*Privy Council Appeal No.* 143 *of* 1927.

**Gangabai Kom Baswantrao Desai and others** - - - *Appellants*

*v.*

**Fakirgowda Somappagowda Desai and others** - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT BOMBAY.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER, 1929.

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*Present at the Hearing*:

LORD ATKIN.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* SIR BINOD MITTER.]

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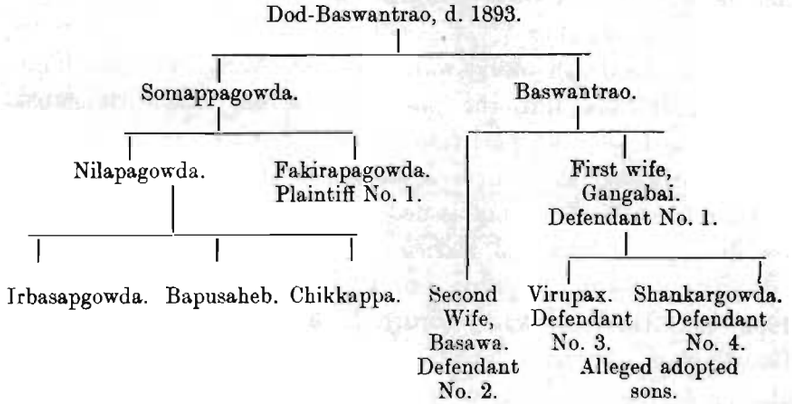
This is an appeal from a decree of the High Court of Judicature at Bombay dated the 15th September, 1925, reversing a decree of the Subordinate Judge of Dharwar dated the 25th June, 1923.

The following pedigree will show the relationship of the parties to the litigation and their ancestors :—



Dod-Baswantrao died in 1893. He left two sons, Somappagowda (hereinafter referred to as Somappa) and Baswantrao. Dod-Baswantrao owned and possessed considerable *watan* land in the villages of Hallikeri and Annigeri, Bhadrapur and Basapur. Somappa died on the 28th February, 1911, and Baswantrao on the 11th October, 1911. Baswantrao left two widows, Gangabai, Defendant No. 1, and Basava, Defendant No. 2. Gangabai is said to have adopted either the 3rd or 4th defendant: in litigation between them a compromise was effected by which the adoption of the 3rd defendant was upheld.

Only two questions have been debated before the Board, and they are (1) was there a partition between Somappa and Baswantrao between the years 1898 and 1900, and (2) are the plaintiffs (the respondents in this appeal) entitled to a declaration that Gangabai did not adopt either Defendant No. 3 or Defendant No. 4 as a son to Baswantrao.

After Dod-Baswantrao's death Somappa became *patel* and he appointed Baswantrao, as he was entitled to do, his deputy, who resided at Hallikeri and acted as the officiating *patel* there from 1902 to 1911.

On the 15th and 16th September, 1896, two self-reducing mortgages were executed by Somappa and Baswantrao jointly of land situated in Bhadrapur and in Hallikeri.

It appears that from and after the 9th June, 1898, various sums were borrowed by Somappa on his own personal responsibility, and ultimately he executed two self-reducing mortgages, both dated the 26th September, 1905, of lands situate in Bhadrapur and Basapur. During this time Somappa was living apart from Baswantrao. These last two mortgages recited the previous loans incurred by Somappa. On the 2nd July, 1900, Baswantrao mortgaged some lands in Hallikeri, describing them to be in his sole ownership and his sole enjoyment and appropriated the moneys so raised to his own use. From the last-mentioned date down to the 9th December, 1910, Baswantrao on many occasions transferred various other plots of land in Hallikeri by executing instruments of mortgage and lease and appropriated the consideration thereof to his own use, and in many of them he asserted that he was the sole owner of such land and that the same were in his sole enjoyment.

After the death of Baswantrao in October, 1911, the lands in Hallikeri came into the possession of his widow Gangabai. If there had been no partition between the two brothers, then the estate would have survived to the descendants of Somappa, as Baswantrao left no male issue.

It appears from the entries in the record of rights and the mutation registers prepared and kept under Bombay Act 4 of 1903, that Hallikeri was recorded as being in the possession of Baswantrao by virtue of private partition. A large number of such entries extending over several years have been exhibited in this case and placed before their Lordships.

On the death of Baswantrao the name of his widow was entered in the mutation register, and the reason given for such mutation was the separation of the two brothers.

It will be sufficient if their Lordships, by way of illustration, refer to one entry only, namely, Survey No. 103 in the Hallikeri record of rights (*see* p. 207 of the record). Baswantrao is described there as the separated younger brother of the Inamdar, *i.e.*, Somappa, and the reason of the transfer from the name of Somappa to that of Baswantrao was given as private partition. There is a reference in the register of the record of rights to the mutation register of 1911 to 1912, which also states that private partition had been effected between the two brothers.

It appears from a perusal of the Act and the rules framed thereunder that the Act imposed on the officers concerned the duty of making the most careful public enquiry before recording any entry. Further, there are provisions for checking from time to time the correctness of entries made to prevent incorrect entries remaining on the records.

Section 3 directs the preparation, revision and correction of the record of rights and register of mutation. Section 3, clause 1 (*a*), directs *inter alia* the preparation and the maintenance of a register containing the names of persons who are the owners, holders, mortgagees, landlords and tenants of the land. Subsection 3 directs that there shall be kept a register of mutations. Section 4 (1) directs that any person acquiring land by partition shall report in writing his acquisition of such right to the village accountant within three months of the date of such acquisition. Subsection 5 requires the village accountant, on receipt of such report, to give notice in writing of the same to all persons appearing from the report to have any interest in the subject matter thereof and to enter such report in his register of mutations. Rules were framed under the Record of Rights Act and Rule 2 requires the village accountant, as soon as the preparation of the record has begun in any village, to cause notice thereof to be published by beat of drum throughout the village and to post a copy of the notice in a conspicuous place in the village Chavdi and to make an entry at the foot of the record to the effect that such notice has been duly published. Various other duties were imposed by the Act and the rules framed under it upon the persons responsible for the preparation of the record. and to give wide publicity to such preparation. These entries were prepared by public servants in the discharge of their official duty, and they are relevant under Section 35 of the Evidence Act to prove the facts recorded therein. After the Act of 1903, the Bombay Act of 1913 was passed, and under Section 135 (*j*) the entries recording Gangabai as the owner are presumptive evidence of title in her favour. It has, however, been argued that the Act has no retrospective effect, and therefore the entries which were made in 1912 in favour of Gangabai ought not to be treated as any evidence of her

separate title. It is not necessary for the purposes of this case to decide this point, because whether Section 135 (*j*) of the Act of 1913 applied to the entries made before 1913 or not, they are evidence of the facts recorded in them under Section 35 of the Evidence Act. In the next place, these entries are repeated in the mutation registers for the years 1918–1919, *i.e.*, under the Act of 1913.

Counsel for the respondents contended that these entries in the revenue records have little evidentiary value on title, and relied on the cases *Nageshar Bakhsh Singh* v. *Ganesha*, 47 I.A., p. 57, and *Gajendar Singh* v. *Sardar Singh*, I.L.R. 18 Allahabad, p. 176. These judgments dealt with entries of a different character, and are no authority for the construction of the Bombay Act IV of 1903. Lord Shaw in delivering the judgment in *Nageshar Bakhsh Singh's Case* (*supra*), at p. 69, said :—

" Records of that character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case ; they may supply gaps in it, and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice, and afford temptation to the manipulation of records, or even of the materials for the first entry."

Their Lordships do not hold that the entries made under the Bombay Act IV of 1903 are in any way conclusive, but they are evidence of the facts recorded therein. The pronouncement of Lord Shaw that the importance of revenue records varies with circumstances applies directly to the present case. Their Lordships have already pointed out the manner in which entries under the Bombay Act IV of 1903 were made and the strict scrutiny to which they must have been subjected. The entries exhibited in this case spread over a series of years. The Act, as has been pointed out, contains careful provisions for the entries being checked from time to time, and in the circumstances of this case the entries are in their Lordships' opinion cogent, though not conclusive, evidence of the facts recorded therein.

It appears from the judgment of the High Court that the plaintiff-respondents, who were the appellants before that Court, argued that separate possession originated from a mutual agreement between the two brothers to the effect that Somappa should enjoy the profits of Annigeri, Bhadrapur and Basapur, and that Baswantrao, the younger brother, should enjoy the profits of Hallikeri, and the High Court accepted this argument. There is no trace of any such agreement in the pleadings, nor was any issue framed on this point. No evidence was led by the plaintiff-respondents, nor did they cross-examine the witnesses of the

appellants on this point. Nilappa, however, in his application dated 19th February, 1914, alleged that the lands in the possession of Baswantrao were given to him for maintenance in accordance with the practice of the family from ancient times. This matter was enquired into by the *Mamlatdar*, who decided against Nilappa. Nilappa appealed against this decision, but the Collector on the 24th February, 1915, on appeal upheld the decision of the *Mamlatdar* and the matter was allowed to rest there. It seems to their Lordships that if there was a mere amicable arrangement and not a partition between them it would be most unlikely that, on the death of Baswantrao, the sons of Somappa would allow Gangabai to enjoy the whole property of Hallikeri, as it was said to be more valuable than the other three villages taken together. The plaintiff-respondents attempted to meet the effect of the entries in the record of rights by suggesting that the entries were made by Bahaguni (the village accountant) in collusion with Baswantrao, who was the *patel* from 1902/11.

It appears that, although a number of entries in the record of rights were annexed to the plaint, there is no allegation in it that the same were made in collusion between Baswantrao and Bahaguni. These entries were made after public enquiry, and it is impossible to believe that Somappa would not have heard of them during his lifetime. There was no cross-examination suggesting that the entries were collusive, nor was any evidence led on this point. Bahaguni was nominated to his office by Somappa as his deputy, and was a friend of his. Their Lordships are therefore unable to give any weight to mere suggestions of fraud and collusion based on suspicion without any evidence to support the same. The plaintiff-respondents alleged throughout that the partition was unequal and was therefore improbable, but it seems to their Lordships that, if the partition was improbable, the arrangement of separate enjoyment of the properties unequal in value lasting for a considerable number of years, and the acquiescence in the alienations by Baswantrao and the enjoyment of the property to the same extent by the widow of Baswantrao, is more improbable.

According to the case of the plaintiff-respondents, Hallikeri was more valuable than the three properties given to Somappa, and it is highly improbable that Baswantrao, who, according to this case, was merely enjoying the land for his maintenance under a family arrangement, would be allowed to have a bigger share than Somappa. It is still more improbable that after his death, his widow would be allowed to possess those lands. Every argument that has been adduced against partition on the ground of its inequality would apply with greater force against the arrangement of separate enjoyment, particularly so as there were transfers of property on the basis of such arrangement.

Counsel for the respondents placed great reliance upon a mortgage of lands in Bhadrapur, dated 6th November, 1909, executed by Baswantrao in favour of Shamcharya. The

document, after reciting that Baswantrao and his brother Somappa had requested the mortgagee to advance a sum of Rs. 5,000, purported to empower him to enjoy the property for 20 years commencing from the year 1911–12. Somappa complained to the authorities that Baswantrao had no power to execute this mortgage, as the property belonged to him solely, and thereupon enquiries were held by the revenue authorities, in course of which both the brothers and the mortgagee were examined. Somappa asserted that Baswantrao had no right of ownership over the land in question, but he also stated that their family was joint. Baswantrao said that Somappa and he were joint and that at Somappa's request he had executed the deed. The revenue authorities held that the mortgage was not a valid mortgage and they refused to recognise it. The learned Subordinate Judge also held that this mortgage was a fictitious transaction, as Nilappa purported to pay back the said sum of Rs. 5,000 to the mortgagee. The High Court, however, placed very great reliance upon this document.

It appears to their Lordships that Baswantrao at the time of the mortgage was heavily involved and had already repeatedly mortgaged lands at Hallikeri, and if, therefore, he wanted further money on mortgage of lands outside Hallikeri, it is not difficult to see that, in order to make out a title to the mortgagee, it was necessary for him to assert that the estate was joint and that he had been requested by Somappa to execute the mortgage. The latter statement, according to the evidence of Somappa, was false. Baswantrao's statements, although *prima facie* admissible against the appellants as admissions, are clearly explained by the circumstances under which the mortgage was executed. Somappa no doubt said that the family was joint, but at the same time asserted that he was solely entitled to the property. This statement that he was solely entitled to the property is destructive of the supposition that there had been no previous partition. At best Somappa's statement is ambiguous. As every item of property had not been partitioned, Somappa probably thought that the family was still undivided. Anyhow, this statement of Somappa is not such a clear assertion of the jointness of the family as would induce their Lordships to hold, in the face of the other evidence in the case, that there had been no partition.

Subsequently there were other enquiries held by the revenue authorities, the result of which was that they maintained Gangabai in possession of Hallikeri on the footing that there had been a partition.

Their Lordships find the following facts established, viz., that :—

(*a*) For a long period Somappa and Baswantrao were separate in food and residence.

(*b*) Baswantrao after 1896 kept one Fatima, a Mohomedan, as his mistress, and at first introduced her to the family *wada*, from which she was removed to a cattle shed on the remonstrance of Somappa.

(*c*) From 1898 Somappa began borrowing money on his own responsibility, and in 1905 mortgaged properties which were alleged to have fallen to his share and were in his separate possession, and appropriated the income of the property to his own use.

(*d*) From 1900 Baswantrao repeatedly mortgaged and leased the lands in Hallikeri and appropriated the proceeds thereof to his own use. He was in separate possession thereof up to the time of his death in 1911. In most of the documents he asserted that the lands in Hallikeri were in his sole ownership and possession.

(*e*) In 1907 he sold some lands in Hallikeri. Somappa complained against the sale, but his complaint was not recognised by the Deputy Collector, and Somappa took no further steps to vindicate his rights.

(*f*) In the record of rights prepared under Act IV of 1913 and the mutation registers, Baswantrao was described as the separated brother of Somappa.

(*g*) The suggestion that such entries were made by Bahaguni, the nominee of Somappa, in collusion with Baswantrao, has wholly failed.

(*h*) The suggestion of the respondents that the separate possession and appropriation of the income of Basapur, Annigeri and Bhadrapur by Somappa and that of Hallikeri by Baswantrao originated from mutual arrangement, as opposed to partition of these four properties, has not been proved.

(*i*) On the death of Baswantrao his widow Gangabai enjoyed the properties at Hallikeri exactly in the same way as Baswantrao did.

(*j*) That in the mutation registers prepared in 1918–19 under the Bombay Act No. IV of 1913, Gangabai was recorded as the owner of Hallikeri.

Under Section 135 (*j*) of this Act an entry in the record of rights and register of mutations is presumed to be correct unless the contrary is proved.

The learned Subordinate Judge believed some of the witnesses who were examined before him on the issue of partition, and the evidence of these witnesses has been corroborated by the documentary evidence. Their Lordships see no reason to disagree with the Subordinate Judge as to his estimate of such evidence, and they are clearly of opinion that there had been a partition between the two brothers during their lifetime.

There is evidence on the record that the ceremonies of the adoption of defendant No. 4 did in fact take place. There is, further, no dispute that there was a deed of adoption executed on the occasion of the alleged adoption of Defendant No. 4. If,

however, it were held that the Defendant No. 3 had not been validly adopted, then there being no sufficient evidence to displace the adoption of Defendant No. 4, the result would be that the adoption of Defendant No. 4 would stand good, although as between Defendant No. 3 and Defendant No. 4 the matter had been litigated and a compromise had been arrived at whereby Defendant No. 3 had been declared to be the duly adopted son, and although from the date of such declaration on the 25th September, 1918, Defendant No. 3 has been treated as the duly adopted son of Baswantrao by the members of the family of Baswantrao. Their Lordships are of opinion that if they were forced to hold on the evidence that the adoption of Defendant No. 3 is bad and that of Defendant No. 4 is good, the result would be very curious indeed. Fortunately, on the evidence their Lordships are of opinion that the plaintiff-respondents have failed to prove that the adoption of Defendant No. 3 did not take place. If the adoption of Defendant No. 3 took place, necessarily the adoption of Defendant No. 4 would be bad. There is no doubt that on the 28th July, 1914, every preparation had been made for the adoption of Defendant No. 3, although Defendant No. 4, who was the son of the brother of Gangabai, had been living in Gangabai's house for quite a long time. The letter written by Chanvirrappa Desai and others to Nilappa, the elder brother of the 1st respondent, dated 28th July, 1914, clearly shows that they apprehended that Defendant No. 3 was going to be adopted by the widow Gangabai and "that preparations for a feast were going on in the house, the sub-Registrar will come, and that a large number of guests will assemble." This letter shows in any event that Karvirappa intended to give and Gangabai intended to take Defendant No. 3 in adoption. It is quite clear that on that date she did not have any intention of adopting Defendant No. 4 or any other person belonging to her husband's family. If, therefore, every preparation had been made for adopting Defendant No. 3 and the widow was willing to adopt him, it appears to their Lordships that very strong evidence is not required to prove the adoption of Defendant No. 3. In their Lordships' opinion, there is ample evidence to prove the adoption of Defendant No. 3. No doubt the evidence of Gangabai and of the priest Chenviraya has got to be received with great caution, but there is also evidence of other witnesses, some of whom are quite respectable, proving adoption. The learned Subordinate Judge before whom these last-mentioned witnesses appeared has believed them, and their Lordships accept such evidence. There is the further fact that there was a deed of adoption which was executed at night and attested by a large number of persons, two of whom were examined in Court. The learned Subordinate Judge has believed them. The probabilities are in favour of the adoption having taken place. Their Lordships are not unmindful of some of the criticisms which the respondents' Counsel very forcibly urged before them, but, after

carefully considering them, they are of opinion that the plaintiff-respondents have failed to disprove the adoption of Defendant No. 3.

Their Lordships therefore are of opinion that the judgment and decree of the High Court should be reversed and that of the learned Subordinate Judge restored. The appellants are entitled to their costs, and their Lordships will humbly advise His Majesty accordingly.

**In the Privy Council.**

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GANGABAI KOM BASWANTRAO DESAI AND OTHERS

*v.*

FAKIRGOWDA SOMAPPAGOWDA DESAI AND OTHERS

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DELIVERED BY SIR BINOD MITTER.

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