APPELLATE CIVIL.

Before Mr. Justice N. J. Wadia.

BASANGOUDA HULIAPPAGOUDA HIREGOUDAR (ORIGINAL DEFENDANT), APPELLANT *v.* FAKIRGOUDA LINGANGOUDA PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

1938
August 16

Indian Limitation Act (IX of 1908), first schedule, arts. 14, 120—Suit to obtain declaration—Plaintiff alleging that he is nearest heir—Representative watandar—Collector's order—Starting point of limitation—Bombay Hereditary Offices Act (Bom. III of 1874, as amended by Act III of 1910), s. 36.

A suit to obtain, under s. 36 of the Bombay Hereditary Offices Act, 1874, a declaration that a person is the nearest heir of a deceased representative watandar in respect of the patilki hak is governed by art. 120 of the Indian Limitation Act, 1908, and art. 14 of the Act has no application to such a suit.

Hanmant Ramchandra v. *The Secretary of State for India*,[1] referred to.

The amendment in 1910 by Act III of 1910 of s. 36 of the Bombay Hereditary Offices Act, 1874, did not introduce the principle of lineal primogeniture for the first time, but merely declared more explicitly what was the intention of the section as it stood prior to the amendment, and the original section also contemplated that the nearest heir should be determined according to the principle of lineal primogeniture.

SECOND APPEAL from the decision of D. C. Joshi, Assistant Judge, Dharwar, confirming the decree, passed by J. H. Chinmulgund, Subordinate Judge, Hubli.

Suit for declaration.

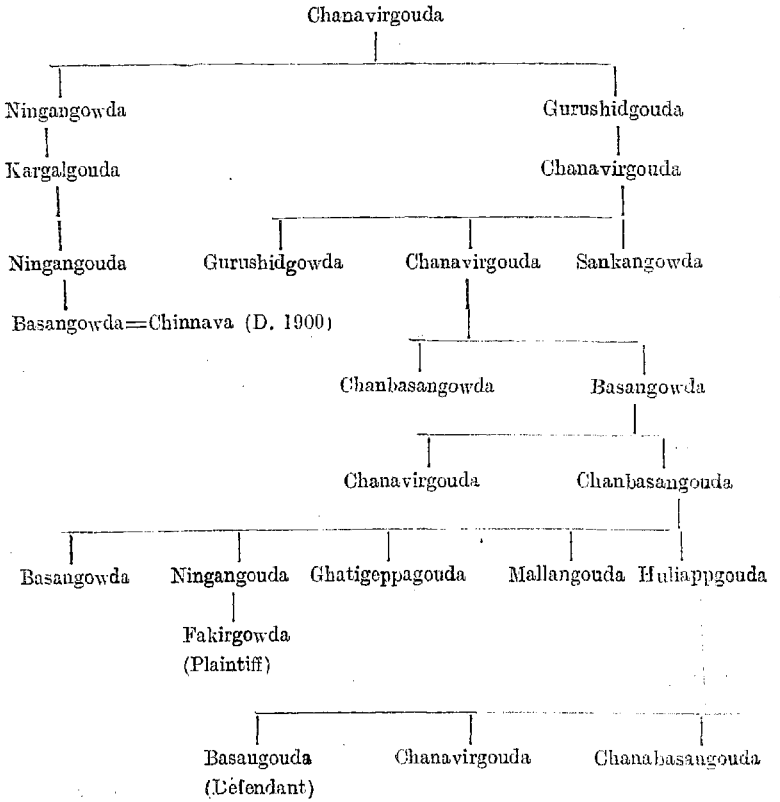
*Second Appeal No. 39 of 1937.

[1] (1929) 54 Bom. 125.

1938

BASANGOUDA HULIAPPA-GOUDA v. FAKIRGOUDA LINGANGOUDA

The following pedigree will explain the relationship of the parties :



One Basangouda who was the representative watandar in the patilki watan of Adargunchi died in 1876, leaving him surviving his widow Chinawa who too died in 1900.

Chanbasangouda Basangouda, the grandfather of respondent Fakirgouda and appellant Basangouda, died in 1904 and after his death the respondent's name was entered in the revenue records in respect of his patilki hak.

Subsequent to the death of Chinawa in 1900, there was no inquiry about her successor until 1928 when after an inquiry the Deputy Collector ordered the respondent's name to be entered on May 4, 1928. Then on June 12, 1929, the Collector reversed the Deputy Collector's order and

directed the appellant's father's name to be entered therein. The respondent appealed to the Commissioner, but his appeal failed on April 15, 1930.

On July 22, 1933, the respondent filed the present suit to obtain a declaration that he was the nearest heir of deceased Chanbasangouda in respect of the patilki hak of deceased Chinawa, alleging, *inter alia*, that after her death her right was inherited by his grandfather and that under s. 36 of the Hereditary Offices Act, 1874, he was entitled to succeed as being Chinawa's nearest heir by lineal primogeniture.

The appellant contended, *inter alia*, that according to s. 36 of the Bombay Hereditary Offices Act, 1874, as it stood prior to its amendment in 1910, the order of the revenue authorities was legal and correct and that the suit was not maintainable as the respondent had not got the order of the revenue authorities set aside.

The Subordinate Judge held that the respondent was the nearest heir as alleged and that the suit was not bad in law for want of a prayer to set aside the order passed by the revenue authorities. He accordingly granted the respondent a decree as prayed.

On appeal, the Assistant Judge, Dharwar, confirmed the trial Court's decree and dismissed the appeal.

The defendant appealed.

A. G. Desai, for the appellant.

G. P. Murdeshwar and *R. A. Mundkur*, for the respondent.

N. J. WADIA J. The respondent filed the suit out of which this appeal arises for a declaration that he was the nearest heir of Chanbasangowda in respect of the patilki hak of one Chinawa under s. 36 of the Watan Act. The relationship of the parties is given in the pedigrees in the judgments of both the lower Courts. Basangowda

1938

BASANGOUDA HULIAPPA-GOUDA v. FAKIRGOUDA LINGANGOUDA

N. J. Wadia J.

Ningangowda, who was entered as the representative watandar in the patilki watan of Adargunehi, died in the year 1876. After him the name of his widow Chinawa was entered as the representative watandar. She died in 1900. Basangowda represented the senior branch of the family. The plaintiff and the defendant belong to the junior branch. Chanbasangowda *bin* Basangowda, the grandfather of the defendant as well as of the plaintiff, who was the representative of the junior branch, died in the year 1904. His patilki hak was entered in the revenue records in the name of the plaintiff Fakirgowda who was the son of Chanbasangowda's second son Ningangowda. Chanbasangowda had five sons, all of whom except Huliappagowda, the father of the defendant, had predeceased Chanbasangowda. The eldest son Basangowda left no heir. The plaintiff Fakirgowda therefore would be the heir of Chanbasangowda according to the rule of lineal primogeniture. The defendant contended that the rule of lineal primogeniture did not apply to the succession in this case and that as Chanbasangowda died in the year 1904, his son Huliappagowda, the defendant's father, who was then alive, was the nearest heir according to s. 36 of the Watan Act as it then stood, and was entitled to have his name entered, and that on his death the defendant was the nearest heir. It is not disputed that the case is governed by s. 36 of the Watan Act as it stood prior to the amendment of 1910.

Two questions arise for consideration in the appeal. The first is whether under s. 36, as it stood prior to the amendment, the rule of lineal primogeniture applied. The second question is whether the plaintiff's suit is in time. The trial Court held that the rule of lineal primogeniture applied even under the section as it stood prior to the amendment of 1910, and that the plaintiff was therefore the nearest heir to Chanbasangowda and therefore to the deceased Chinawa. It also held that the suit was in time. In appeal the learned Assistant Judge of Dharwar agreed

1938

BASANGOUDA HULIAPPA-GOUDA v. FAKIRGOUDA LINGANGOUDA

N. J. Wadia J.

with the view taken by the trial Court and dismissed the appeal. The defendant has come in second appeal.

I will take up the question of limitation first. The appellant's contention is that the plaintiff's suit is in effect a suit to set aside an order made by the Collector. It appears that though Chinawa died in 1900 there was no inquiry about her successor and nobody's name was entered as her successor till 1928 when an inquiry was held by the revenue authorities and the Deputy Collector ordered the name of the plaintiff Fakirgowda to be entered in place of Chinawa. There was an appeal to the Collector who reversed the decision of the Deputy Collector and ordered that the name of the defendant's father Huliappagowda should be entered. The order of the Deputy Collector was made on May 4, 1928, and that of the Collector on June 12, 1929. The plaintiff appealed to the Commissioner, but the appeal was rejected on April 15, 1930, and the present suit was filed on July 22, 1933. If the contention of the appellant is correct that the present suit is in effect to set aside the order made by the Collector on June 12, 1929, confirmed by the Commissioner on April 15, 1930, the suit would be clearly beyond time, since it would be governed by art. 14 under which a suit to set aside any act or order of an officer of Government in his official capacity, not otherwise expressly provided for in the Act, is to be filed within one year from the date of the order. In my opinion, however, the suit cannot be said to be a suit to set aside the order made by the Collector. If the suit had really been to set aside the order made by the Collector under the Watan Act, it would clearly have been barred under s. 4 of the Bombay Revenue Jurisdiction Act. The order of the Collector was an order that the defendant should be recognized as the representative watandar in place of the deceased representative watandar Chinawa and a suit brought expressly or by implication to set aside that order would clearly be barred under s. 4 of the Bombay Revenue Jurisdiction Act. Section 36, cl. (*3*), of

1938

BASANGOUDA HULIAPPA-GOUDA v. FAKIRGOUDA LINGANGOUDA

N. J. Wadia J.

the Bombay Hereditary Offices Act, provides that if any person shall, by production of a decree of a competent Court, satisfy the Collector that he is entitled to have his name registered as the nearest heir of such deceased watandar in preference to the person whose name the Collector has ordered to be registered, at any time within six years of such order, the Collector shall, subject to the provisos, cause the entry in the register to be amended accordingly. Section 36 thus contemplates a suit being filed for a declaration that a person is the nearest heir of a deceased representative watandar, and it has been held by a division bench of this Court in *Hanmant Ramchandra* v. *The Secretary of State for India*[1] that though the civil Courts have no jurisdiction in matters which are within the exclusive jurisdiction of the Collector, namely, the duty to determine the custom of the watan and what persons shall be recognized as representative watandars under s. 25 of the Bombay Hereditary Offices Act, and to specify the names of the heads of the family and the proportionate part possessed by each head in preparing the register under s. 67 of the Act, they have nevertheless the power to declare that the plaintiff is the nearest heir of a deceased representative watandar; that where Government have resolved that a certain person should be recognized as a representative watandar of a watan, a suit brought against Government to set aside the Government resolution is barred under s. 4 of the Bombay Revenue Jurisdiction Act, 1876; but that a suit, brought under s. 36, proviso (3), of the Bombay Hereditary Offices Act, 1874, for a declaration that the plaintiff is the nearest heir of the deceased last holder of a watan is maintainable against the defendant who has been recognized by Government as the representative watandar. The plaintiff's suit does not either expressly seek to have the order made by the Collector set aside, nor is it a necessary implication of the suit that the order made by the Collector would be set

[1] (1929) 54 Bom. 125.

1938

BASANGOUDA HULLAPPAGOUDA v. FAKIRGOUDA LINGANGOUDA

N. J. Wadia J.

aside. Proviso (3) to s. 36 leaves it to the Collector to cause the entry in the register to be amended according to the decree of the civil Court, and if such decree is not produced before the Collector within six years of the Collector's order, it would be open to him not to act upon the decree. It cannot therefore be said that the present suit is a suit to set aside the order of the Collector. That being so, art. 14 of the Indian Limitation Act has no application. The suit is one merely for a declaration and would in my opinion be governed by art. 120 of the Indian Limitation Act which deals with suits for which no period of limitation is provided elsewhere, and the suit would therefore have to be filed within six years from the time when the right to sue accrued. The right to sue accrued to the plaintiff on June 12, 1929, when the order made by the Deputy Collector in his favour was set aside by the Collector. The suit, having been filed within six years from that date, is in time.

The next question is whether the rule of lineal primogeniture applies. Section 36 of the Bombay Hereditary Offices Act provides that when any representative watandar dies it shall be the duty of the patel and village-accountant to report the fact to the Collector; and the Collector shall, if satisfied of the truth of the report, and subject to the provisions of Bombay Act V of 1886, register the name of the person appearing to be the nearest heir of such watandar as representative watandar in place of the watandar so deceased. The first proviso to the section directs that in determining who is the nearest heir for the purpose of the section the rule of lineal primogeniture shall be presumed to prevail in the watan family. There is therefore no question that under s. 36 as it now stands the nearest heir for the purpose of s. 36 would have to be determined according to the rule of lineal primogeniture. The section as it now stands, however, is the result of an amendment

1938

BASANGOUDA HULIAPPA-GOUDA v. FAKIRGOUDA LINGANGOUDA

N. J. Wadia J.

made by Act III of 1910. Prior to that amendment s. 36 ran as follows :—

"When any representative watandar dies, it shall be the duty of the patel and village-accountant to report the fact to the Collector: and the Collector shall, if satisfied of the truth of the report, register the name of the eldest son or other person appearing to be the nearest heir of such watandar as representative in place of the watandar so deceased."

The trial Court and the lower appellate Court have both taken the view that the amending Act of 1910 merely made explicit what was really the intention of the section as it stood prior to the amendment, and that the original section also contemplated that the nearest heir was to be determined according to the rule of lineal primogeniture. In arriving at this conclusion both the trial Judge and the learned Assistant Judge have referred to certain remarks in Mr. Phadnis' edition of the Watan Act in which the learned author says that the new section is not an amendment so far as the rule of lineal primogeniture is concerned, but a mere declaration. In support of his opinion he referred to the statement of objects and reasons. Without, however, referring to the statement of objects and reasons it seems to me that a consideration of the scheme of the Watan Act suggests that it was the intention of the legislature, even prior to the amendment of 1910, that in determining who is the nearest heir for the purpose of s. 36 the rule of lineal primogeniture should be applied. Although watan property is divisible, the watan hak or the right to service is indivisible. The provisions of Part VI of the Act, in which s. 36 falls, show that for the purpose of determining who should be entered as representative watandar the rule of lineal primogeniture is to be applied. Section 27 provides that if it shall appear to the Collector that the custom has been for a member of one family only to serve, the Collector shall register the name of the head of such family only as the representative watandar and no other person. Section 28 provides that if it shall appear to the Collector that the custom has been for a member of each of several families

to perform the duties either contemporaneously or for successive periods, the Collector shall register the name of the head of each of such families as representative watandars and no other persons. Section 29, cl. (*1*), provides that where the practice of service in successive periods appears to have existed, but is not proved to the satisfaction of the Collector to have existed at the date of the introduction of Act No. XI of 1843, or when the practice of selection by the Collector from several families prevails, he shall determine who is the head of the eldest family descended from the original watandar and shall register his name as sole representative watandar.

It would appear therefore that it was the intention of the legislature that in the registration of representative watandars the principle of lineal primogeniture should be applied. Section 36 is one of the sections in Part VI of the Act dealing with "Representative Watandars", and it seems to me reasonable therefore to infer that the rule which was intended to apply in determining who were to be entered as representative watandars, was intended to apply also in determining who should be entered as the heirs of deceased representative watandars. The language of the old s. 36 itself, although not very clear, lends some support to this view. That section provided that the Collector should register the name of the eldest son or other person appearing to be nearest heir. If the intention had been that the nearest heir should be determined by nearness of relationship and not by the rule of lineal primogeniture, there would have been no necessity to refer to the eldest son. It would have been sufficient if the section had stated that the Collector should register the name of the nearest heir of the deceased watandar. The specific mention of the eldest son seems to suggest that the principle of lineal primogeniture was contemplated and that the "other person appearing to be the nearest heir" in case there were no sons, was to be of the same kind as the eldest son, that is an heir according to the rule of lineal primogeniture. The watan hak or right to

1938

BASANGOUDA HULIAPPAGOUDA v. FAKIRGOUDA LINGANGOUDA

N. J. Wadia J.

serve is, as I have stated, impartible. Sir Dinshah Mullah in his commentary on Hindu Law points out in art. 584 that property, although partible by nature, may, by custom, or by the terms of a grant by Government, be impartible, in the sense that it always devolves on a single member of the family to the exclusion of the other members; and in art. 590 he refers to certain general principles which have been well established in regard to successions to impartible estates. The second principle which he refers to is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law. The third principle is that in the absence of a special custom, the rule of primogeniture furnished a ground of preference.

In *Sahebgouda* v. *Basangouda*,[1] which was a case of a suit brought by a plaintiff under s. 36 for a declaration that he was the nearest heir to a certain patilki watan, Mr. Justice Patkar said (p. 584) :—

> "There are no rules under the Act nor are there any decided cases as to how the succession should be determined in such cases. Resort, therefore, can be legitimately had to the rules of succession to impartible estate like the zemindari in which the rule of lineal primogeniture prevails."

In that case there was no question that the rule of lineal primogeniture applied because the amended s. 36 was applicable. In my opinion, therefore, the amendment of 1910 did not introduce the principle of lineal primogeniture for the first time, but merely declared more explicitly what was the intention of the section as it stood prior to the amendment, and the original section also contemplated that the nearest heir should be determined according to the principle of lineal primogeniture.

The view taken by both the lower Courts is therefore correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

Y. V. D.

[1] (1930) 33 Bom. L. R. 580.