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**(1927) 12 BOM CK 0022**

**Bombay High Court**

**Case No:** First Appeals No. 289 and 303 of 1924

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| Ganesh Mahadev Deshpande | | APPELLANT |
| | Vs | |
| Shriniwas Madhav Deshpande | | RESPONDENT |

**Date of Decision:** Dec. 15, 1927

**Citation:** AIR 1928 Bom 211 : (1928) 30 BOMLR 457 : 113 Ind. Cas. 620

**Hon'ble Judges:** Patkar, J; Madgavkar, J

**Bench:** Division Bench

**Judgement**

Madgavkar, J.

This is a dispute between the members of the Deshpande family which enjoyed the watan inam of Chincholi. The suit was by the plaintiffs'' father and son for partition, the father being the eldest brother of the eldest branch The main dispute between the parties was as to which property was impartible and which was subject, to partition. The inam grant itself was a vadilki inam, The trial Court held that the grant was a grant of the soil and not of the revenue only, and that apart from the Kadim inams enjoyed by the family prior to the present grants, which were subject to partition, the lands comprised in the grant or which had come into the possession of the inamdar qua-inamdar must be held to be impartible as also the old wada at Sangola. It also allowed the partition subject to the payment by the plaintiffs of Rs. 800 to each of the defendants Nos. 1, 2 and 3 for their marriage expenses and declined partition of the burden of payment of Rs. 1,000, the subject matter of a decree against the present plaintiffs in Suit No. 158 of 1912 of that Court.

2. Against this decree defendant No. 1 appeals in F.A. No. 303 of 1924 which is mainly concerned with the lands and the wada at Sangola. The plaintiffs appeal in F.A. No. 289 of 1924 in respect of Survey No. 64 and of lands which may be called Mangewadi lands, and also as regards the payment of Rs. 1,000 and the marriage expenses.

3. Before considering the question of impartiality in regard to each item, as 1 have already stated before, the grant itself Exhibit 64 is a grant of Chincholi with rights of

primogeniture. As regards the question at issue generally, it is clear that it would depend on how the family has treated the other property. If successive generations have treated it as an acquisition to the inam to which the rule of primogeniture and impartibility applied, then it would require strong evidence to treat it as now subject to partition. As pointed out by their Lordships of the Privy Council in a series of cases, such as 6 CWN 490 (Privy Council) Janki Pershad Singh v. Dwarka Pershad Singh (1913) L.R. 40 IndAp 170, s.c. 15 Bom. L.R. 853; and AIR 1923 59 (Privy Council) , the intention is the test by which the Courts should be guided in cases of this nature.

4. As regards the lands, notwithstanding the elaborate argument for defendant No. 1, the words in the grant "(sic)" have usually and almost invariably been treated by this Court as indicative of a grant of the soil and not of the revenue only. Other circumstances have been brought to our notice, for instance, the use of the word in Exhibit 62, references to the property of the inamdar in Exhibit 63, and the accounts Exhibit 58. After considering the sum total of all these circumstances, we are still of opinion, without prejudice to the rights of Government which is not a party to this litigation, that the grant itself which is the main document, is in terms a grant of the soil and not of the revenue, and, therefore, the lower Court rightly held that, apart from the soil, the lands which belonged to the family prior to this grant must be partible. It is argued for defendant No. 1, appellant that out of the lands in the plaintiffs khata Exhibit 49, only two small portions of Survey Nos. 42 and 6S are proved from the Hat Exhibit 77 to have been forfeited by the Inamdar for non-payment of the revenue and that the other lands at leant are, therefore, subject to partition. There is no evidence that these lands were ever purchased by the appellants, much leas that they have been treated as subject to partition. On the contrary, this list shows that they have been treated as impartible and as appertaining to the inam. We are of opinion, therefore, that in regard to the lands in the list Exhibit 49, the finding of the lower Court is correct that they are not subject to partition.

5. As regards the wada in Sangola, it appears from the yadi Exhibit 99, of 1834 that it was amongst the items of the property which were expressly intended to remain with the vadil or the senior. It ha? for nearly a century been allowed to remain with the eldest member, as in apparent from a comparison of the detailed genealogical tree Exhibit 68, with the genealogy in the judgment appealed against. From this) genealogy it appears that as between the three sons of Bidopant between whom this partition Exhibit 99 was made, not only the eldest son Madhavrao was allowed to remain in possession of this wada in 1831 but after the death of Madhavrao it does not appear that his youngest son Narayan or that Narayan''s son Gopal had had any share in this wada. It appears to have descended from Madhavrao to Bhairopant and from Bhairopant to the second Madhavrao the father of plaintiff No. 1. It is, therefore, a justifiable inference, when for a hundred years the wada has been allowed to remain in the possession of the eldest member of the eldest

branch, that the family have for generations agreed that it would be treated as appertaining to the vadilki inam. For these reasons, we agree with the trial Court that it is not partible.

6. Turning to the appeal by the plaintiffs, as regards Survey No. 64, the previous judgments are not between the present parties or their predecssors-in-title and are, therefore, not res judicata Survey No. 64 clearly is a Kadim inam as per Exhibits 63, and 64 and is, therefore, subject to partition.

7. As regards the Mangewadi lands, they appear also to have been the subject of the grant Exhibit 59 prior to the present vadilki grant and not subject to vadilki rights. It is included amongst the lands partitioned, and notwithstanding their inclusion in Exhibit 99 we agree that as between the members of the elder branch of Madhavrao they are subject to partition.

8. As regards the payment of Rs. 1,000, the decree made the plaintiffs alone liable. Although the defendants demurred to partition of it in their written statement, no issue was raised by the plaintiffs. We have no clear evidence as to how the liability arose. We are unable, therefore, in appeal to hold that this amount must necessarily be the subject of partition.

9. In regard to marriage expenses, in ground No. 11 of their appeal and in their valuation the plaintiffs did not demur to the expenditure of Rs. 800 which were allowed but only sought to reduce them by Rs. 500. In argument reliance is placed on the decision of their Lordships of the Privy Council in Ramalinga Annavi v. Narayana Annavi, 24 Bom. L.R. 1209 . The learned pleader for the appellants applied in arguments to be allowed to amend the appeal and to pay additional Court fees, so that the plaintiffs should not be hold liable for any marriage expenses whatever, To this course objection was taken for the defendants-respondents; and on general principles, we do not think that the amendment of the pleadings should be allowed at so late a stage. Treating the matter on the pleadings as they stand, we think that the amount may reasonably be reduced to what the plaintiffs ask, i. e., Rs. 500 each instead of Rs. 800. It is true that defendant No 1 alone is their brother but the other defendants are their cousins.

10. As regards the question of law we are unable to accede to the argument of the pleader for the defendants that the question on the texts as they stand is res Integra. It is observed by Mayne in his treatise on Hindu Law and Usage, 9th Edition, para. 470, that such expenses have usually been allowed in Bombay, for instance, in Ramnath Chhoturam v. Goturam Radhakisan ILR (1919) Bom. 179, s.c. 21 Bom. L.R. 1179, and in Madras, Gopalam v. Venkataraghavulu ILR (1915) Mad. 632. We are bound by the decision of their Lordships of the Privy Council in Ramalinga Annavi v. Narayana Annavi, 24 Bom. L.R. 1209 , even though (as appears from page 173) the question was argued only from the standpoint as to whether the severance of the status of the joint family commenced before or after the decree for partition. The

attention of their Lordships of the Privy Council was not invited to the text of the Mitakshara, Ch I, Section 7, placitum 3. That verse is not quite correctly translated by Mr. Stokes in respect of the word "Sanskarah". According to Mr. Gharpure''s more faithful translation, it runs. "The uninitiated (brothers) however, should be initiated by those brothers who have been initiated before". And according to ordinary Hindu notions, marriage and not merely "Upanayan" would be "Sanskarah" included in such duties. The Privy Council decision has been followed by the learned Chief Justice in a recent decision, Pranjivan Kashiram Vs. Motiram Manchharam, in which the decision of Ramnath Choturam v. Goturam Radhalman ILR (1919) Bom. 179, s.c. 21 Bom. L.R. 1179 was treated as overruled on the strength of the Privy Council decision above. The matter will no doubt be reconsidered by their Lordships of the Privy Council if it comes before them again. In the present case it is not necessary for us to go deeper into the question.

11. For these reasons the appeal of defendant No. 1 is dismissed with costs. Except in regard to the substitution of the amount of Rs. 500 for the amount of Rs. 800 allowed for marriage expenses, the appeal of the plaintiffs is dismissed with costs,

Patkar, J.

12. I agree. This is a partition suit in which the plaintiffs and defendant No. 1 have appealed from the decree of the lower Court, In the appeal of defendant No. 1 two points have been taken first with regard to the lands included in Exhibit 49 and second with regard to the wada at Sangola. It is contended that the eight lands included in Exhibit 49 are liable to partition. In support of that contention it is suggested that, according to the Sanad, the alienation was only of the royal share of the revenue and not of the soil. The lower Court came to the conclusion that these lands must have come to the Inamdar of the village, namely vadilki branch either because the old tenants left them or because they did not pay the assessment or their line became extinct. It is contended on behalf of defendant No. 1 that Exhibit 79 only showed that with regard to Survey Nos. 42 and 65 the lands were forfeited and with regard to other lands there was no suggestion that the lands came to the Inamdar by reason of the extinction of the line of the tenants or on account of forfeiture. It is argued on behalf of the defendants that the lands were purchased by the Inamdar, and that they would, on the analogy of a holder of impartible estate, be considered to be joint family property. Reliance is placed on Gurusami Pandiyan v. Pandia Chinna Thambiar I.L.R.(1920) Mad. 1 and Janki Pershad Singh v. Dwarka Pershad Singh (1913) L.R. 40 IndAp 170, s.c. 15Bom. L.R. 853. Those cases, in my opinion, have no application to the present case. It was decided in those cases that if a holder of an impartible estate acquired lands out of the income of the estate they might be considered to be separate property which would go to his heirs. The question in this case is whether the lands which have been acquired by purchase by the vadil branch would go to the vadil branch or are partible at the instance of the junior members of that branch. Unless it is shown that the lands had been thrown

into the common stock and formed part of the joint family property, the junior members of the elder branch cannot claim any share. With regard to the construction of the Sanad. I think that the words show that the soil was transferred to the inamdar. This view has been adopted by Westropp C.J. in Ravji Narayan Mandlik v. Dadaji Bapuji Desai ILR (1875) Bom. 523 and in Ramchandra v. Venkatrao ILR (1882) Bom. 598. I think, therefore, that the alienation was of the soil and not of the royal share of the revenue, and that if the elder branch was the owner of the inam and owner of the soil, the lauds which came to the elder member of that branch would be appertinent to the inam, and the junior branch of the vadil family would not be entitled to share in those lands. Those lands would appertain to the inam and would go to the vadil by the rule of primogeniture. Even if the inam was the alienation of the royal share of the revenue, the inamdar can deal with unoccupied lands as may be best for the purpose of revenue, and if the Inamdar got those lands, they would form part of his inam. On this ground I think that the junior members of the vadil family are not entitled to any share in the lands mentioned in Exhibit 49.

13. With regard to the wada at Sangola, it has been treated as forming part of the inam in Exhibit 99 and it has gone to the vadil branch and is in possession of the vadil branch for over one hundred years. I think, therefore, that the appeal of defendant No. 1 must fail.

14. In the appeal of the plaintiffs the first point is with regard to Survey No. 64. The lower Court has held that Survey No. 64 is a Kadim inam, that is, it came to the joint family before the grant of the inam of Chincholi, and in Exhibit 99 it was given to the vadil. Hit was a Kadim inam, it became the joint family property and was liable to partition.

15. The second point is with regard to Mangewadi lands. It is urged that they were reserved for vadilki in Exhibit 99, and reliance is placed on Exhibit 60. The judgment Exhibit 60 is not between the parties to the suit and would not operate as res judicata. These lands have been entered in Clause 17 of Exhibit 105 as belonging to bhaubands and must be considered to be joint. Besides, the lands are included in the previous Sanad Exhibit 59 and would, therefore, presumably form part of the joint family.

16. The third point is with regard to debt of Rs. 1,000. It is urged that Rs. 1,000 were to be paid to one Digamber plaintiff No. 1's cousin. No issue on the point was raised In the lower Court, and we think the lower Court has rightly disallowed that item.

16. The last point is with regard to the marriage expenses which have been awarded by the lower Court to defendants Nos. 1, 2 and 3 to the extent of Rs. 800. In point No. 11 of the memo, of appeal it is urged by the plaintiffs that Rs. 500 were quite sufficient for marriage expenses and they restricted the appeal only to the excess of

Rs. 300 in the case of each of the defendants Nos. 1, 2 and 3. It is urged on behalf of the appellants that they should be allowed to amend the memo, of appeal, in view of the recent Privy Council decision in Ramalinga Annavi v. Narayana Annavi, 24 Bom. L.R. 1209 which has been accepted and followed in Pranjivan Kashiram Vs. Motiram Manchharam, . The decision of the Privy Council is binding on us. There is considerable force in the contention raised on behalf of defendant No. 1 that their Lordships of the Privy Council have not, considered the original texts bearing on the point. Their Lordships proceeded on the short ground that the institution of a suit operated as severance of the joint family, and any expenses with regard to marriages between the institution of the suit and the decree would fall on the share of the person who is a party to the suit and no obligation rested on the joint family in respect thereof, and therefore the marriage expenses should not be provided for in the decree for partition. According to the practice prevailing in Bombay and Madras, the marriage expenses have always been provided for in partition decrees: see Mnyne''s Hindu Law, para. 470, at pages 677, 678, 9th Edition. It was held in Jairam v. Nathu ILR (1906) Bom. 54, s.c. 8 Bom. L.R. 632 by Scott J. that provision should be made in the partition decree for those -who are of the same degree of relationship as those members who have already been married at the expense of the family. In Sundrabai v. Shivnarayana ILR (1907) Bom. 81, s.c. 9 Bom. L.R. 1366 the point has been exhaustively dealt with by Chandavarkar J., and it has been pointed out that under Mayukha, Ch IV, Section 4, pl. 38, Stokes'' Hindu Law, p. 57, and Mitakshara, Ch. I, Section 7, placitum 3, Stokes1 Hindu Law, p. 398 "Sanskaras" i. e., initiatory or sacramental ceremonies referred to in the texts of Yajnyavalkya and Brahaspati, include the marriage ceremony also. The same view was adopted in Gopalam v. Venkataraghavulu I.L.R.(1915) Mad. 632 which followed the view of Sundara Ayyar J. in Srinivasa Iyengar v. Thiruvengadathaiyangar ILR (1914) Mad. 556. We are bound by the Privy Council decision in Ramalinga Annavi v. Narayana Annavi, which has been followed in Mussammat Bholi Bai v. Dwarka Das ILR (1924) Lah. 375 and by this Court in Pranjivan Kashiram Vs. Motiram Manchharam, . We are, however, unwilling to accede to the suggestion made on behalf of the plaintiffs that they should be allowed to amend the memo, in order to enable them to escape the liability with regard to the marriage expenses of defendants Nos. 1, 2 and 3. We, therefore, reduce the amount of Rs. 800 to Rs. 500 as stated in point No. 11 in the memo, of appeal.

17. For these reasons I agree that the appeal of defendant No. 1 should be dismissed, In appeal by the plaintiffs a variation should be made with regard to the amount for the marriage expenses from Rs. 800 to 500.