Privy Council Appeal No. 87 *of* 1926.

Yellappa Ramappa Naik and others - - - - - *Appellants*

v.

Tippanna bin Laxmanna Naik - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER, 1928.

Present at the Hearing:

LORD SHAW.
LORD BLANESBURGH.
SIR JOHN WALLIS.

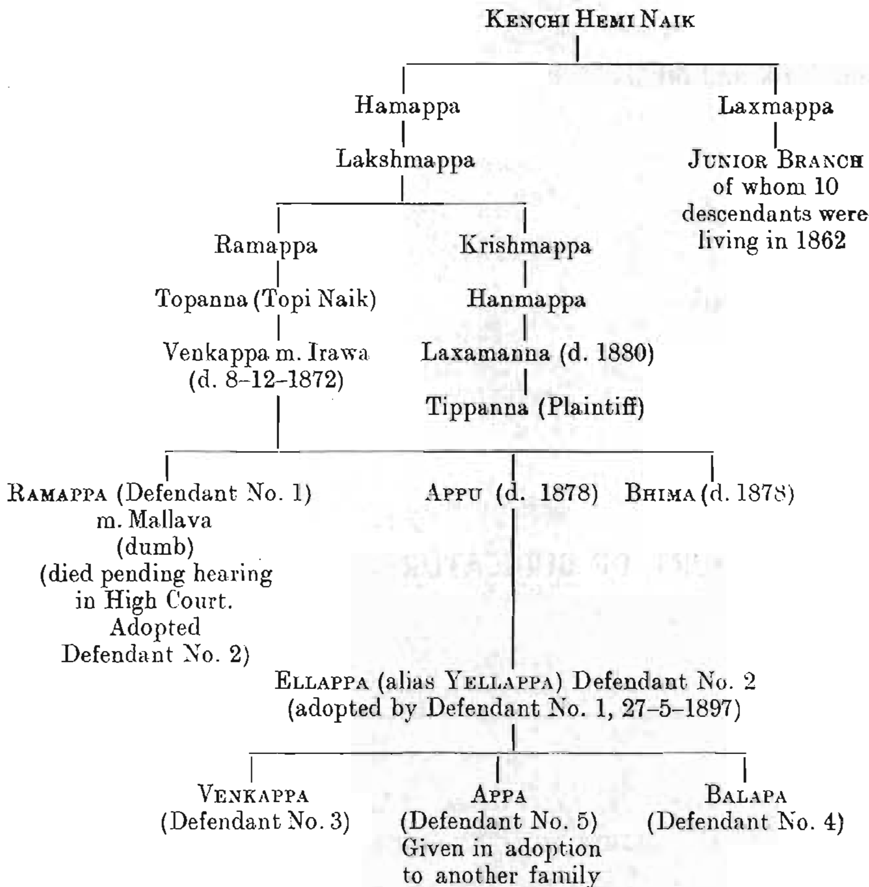
[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the High Court of Judicature at Bombay. It was dated the 29th February, 1924, and it reversed a decree of the Court of the First Class Subordinate Judge of Belgaum dated the 28th August, 1919.

The suit was brought by the respondent for a half share in property possessed by the appellants for many years as after mentioned.

The appellants were distant kinsmen of the respondent.

The family genealogy is thus set out :—



The suit was brought in 1916. The case was most carefully tried by the Subordinate Judge. One cannot peruse his judgment and the relative evidence without being struck by the accuracy and minuteness of his exposition and the apparent correctness of his conclusions.

Had the case been considered by the High Court as one to be determined merely upon the facts proved, their Lordships do not doubt that that Court would have reached the same conclusion as the Subordinate Judge. The High Court, however, in a brief deliverance, reversed the judgment substantially upon the ground of their view as to the *onus probandi* in allegations as to joint family property.

First as to the facts. Their Lordships agree in substance with the Subordinate Judge's narrative and only add this brief summary. The property is *naiki watan* (police service land) in the village of Manyal in the Kagwad State. It was annexed by the Government in 1858. The property being under attachment owing to a failure to pay *judi* or quit rent, a Government enquiry was ordered. That took place in 1862. There were rival claimants belonging to two branches of the family. The property, however, stood in the quit rent book as in the possession to the extent of 681 acres in the name of Venkappa, the father of the first defendant. Venkappa was the senior member of the senior branch of the family, treating, for the moment, the family of which Lakshmappa was the common ancestor as one branch. There was a junior branch, and one Yellappa stood in the quit rent book for the balance of 67 acres. Apart from the

book the results of an enquiry held by the Mamlatdar was that so far as the whole property was concerned it was undoubtedly in Venkappa's possession, that he resisted the idea of there being any joint family interest in it or any other person with title thereto. In these circumstances, the year being 1862, the Government left it to anyone who so wished to bring a suit to establish their right.

No such suit was ever brought and no claim on behalf of the junior branch has ever since been made. The property remained in Venkappa's possession from that time, 1862, that is to say, 54 years before the present suit, until his, Venkappa's death. That event occurred in 1872, namely 44 years before the suit, and from that time the successors of Venkappa reaching down to the present ~~respondents~~ appellants have continued exclusively to possess the property, and pay the *judi* thereof.

On Venkappa's death a question arose as to who was to occupy the position of police patil. Venkappa had a family, the eldest of whom, Ramappa, was dumb. But there was a younger son, Bhima, who performed the service of police patil for him. During this period and until the death of Bhima in 1878, neither the plaintiff, Tippanna, nor his father Laxmanna, raised any objection to these proceedings or put forward any claim either to the property or to any office in connection therewith.

Thereafter, Irawa, the widow of Venkappa, applied in 1882 on behalf of the dumb son, Ramappa, for permission to appoint the police patil. In her petition she stated that in her house there were none who could do the work and she herself suggested the name of the plaintiff, Tippanna, for the office, describing him as one of her distant kinsmen, or baumgand ; and it was in support of the claim so made for him, the date being 1882, that he alleged for the first time that he was a kinsman having a half-share in the *naiki watan*.

This in truth is substantially the only connection of Tippanna with the idea of a joint family, or of any title to the property as a co-sharer thereof. His father, Laxmanna, had never in his lifetime made any such claim. Whether the clause quoted was inserted in order to fortify the title of Tippanna to the widow's nomination of him as patil, or not, cannot now be decided. He or his advisers at all events must have thought that it was relevant to that appointment.

In 1894 the plaintiff's second term of appointment as patil expired. Irawa had died in the meantime. The successors of Venkappa's branch were quite willing that the plaintiff—distant relative though he was—should be continued as police patil. The position of the plaintiff was by this time quite clear. He himself gave his own description as a distant kinsman of the representative Watandar. The contrast between that and the situation in 1882 was this, that in 1895 he made no suggestion, as on the former occasion, that he had a half share of the property.

The Mamlatdar made an enquiry and he took his own line. Since the first appointment in 1872 the younger generation had grown up; and Yellappa of the Venkappa branch (being the

adopted son of Ramappa, one of Venkappa's family) was appointed. The plaintiff in his statement shows that he consented to his own supersession and had no objection to Yellappa's appointment. This occurred in the year 1895, 21 years before the suit was brought.

It is a circumstance of note, as mentioned, that in these later transactions he made no representation of the suggestion that he had a half share in the property. Apart from these quasi administrative proceedings, there is no doubt cast upon the general point of possession of the property. Their Lordships do not enter into details but they agree with the Subordinate Judge in holding that the plaintiff never did in fact possess or pay *judi* for any part thereof; and that he never was occupying the same house with the appellants and never was joint with them or their predecessors in food, in worship, or in estate. So far as the facts go, that is how, sketched in outline, they stand. On these facts—stated in full detail in his judgment—the Subordinate Judge was against the plaintiff's claim.

The judgment of the High Court is, however, to the effect that many years ago, at least three generations ago, it must be concluded that there was a joint family, and that in these circumstances the duty and onus lie upon the appellants who and whose ancestors have been in undisputed sole possession of the property for the long tract of time referred to, to establish that the "plaintiff's branch had been excluded to their knowledge for more than 12 years before the suit."

In the opinion of the Board this, which is the sole ground of the High Court's judgment, is an improper application and an undue stretch of the doctrine of *onus probandi* in such cases. In any case *onus probandi* applies to a situation in which the mind of the judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the judge to be blind to facts established before him, or, as in this case, to a whole category of facts extending over a long period of time and establishing the possession of property for generations as being in one line and not in two lines. (See *Robinson* v. *National Trust Company,* Lord Dunedin's judgment [1927] A.C. 515, at p. 520.)

It is no doubt true that there is a presumption that a Hindu family continues joint, but the sound proposition has for many years been accepted that—

> "The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker."

Thus properly cited by Mr. Mayne in his work on Hindu Law. The citation is from *Moro Visvanath* v. *Ganesh* (10 Bombay H.C. Rep. 444), which is now and has long been a leading and authoritative judgment. Their Lordships think it advisable to

quote from it further the following statement of the law made by Mr. Justice West :—

> "The state of things shown to have existed is presumed to have continued, until the contrary be shown. But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united ; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued, is, at some point, met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu law, in the form in which it has come down to this generation, looks on all separation of families with disfavor."

The proposition is indeed one which speaks for itself apart from judicial authority. When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago from another line which appears on the scene as a claimant and propones no facts of jointness, such as living in the same home, sharing in food or worship, or *quoad* estate participating in the enjoyment or fruits thereof. To put, in consequence of a stretch of the doctrine of onus, an unnatural and forced construction upon the actual facts of family life and development is not warranted either by the reason of the case or the law of India.

To apply these principles to the present case : The common ancestor was one Lakshmappa. He had two sons, Ramappa and Krishmappa. From the former (Ramappa) the defendants' family was descended ; they are his grandsons and great-grandsons. The plaintiff family are descended from Krishmappa. The relationship between the plaintiff himself and the defendants is that he is their third or fourth cousin, he being the great-grandson of Krishmappa and the great-great-grandson of the common ancestor Lakshmappa. The idea that solely out of such circumstances there is some presumption of jointness in family, or—which is the true proposition—that a family originally joint has continued in jointness to this day, there being no other evidence of that, but on the contrary evidence of undisputed separate enjoyment, is not one which their Lordships can support. Should such presumption be allowed to enter the case it would immediately be countered by the broad and undisputed facts as above sufficiently set forth.

It follows also from this that the suit is excluded by the 12 years' limitation prescribed in Article 127 of the Limitation Act, 1908.

The foundation of the High Court's judgment is therefore destroyed : and their Lordships see no reason to doubt that the judgment of the Subordinate Judge should be restored.

They will accordingly humbly advise His Majesty that the appeal should be sustained with the restoration as stated, and with costs thereafter and of this appeal.

In the Privy Council.

YELLAPPA RAMAPPA NAIK AND OTHERS

v.

TIPPANNA BIN LAXMANNA NAIK.

DELIVERED BY LORD SHAW.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1928.