watan, that is, assuming that there was a grant by the Peshwas' Government to one individual, but whether the acquisition was made by the common ancestor or before his time or after his time is a matter of the merest conjecture. If then reference be made once more to the conjectural pedigree which I set out at the beginning of this judgment, it would be seen that though there may be an original watandar from whom these persons are descended, there may just as well have been a collateral who was the original watandar from whom the two existing branches of the family inherited

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this property. And there are a variety of other hypotheses consistent with the facts of this case which it is unnecessary to enumerate. It follows therefore that there is a fatal obstacle to the defendants' success, and that they have failed to show that the plaintiffs, the nearest heirs under Hindu law, are excluded by the operation of section 2 of Act V of 1886.

There is one further point to which reference was made in the course of argument, that is, whether in these circumstances it can be said that the defendants are persons qualified to inherit under the Hindu law. Now here we are entirely in the dark, because we do not know how remotely they are connected with the plaintiffs, assuming the connection to be established, and, therefore, without a clear knowledge of the facts, it is somewhat difficult to endeavour to apply legal principles. The question whether any remoteness of descent would exclude a *samanodaka* has been considered in several cases. We have a decision of our own Court in *Bai Devkore* v. *Amritram Jamiatram*[1] and that decision lays down that the word *samanodaka*, meaning literally those participating in the same oblation of water, includes descendants from a common ancestor more remotely related than the 13th degree from the propositus. Such cases are of very rare occurrence, but so far as this Court is concerned that decision is still an authority. And if it be followed, however remote the descent might be, the result would be that the defendants would be qualified to inherit.

But in *Rama Row* v. *Kuttiya Goundan*[2] the Madras High Court has taken a different view. And they have dissented from the Bombay decision. They say there that the general tendency is to confine the relationship to the 14th degree. In *Kalka Parshad* v. *Mathura Parshad*[3] the matter incidentally came for consideration before their Lordships of the Privy Council. But the judgment does not contain

(1) (1885) 10 Bom. 372.
(2) (1916) 40 Mad. 654.
(3) (1908) L. R. 35 I. A. 166.

any decision upon the exact point. It appears to have depended upon their Lordships' view of the facts of the particular case, and therefore, so far as I understand it, that decision furnishes no guide. But upon the facts of this case it is unnecessary to decide that point, because there is, as I have indicated, in any view, a fatal obstacle in the way of the defendants. It follows that this appeal must be dismissed with costs.

MARTEN, C. J. :—I agree. The learned pleader for the appellant has taken us carefully and in detail through all the documents and facts which tell in favour of his clients. He has clarified the position by giving numbers to the various parties appearing in the rival pedigrees produced before the Inam Commission in 1844, viz., the pedigree, Exhibit 92, produced by the branch of the defendants, and the pedigree, Exhibit 93, produced on behalf of the plaintiffs' branch. The necessity for this will be seen by the paucity of names in this family. There are no less than three Kallangoudas who play an important part in this story. It was Kallangouda No. 13 who produced the pedigree, Exhibit 92. It was Kallangouda 4-F, who produced the pedigree, Exhibit 93. It was the latter's grandson Kallangouda 4-H, who died in 1885 and whose widow Yellawa died in 1917, and thus opened the succession which is now in dispute.

On the merits of the case there are several interesting points that have been raised, but the crux of the case seems to me to be whether the defendants can show that they were not merely descendants of a common ancestor with the plaintiffs, but that both the plaintiffs and the defendants were descended from a common watandar. That is the effect of the decision of this Court in *Bai Laxmi* v. *Maganlal*.[1] There Sir Basil Scott laid stress on the meaning of the word *family*, viz., descent from a common ancestor and held that under the Hereditary Offices Act,

[1] (1917) 41 Bom. 677 : 19 Bom. L. R. 730.

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the common progenitor must be a watandar. In *Balai* v. *Subba*[1] Mr. Justice Patkar accepted the interpretation put by Sir Basil Scott on the meaning of the word *family*, and held that the particular person in that case was a descendant from the common watandar. On the other hand in Sir Basil Scott's case the parties were not descended from the common watandar, because as is shown at p. 731 of the report in 19 Bom. L. R. 730 the original watandar was one Gopinath, and on his death collaterals succeeded to the property. No doubt there were separate sanads granted by Government on Gopinath's death in that case, but apart from that the case is an illustration of what might easily have happened in the present case in days long gone by, in the absence of any positive knowledge on the point.

As to whether the parties in the present case were descended from a common ancestor it may well be that the learned Judge went too far in holding that even that point was not proved. But we have stopped counsel for the respondents on his argument on that and other points in the case. Accordingly, speaking for myself, I do not propose to give a definite finding on the point. I am prepared to assume for the sake of argument that the defendants were descended from the same common ancestor as the plaintiffs were.

But assuming that, in my judgment, the next step, which I regard as the crux of the case, is fatal to the defendants. After carefully considering all the documents and matters laid before us, and after giving due consideration to the presumptions which we are entitled to make under section 114 of the Indian Evidence Act, I am quite unable to say that it is any more likely here that the original watandar was a common ancestor of both branches than that those branches acquired the watan by collateral descent. In 1844 before the Inam Commission the respective parties who gave

[1] (1926) 29 Bom. L. R. 246.

evidence and produced those pedigrees, I mean Kallangouda No. 13 and Kallangouda No. 4-F, were unable to say who the original watandar was. In 1880 when the defendants' branch sought to acquire the land now in dispute, viz., that held by the plaintiffs, they were unable to satisfy the trial Judge as to their genealogy, and their right to succeed even if they had been able to prove that the then succession by Kallangouda No. 4-H was not a rightful succession. In fact they failed on the latter point.

If then in 1845 and in 1880 the defendants were unable to prove successfully their exact heirship, it is not strange that the present defendants are in no better position. I appreciate what Mr. Desai for the appellants has forcibly urged upon us that the watan lands have been equally divided over a long series of years, into 8½ mars for each branch, a mar being said to be about 17 acres. I also appreciate that it does not necessarily follow that because a watan has been partitioned, it is thereby split up into two distinct watans. The contrary has been held in *Yeshwant* v. *Satyanna*.[1] But from that it seems to me a long step to go to hold that the original watandar must have been a common ancestor whose descendants subsequently partitioned the watan, and that it is unreasonable to hold that there may have been a collateral succession from the original watandar. That being so, this point, as I have already intimated, seems to me to be fatal in any event to the defendants.

Consequently, in my judgment it is unnecessary to go into the point raised by my brother Crump as to whether the defendants, being further remote in degree than the 13 degrees, could claim in any event to succeed to this property. If it was necessary the case in *Rama Row* v. *Kuttiya Goundan*[2] and the case in *Kalka Parshad* v. *Mathura Parshad*[3] would

[1] (1900) 2 Bom. L. R. 420. [2] (1916) 40 Mad. 654.
[3] (1908) L. R. 35 I. A. 166.

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have to be considered along with the decision in *Bai Devkore* v. *Amritram Jamiatram*.[1]

I should have mentioned that certain pedigrees, Exhibits A, B and C were not relied on to any great extent by counsel for the defendants. Even so far as they are admissible, they do not carry the matter much further on what I have described as the main point of the case. I should also state that I fully appreciate that it has been held that the definition of *family* in the Watan Act is an inclusive definition and not an exclusive definition. But, notwithstanding that, on the authorities of this Court it does not absolve the parties from the necessity of proving that the original watandar was an ancestor of the parties. In the result, therefore, I agree that this appeal must be dismissed with costs.

As to the question of interest on costs, the learned Judge should not have awarded interest at 12 per cent. The maximum fixed by section 35 (3) of the Civil Procedure Code is 6 per cent., but as he has considered this to be a case where interest on costs ought to be given, we will let his order in that respect stand subject to substituting 6 per cent. for 12 per cent.

Decree confirmed.

J. G. R.

APPELLATE CIVIL

1927

September 27

Before Mr. Justice Patkar and Mr. Justice Baker.

HARI LAXMAN JOSHI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Contract Act (IX of 1872), section 56—Lessor and lessee—Contract for manufacture of salt—Offer and acceptance—Delay in acceptance—Strike of workmen—Impossibility of performance.

On May 11, 1920 tenders were invited for the lease of Government Salt Works for a period of five years. Tenders were to be delivered before July 1, 1920. On July 1, the tenders were opened and were found to include an offer of Rs. 1,425 annual rent by defendants. Their tender was, after further negotiations, accepted on October 4, 1920, and notice of acceptance was given to them on October 11. On October 22,

*First Appeal No. 228 of 1925.

[1] (1885) 10 Bom. 372.