

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Padapa bin Bhujangapa v. Swamirao Shrinivas and Another, from the High Court of Judicature at Bombay; delivered 24th March 1900.*

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Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

This is an Appeal from a decree of the High Court of Bombay dated the 18th November 1892 which reversed the decree of the Subordinate Judge of Sholapur dated the 27th July 1889. The sole question is whether the Appellant is entitled to possession of two villages free from any incumbrance by the Respondents, or whether they have a mortgage on the property which is valid and effectual against him. The High Court decided in favour of the Respondents.

The facts of the case are complicated but so far as material for the present purpose are as follows:—

The villages in question form part of certain Watan lands formerly belonging to Bhujangapa the Watandar. He died on the 27th September 1847 leaving two widows, Kalova and Ramova. The senior widow Kalova was childless. The Appellant is the son of Ramova born on the 15th September 1848. The legitimacy of the Appellant's birth was at one time disputed and

is denied by the Respondents in their statement of defence in this suit. Both Courts below agree in holding that the Appellant has in previous litigation and in this suit established his status as legitimate son and heir of Bhujangapa.

Before the Appellant's birth the Revenue authorities placed the Watan under sequestration and it so remained until an order was made by Mr. Gordon President of the Special Commission on the petition of Kalova recognising her title to the Watan. This order bears date the 10th August 1863 but she does not appear to have been put in actual possession until some time in 1865. No Sanad from the Government to Kalova is produced but possession was given on the terms of what is called the Gordon Settlement which were ratified by the Bombay Act III. of 1874. By this settlement the services were commuted for one-fourth of the income but the tenure continued to be Watan.

On the 15th September 1865 Kalova made the mortgage in question of the Watan to Shrinivas the father of the Respondents and she subsequently made further charges on the property in his favour. Litigation ensued between Kalova and Shrinivas with the result that on the 31st August 1875 Shrinivas was placed in possession of the property and he was in possession at Kalova's death which took place in November 1877.

By an order of the Collector of Bijapur dated the 4th April 1881 the Appellant was placed in possession of the revenues of the villages. But that order was reversed by an order of the Commissioner of the 20th March 1886 on the erroneous ground that the prohibition against alienation of Watan property did not preclude the making of a mortgage and the Respondents were by the Commissioner's order restored to

possession until the Appellant should bring a decree of a competent Court to the contrary.

The Appellant thereupon obtained from the Government a Sanad dated the 22nd December 1886 whereby the villages were conferred upon him subject to a fixed annual payment in lieu of services and it was provided that the said lands and cash allowances should be continued without demand of services and without increase of land tax over the above fixed amounts and without objection or question on the part of Government as to the rights of any holders thereof so long as any male heir to the Watan lineal collateral or adopted within the limits of the Watandar family should be in existence.

The present suit was commenced by the Appellant on the 16th August 1887 against the Respondents who are the two sons of Shrinivas now deceased. The prayer of the plaint so far as material was for an order that the villages in suit being in the nature of Watan property the mortgage was not binding after the death of Kalova and for possession.

The material defences were (1) that the villages were not Watan property (2) that Kalova's and their own possession under a title derived from her had been adverse and so the suit was barred by limitation.

The Subordinate Judge in his judgment dated the 27th July 1889 found (1) that the cause of action arose in the month of February 1886 (2) that the property was Watan and consequently not liable for the debt (even if proved) after Kalova's death and (3) that the Appellant was entitled to possession. Accordingly the Subordinate Judge made a decree that the Appellant should recover possession and that the investigation of mesne profits be reserved—all costs on the Respondents.

The Respondents appealed to the High Court. By their Judgment the learned Judges held that the property was Watan and there was nothing in the Sanad granted to the Appellant to take the property out of the well established rule (which was in force in 1865 when the mortgage to Shrinivas was executed) that alienation by way of mortgage of any portion of Watan property had no force beyond the life of the Watandar mortgagor. They referred to the case of *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa* (I. L. R. 5 Bomb. 435). It was there held that a mortgage by a Watandar of Watan property executed in 1871 when Regulation XVI. of 1827 was yet in force was in its inception void against the heir of the Watandar, and did not become validated against the heir by reason of the repeal of that Regulation by Act III. (Bombay) of 1874. Their Lordships agree with that decision and think it is directly applicable to the present case.

The learned Judges therefore held that *primâ facie* the Appellant (if the successor to Kalova) was entitled to recover the lands free from any mortgage executed by his predecessor. But they considered that Kalova was not the incumbent of the Watan, and the Appellant was not her successor. Having established his legitimacy he was the Watandar from the date of his birth and Kalova was a trespasser. It followed that his title to recover the lands free from any incumbrance on the ground that he is the Watandar has been lost by limitation. True he is also the heir of Kalova but in that character his only right was to redeem Kalova's mortgage.

It may be useful to recapitulate the material dates in the case. The Appellant was born on the 15th September 1848 and therefore attained his majority on the 15th September 1866.

Kalova died in November 1877. At her death therefore the Appellant was not barred from asserting his original title as heir of Bhujangapa. But on the 15th September 1878 it would seem that he became barred and his title as son and heir of Bhujangapa was extinguished. Thereupon Kalova's heir would *primâ facie* be entitled to the Watan and if he found other persons in possession also claiming under Kalova he could maintain an action against them in which their title as against him would be determined. The question would then come to be who has the best title through Kalova she being assumed to have been the rightful owner of the land. If the persons in possession did not claim under Kalova but were independent trespassers other considerations would arise.

Unfortunately their Lordships had not the advantage of hearing Counsel for the Respondents in support of the ingenious argument which found favour in the High Court. But giving it their best consideration they think it errs in leaving out of sight the incidents of the tenure and Kalova's true position.

Assuming that the Appellant was barred by limitation from recovering the lands as heir of his father from those claiming under Kalova and consequently his title as Watandar from his own birth was extinguished that circumstance did not alter the tenure. The lands remained Watan and Kalova was Watandar *de facto* with all the rights and subject to all the restrictions incident to that tenure. In the order of Mr. Gordon under which Kalova obtained possession it was conferred on her as Watan and in the mortgage made by her the lands are described as Watan. And in all the proceedings in the Collector's office she is recognised as Watandar. It is clear therefore that she held possession as Watandar and in no other character.

Consequently she could not make any alienation which would be valid against her own heir whether that heir were the Appellant or another. And on the assumption that the Appellant's earlier title is extinguished by limitation there is nothing to preclude him from asserting his title as Kalova's heir. The argument seems to give greater right to possession as Watandar by wrong or usurpation than would be enjoyed by a rightful Watandar.

The learned Judges seem also to have thought that the Appellant had in some way adopted the mortgage.

Their Lordships think the evidence insufficient to support this finding. But it is unnecessary to discuss this topic further because if the mortgage was void against the Appellant and not merely voidable no amount of acquiescence short of the period of limitation would give it validity as against the Appellant.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court should be reversed and instead thereof the Appeal to that Court should be dismissed with costs. The Respondents must also pay the costs of this Appeal.

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