Supreme Court of India
Nagesh Bisto Desai Etc. Etc vs Khando Tirmal Desai Etc. Etc on 2 March, 1982
Equivalent citations: 1982 AIR 887, 1982 SCR (3) 341
Author: A Sen
Bench: Sen, A.P. (J)

PETITIONER:
NAGESH BISTO DESAI ETC. ETC.

Vs.

RESPONDENT:
KHANDO TIRMAL DESAI ETC. ETC.

DATE OF JUDGMENT02/03/1982

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
REDDY, O. CHINNAPPA (J)
ISLAM, BAHARUL (J)

CITATION:
1982 AIR 887 1982 SCR (3) 341
1982 SCC (2) 79 1982 SCALE (1)418
CITATOR INFO :
F 1984 SC1121 (12,18)

ACT:
Bombay Pargana and Kulkarni Watans Abolition Act 1950-Section 4(1) and Bombay Merged Territories Miscellaneous Alienations Abolition Act 1955-Section 7-Scope of-Watan properties if impartible-Members of joint family-If entitled to a share in the watan properties.

HEADNOTE:
The plaintiff's rather was the last holder of the office of Desai. After his death the plaintiff, who was his eldest son, was recognised as the watandar. In 1904 service appurtenant to the office of Desai was commuted by the imposition of 'judi' or quit-rent. Under s. 4 (1) of the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 and s. 7 of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 all the watan lands were re-granted to the plaintiff and he was deemed to be the occupant thereof within the meaning of the Bombay Land Revenue Code.

The plaintiff (appellant) filed a suit against respondents who were members of a joint Hindu family holding

properties described as Kundgol Deshgat Estate claiming a declaration that the estate formed an impartible estate governed by the rule of lineal primogeniture. The plaintiff claimed that as the present holder of the office of Desai he was entitled to remain in full and exclusive possession and enjoyment of the suit properties and that other members of the family had no right, title or interest therein but were only entitled to maintenance and residence and in the alternative for partition and separation of 1/6 share therein.

Denying all the plaintiff's claims the respondents pleaded that the entire properties belonged to the joint Hindu family and were therefore liable to be partitioned.

Rejecting all the claims of the appellant the Trial Court held that the properties belonged to the joint Hindu family and were therefore partible.

On appeal the High Court, subject to a modification, upheld the decree of the court of first instance.

The question at issue in the appeal to this Court was whether, (1) even assuming that the estate was impartible and governed by the rule of lineal primogeniture by custom as pleaded, the incidents of impartibility as well as the rule of

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lineal primogeniture being nothing more than an incident of the watan, stood abrogated by s. 3(4) of the 1950 Act and s. 4 of the 1955 Act and as such it was not open to the plaintiff to make any claim on the basis of the alleged custom, (2) with the resumption of the watan and the re-grant of the watan lands to him, the suit properties lost their character as being joint family property and had become, under the provisions of the 1950 and 1955 Acts, the plaintiff's exclusive property by reason of his status as watandar and as such were not capable of being partitioned.

Dismissing the appeal,

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HELD: It is well settled that property though impartible may be the ancestral property of the Joint Hindu Family. The impartibility of the estate does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence, the estate retains its character of joint family property and its devolution is governed by the rule of survivorship. To establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their succession to the estate. [354 C-D]

Martand Rao v. Malhar Rao, [1928] 55 IA 45: AIR 1928 PC 10: 107 IC 7: Adrishappa v. Gurushidappa, (1880) 7 IA 162: ILR (1880) 4 Bom. 494: 7 Cal. LR 1 (PC); Vinayak Waman Joshi Rayarikar v. Gopal Hari Joshi Rayarikar, [1903] 30 IA 77:

ILR (1903) 27 Bom. 353: 7 Cal. WN 409; Shiba Prasad Singh v. Rani Prayag Kumari Debi, (1932) 59 IA 331: AIR 1932 PC 216: 138 IC 861; Collector of Gorakhpur v. Ram Sunder Mal, (1934) 61 IA 286: AIR 1934 PC 157: CIT v. Dewan Bahadur Dewan Krishna Kishore, (1941) 68 IA 155: AIR 1941 PC 120; Anant Bhikappa Patil v. Shankar Ramchandra Patil, (1943) 70 IA 232: AIR 1943 PC 196 and Chinnathayi v. Kulasekara Pandiya Naicker, [1952] SCR 241;AIR 1952 SC 29, relied on.

Mirza Raja Shri Pushavathi Viziaram Gajapathi Raj Manne Sultan Bahadur v. Shri Pushavathi Visweswar Gajapathi Raj, [1964] 2 SCR 403: AIR 1964 SC 118 and Rajah Velugoti Kumara Krishna Yachendra Varu v. Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu, (1969) 3 SCC 281: [1970] 3 SCR 88: AIR 1970 SC 1795, distinguished.

Neelkisto Deb Burmono v. Beerchunder Thakoor, (1867-69) 12 MIA 523; Rani Sartaj Kuari v. Rani Deoraj Kuari (1888) 15 IA 51: ILR (1888) 10 All 272 (PC); Rama Krishna Rao Bahadur v. Court of Wards, (1899) 26 IA 83: ILR (1899) 22 Mad. 383 (PC); Raja Ram Rao v. Raja of Pittapur, (1918) 45 IA 148: AIR 1918 PC 81; Baijnath Prasad Singh v. Tej Bali Singh, (1921) 48 IA 195: AIR 1921 PC 62 and Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo (1981) 4 SCC 613, referred to.

2. The plaintiff's contention runs counter to the scheme of the Bombay Hereditary offices Act, 1874, and is against settled legal principles. The plain
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tiff's rights to such watan properties, whatever they were, were subject to the rights of the other members of the family. [359 C-D]

In the former Bombay Presidency, a Desghat watan had always been treated to be the joint family property and the grant of watan to the eldest member of a family did not make the watan property the exclusive property of the person who was the watandar for the time being.

3. The definition of the term "watandar" as contained in s. 4 of the Bombay Hereditary offices Act is in two parts: the first sets out what "watandar" means and the other states what is included in it, that is, the entire definition of watandar must be looked upon as one, the latter part being supplementary and additional to what is contained in first part. Thus, a person who acquired watan property or held hereditary interest in it without acquiring the hereditary office and without being under an obligation to perform the services attached to such office was also a "watandar" within the meaning of the Watan Act. There can be no doubt that the Watan Act was designed to preserve to pre-existing rights of the members of a joint Hindu family. The expression "watandar of the same watan" would include members of the family other than the watandar, who were entitled to remain in possession and enjoyment of the watan property. [359 G-H 361 F]

Vijyasingrao Balasaheb Shinde Desai v. Janardanrao

Narayanrao Shinde Desai, 51 Bom. LR 556: AIR 1949 Bom. 314; Kadappo Bapurao Desai v. Krishtappa Bachappa Desai, 37 Bom. LR 599: AIR 1935 Bom. 380 and Laxmibai Sadashiv Date v. Ganesh Shankar Date, (1977) 79 Bom. LR 234: AIR 1977 Bom. 350, approved.

Tarabai Sriniwas Naik Guttal v. Murtacharya Anantacharya, 41 Bom. LR 924: AIR 1939 Bom. 414, overruled.

4. The commutation of service under s. 15(3) of the Watan Act by which the watandars were relieved in perpetuity from liability to perform the services attached to their offices in consideration of 'judi' or quit-rent charged upon the watan land unless where it was otherwise provided for, had not the effect of converting watan land into the private property of the watandars with the necessary incident of the alienability, but to leave them attached to the hereditary offices, which although free from the performance of services, remain in tact. Despite commutation of service, the office of watandars ordinarily survived without liability to perform service, and on that account the character of the watan lands still remained attached to the grant. [364 D-F]

Collector of South Satara v. Laxman Mahadev Deshpande, [1964] 2 SCR 48: AIR 1964 SC 326, relied on.

Appaji Bapuji v. Keshav Shamrav, ILR (1891) 15 Bom. 13, referred to.

Bachharam Datta Patil v. Vishwanath Pundalik Patil , [1956] SCR 675: AIR 1957 SC 34: 1956 SCJ 721, referred to. 344

5. The impartibility of the watan lands of the applicability or the rule of lineal primogeniture regarding succession to the estate, by the alleged custom as pleaded, being nothing more than an incident of the watan, stood extinguished by s.3(4) of the 1950 Act and s.4 of the 1955 Act. The effect of these Acts was to bring out a change in the tenure or character of holding as watan lands but they did not affect the other legal incidents of the property under the personal law. That being so, the members of a joint Hindu family must be regarded as holders of the watan land along with the watandar for the time being and therefore regrant of the lands to the watandar under s. 4(1) of the 1950 Act and under s. 3 of the 1955 Act must enure to the benefit of the entire joint Hindu family. [365 C, E; 367 E]

6. Section 4(2) of the 1950 Act and s. 7(3) of the 1955 Act do not create a statutory bar to a transfer or a partition once the conditions mentioned therein are fulfilled. [370 B]

Laxmibai Sadashiv Date v. Ganesh Shankar Date, (1977) 79 Bom. LR 234: AIR 1977 Bom. 350 and Dhondi Vithoba Koli v. Mahadeo Dagdu Koli, (1973) 75 Bom. LR 290: AIR 1973 Bom. 323, approved.

Kalgonda Babgonda Patil v. Balgonda Kalgonda Patil , (1975) 78 Bom. LR 720, overruled.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 615- 617/73,618-20/73 and 1850 to 1852 of 1972.

From the Judgment and Decree dated the 22nd June, 1962 of the Mysore High Court at Bangalore in Regular Appeal No. 157/56 Regular Appeal (B) No. 16/57 & RA (B) 6 of 1958.

U.R. Lalit, S.S. Javali D.P. Singh & Ravi Parkash, for the Appellants in CA. 1850-52/72, R-5 in CA. 615/73, R-2 in CA. 616/73, R-6 in CA. 617/73 and R-3 in CA. Nos. 618-20/73.

B.D. Bal, R.B. Datar & Miss Madhu Moolchandani, for the Appellant in C.A. Nos. 615-617/73, R-5 in CA. Nos. 1850- 52/72 & for R-1 in CA. Nos. 618-620/73.

S.T. Desai, K. N. Bhat & Nanjappa Ganesh for Appellant in CA. 618-620/73, RR 2 and 3 in CA. 1850 to 1851/72, RR. 2,3,17 & 18 in CA. 1852/72, RR 2,3 in CA. 616/73, RR 10 & 11 in CA. 616/73 & for RR 1, 2, 4,5 in CA. 617/73.

S.B. Bhasame, K.A. Naik, & M.R.K. Pillai for R-1 in CA. Nos. 1850-52/72, CA 615-16/73, R-14 in CA. 617/73 and R-2 in CA. 618-620/73.

K.R. Nagaraja & Alok Bhatacharya for R-12 in CA. Nos. 1850-52/72, CA. 615/73, R-9 in CA. 617/73, R-13 in CA. 617/73 and R-10 in CA, 618-620 of 1973.

P.R. Ramasesh, for RR 13, 15 (a) to (c) in CA. 1852/72, RR 15 & 17 in CA. 617/73 and RR 11, 14 (a) (c) and (d) in CA. 618/73.

The Judgment of the Court was delivered by SEN, J. These nine consolidated appeals on certificate are directed from a common judgment and decree of the High Court of Mysore at Bangalore dated June 22, 1962 which affirmed, subject to a modification, the judgment and decree of the Civil Judge, Senior Division, Dharwar, dated July 5, 1956, substantially dismissing the plaintiff's claim for declaration of title to, and possession of, certain watan properties and decreeing instead his alternative claim for partition and separate possession of his one-sixth share therein.

The principal question in controversy in these appeals is whether ss. 3 and 4 of the Bombay Paragana and Kulkarni Watans Abolition Act, 1950 (for short 'Act No. 60 of 1950') and ss. 4 and 7 of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 (for short 'Act No. 22 of 1955'), which provided for abolition of watans and alienations in the merged territories, resumption of watan land and its re-grant, to the holder for the time being, which brought about a change in the tenure or the character of holding as watan land, affect the other legal incidents of the property under personal law.

The suit out of which these appeals arise, was instituted by the appellant Nagesh Bisto Desai, as plaintiff, claiming against his two brothers Ganesh Bisto Desai and Gopal Bisto Desai defendants Nos.2 & 3, mother Smt. Akkavva alias Parvathibai, defendant No. 4, brother Bhimaji Martand Desai, defendant No.5 who had gone in adoption to Martand, member of a junior branch and father's brother' son Khando Tirmal Desai, defendant No. 1, a declaration that the properties described in Schedules B and C appended to the plaint, called the Kundgol Deshgat Estate, situate in the district of Dharwar in the State of Karnataka, formed an impartible estate and governed by the rule of lineal primogeniture and that the plaintiff being the present holder of the office of Desai was entitled to remain in full and exclusive possession and enjoyment of the suit properties and that the other members of the family had no right, title or interest therein but were only entitled to maintenace and residence, for exclusive possession of the family residential house at Kundgol known as Wada described in Schedule B part 2 from the defendants Nos. 2 to 5, for exclusive possession of insignia of honour described in Schedule E and one-third share in the family movables described in Schedule D. Alternatively, in the event of the Court holding that the properties described in Schedule B, C and D, were properties belonging to the joint Hindu family, the plaintiff claimed partition and separate possession of his one-sixth share therein.

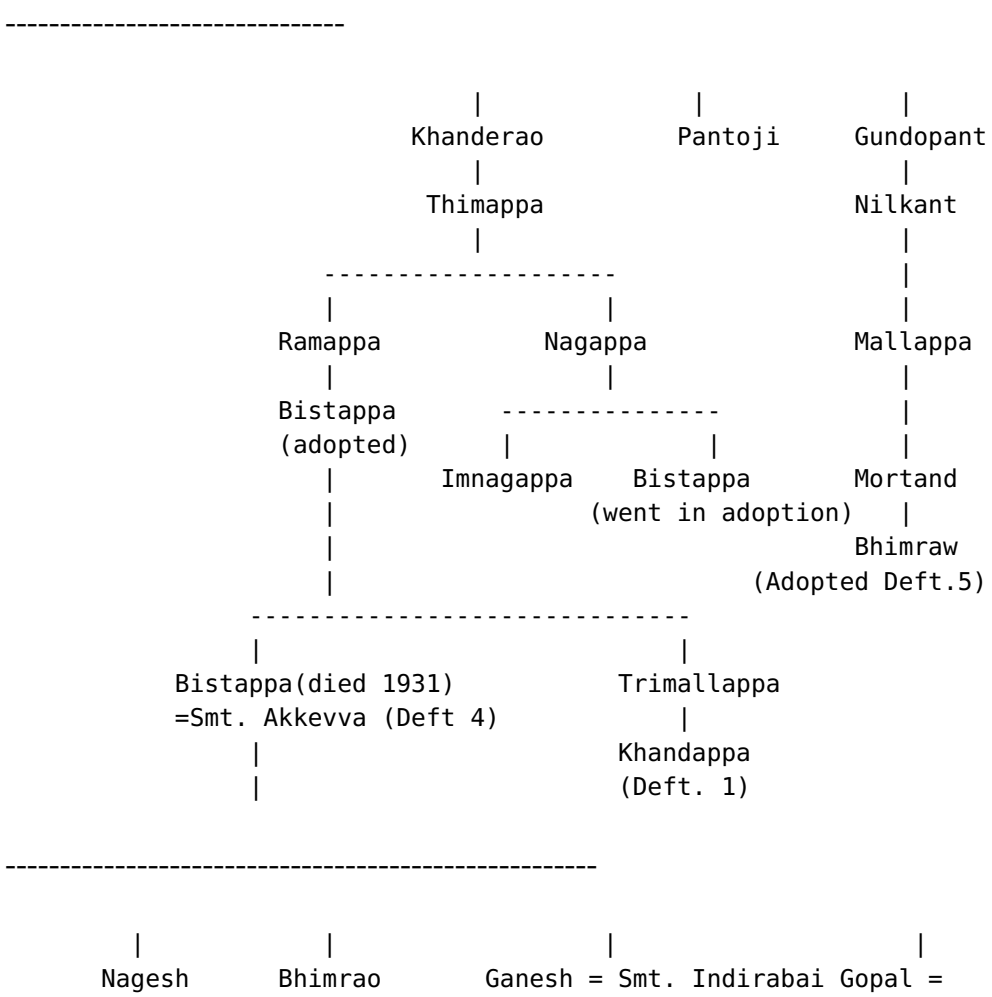
It will be convenient, in the first place, to refer briefly to the history of the estate, to set out the pedigree showing the descent from a common ancestor and to show how the present case arose.

The plaintiff's suit is brought on the allegation that the Deshgat family of Kundgol Paragana of which the plaintiff and the defendants 1 to 4 are members is a very ancient and respectable one in the State of Jamkhandi which later merged in the then Province of Bombay and is now in the State of Karnataka. The lands and cash allowances described in Schedule B para (i) and (iii) are the emoluments of the district hereditary office of Desai. Abkari is the compensation given to the Desai family by the British Government when it took over the control of today and liquor in Hanchinal Inam Village from the Deshgat family. This amount, together with the cash allowance and the service lands appurtenant to the office of Desai and the houses and open sites form the impartible estate called the Kundgol Deshgat Estate, which was partly located within the territory of former feudatory State of Jhamkhandi and party in the territories of the then British India. The first inam was granted at the time of Thimappa in 1575. All the properties constituting the Deshgat were acquired under grants made by the Sultans and Rulers of Bijapur during the period from 1575 A.D. to 1694 A.D. with a couple of other grants received from the Chief of Jamkhandi during the period from 1120 A.D. to 1826 A.D. The watan has remained with the family which held the hereditary office of Desai for over four centuries. In 1904, service appurtenant to the office of Desai was commuted by the imposition of a "judi" or quit-rent. Properties described in Schedules F and G have been in possession of the two junior branches descended from Gundopant and Lingappa from 1825 A.D. and 1854 A.D. respectively and are being enjoyed by them even now.

The plaintiff's father, Bistappa, the last holder of the office of Desai died on July 27, 1931 leaving behind him his widow Smt. Akkavva and four sons, Nagesh, Bhimrao, Ganesh and Gopal. Out of them, Bhimarao had gone in adoption to Martand. member of a junior branch. Upon his father's death the plaintiff Nagesh Bisto Desai was recognised to be the watandar. The plaintiff's cousin is Khandappa The subjoined genealogical table gives the relationship of the parties belonging to the

senior branch descended from Thimappa.

GENEALOGICAL TABLE Thimppa |



(pantiff) (went adoption (Deft. 2) (Deft. 9) (Deft.3) to Martand) Smt. Kashibai (Deft. 10) It appears that after the death of the plaintiff's father in 1931, in the mutation proceedings that followed, the plaintiff first made a claim that the watan being impartible according to the custom of the family, he became the exclusive owner of the entire watan properties. Although his brothers Ganesh Bisto Desai and Gopal Bisto Desai, defendants 2 and 3 had at first consented to mutation of the watan in his name they later resiled from that position and the strongest opposition came from the plaintiff's uncle Tirmal, father of Khando. In consequence of this, the plaintiff accepted before the revenue authorities that the properties belonged to the joint Hindu family and refrained from making any claim on the footing of the properties being impartible. In 1945, the plaintiff's brother Bhimarao defendant No. 5 who had gone in adoption to Martand, started asserting a claim to 7 Mars of land and right of residence in the family Wada and this had the support of the plaintiff's mother Smt. Akkavva. The defendant No. 5 Bhimarao in assertion of his claim brought Special Suit No. 51 of1949, in the Civil Court at Kundgol on the basis of the properties being impartible. In June 1946, the plaintiff leased out some home farm lands to defendants 6, 7 and 8, and this gave rise to proceedings under s. 144 of the Code of Criminal Procedure, 1898. The Sub-Divisional Magistrate Kundgol

passed an order restraining defendants 2, 3 and 5 from disturbing the possession of defendants 6, 7 and 8 and this order was kept in force by the former State of Jamkhandi till merger in the former State of Bombay in August, 1948. The State Government revoked the order with effect from December 15, 1948, as a result of which the defendents 6, 7 and 8 brought suits for injunction. Due to discord in the family, the plaintiff left the ancestral residential house at Kundgol and started residing in his bungalow. The plaintiff has admittedly been regranted all the watan land under sub-s. (1) of s. 4 of Act No. 60 of 1950 and s. 7 of Act No. 22 of 1955 as if it were an unalienated land, being the holder of the watan to which it appertained, and he is deemed to be an occupant thereof within the meaning of the Bombay Land Revenue Code, 1879.

The defendants filed separate written statements and repudiated the plaintiff's claim of impartibility. They denied that the suit properties formed an impartible estate and that succession to the estate was governed by the rule of lineal primogeniture. The defendant No. 1 asserted that there had been at least three partitions in the family. According to him, the allotment of the properties described in Schedules F and G to the two branches of Gundopant and Lingappa represented allotment of shares on partition. He pleaded that all the properties described in Schedules B C D and E were joint family properties and claimed one-half share therein. The defendants Nos. 2 and 3, in their written statement, also asserted that the properties described in Schedules F and G to the two branches of Gundopant and Lingappa were shares allotted to them on partition. The defendant No. 4 supported the case pleaded by her sons defendants Nos. 2 and 3. The defendant No. 5, however, pleaded that there had never been a partition in the family and that the entire properties, that is to say, the properties described in the plaint Schedules B to G continued to be joint family properties wherein he claimed one-fourth share. The remaining defendants also denied that the suit properties were impartible.

The learned trial Judge rejected the plaintiff's claim that he was entitled to remain in full and exclusive possession and enjoyment of the aforementioned properties being the watandar of the Kundgol Deshgat Estate and that other members had no right, title or interest therein except as to maintenance as junior members and held instead that properties belonged to the joint Hindu family and were, therefore, partible. He further held that the properties described in Schedules F and G in possession of the junior branches of Gundopant and Lingappa were not allotted to them as their share on partition and therefore had to be put into the hotchpotch. He accordingly passed a preliminary decree for partition, declaring the plaintiff's share to be one- twentyfourth of the entire estate and to other minor reliefs. On appeal, the High Court upheld the judgment of the trial Judge, holding that the suit properties were not impartible and were therefore liable to partition, but it set aside the direction with regard to Schedules F and G properties on the finding that the two branches of Gundopant and Lingappa had separated from the joint family. It accordingly modified the decree of the learned trial Judge and held that the plaintiff was entitled to one-sixth share in the properties described in Schedules B to E.

Arguments in these appeals have been confined to the question as to whether, as a matter of law, even if it were assumed that the plaintiff had succeeded in proving that the Kundgol Deshgat Estate was an impartible estate, and that succession to it was governed by the rule of lineal primogeniture, the incident of impartibility of the watan as well as the rule of lineal primogeniture stand

extinguished by Act No. 60 of 1950 and Act No. 22 of 1955, and it is no longer open to the plaintiff to make any claim on the basis of the alleged custom of impartibility or the rule of lineal primogeniture.

The questions that fall for determination in these appeals are, firstly, whether the impartibility of the tenure of a paragana watan appertaining to the office of a Hereditary District (Paragana) officer in respect of which a commutation settlement has been effected, regulating succession to the property, by reason of family custom or a local custom being the incidents of such watan stands abolished by virtue of s. 3 of Act No. 60 of 1950 or s. 4 of Act No. 22 of 1955, and, secondly, whether the watan lands lost the character of being joint family property with the resumption of the watan under s. 3 of Act No. 60 of 1950 or s.4 of Act No. 22 of 1955 and re-grants thereof were exclusive to the plaintiff under s. 4 of Act No.22 of 1955, by reason of his status as the watandar and therefore, they belonged to the plaintiff and were not capable of partition There is no merit in any of these submissions.

It is argued that impartibility of the tenure was not an incident of the grant but the watan was impartible by custom and succession to it was governed by the rule of lineal primogeniture. Our attention is drawn to the averment contained in paragraph 3 of the plaint:

> "The Kundgol Deshgat Estate, along with the estates of two other District Hereditary offices of Nadgir and Deshpande of Kundgol is impartible by custom and succession to it is governed by the rule of lineal primogeniture. This custom is ancient, invariable, definite and reasonable. It is both a family custom and also a local custom prevailing in the families of Paragana Watandar of Kundgol ....."

It is urged that in case of an impartible estate, the right to partition and the right of joint enjoyment are from the very nature of the property incapable of existence and therefore, the courts below were in error dismissing the plaintiff's claim for a declaration that being the present holder of the office of Desai he was entitled to exclusive possession and enjoyment of the suit properties. It is further urged that even assuming that impartibility of the estate or the rule of primogeniture regulating succession were an incident of the watan the suit properties lost the character of being joint family property with the resumption of the watan and the re-grants of the suit lands were exclusively to the plaintiff under sub-s. (1) of s 4 of Act No. 60 of 1950 and sub-s. (1) of s. 7 of Act No. 22 of 1955, by reason of his status as the watandar and, therefore, they exclusively belonged to the plaintiff and they were not capable of being partitioned. There is no merit in the submission.

The decision of these appeals must turn on the question whether the impartibility of the estate and the rule of lineal primogeniture by which succession to it was governed makes the suit properties the self acquired or exclusive properties of the plaintiff and, therefore, cannot be partitioned by metes and bounds between the members of the joint family. In Martand Rao v. Malhar Rao,(1) the Privy Council ruled as follows :

> "If an impartible estate existed as such from before the advent of British Rule, any settlement or regrant thereof by the British Government must, in the absence of

> evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom."

It also held in that case :

> "When there is a dispute with respect to an estate being impartible or otherwise the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which custom the estate is to be held by a single member, and as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and decendible to a single person, or that it is impartible and descendible by virtue of a special custom." "Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence."

The courts below in their well considered judgments have considered minutely and elaborately the whole of the evidence, both oral and documentary, led by both the parties on the question of custom, and have come to a definitive finding that the evidence is of little or no assistance to establish the alleged custom pleaded by the plaintiff as to the impartibility of the estate or the rule of lineal primogeniture. They have held in favour of the defendants on this basic issue and substantially dismissed the plaintiff's suit claiming full and exclusive title. That part of the judgment has rightly not been assailed before us, and the argument has proceeded on the footing that even if the Kundgol Deshgat Estate were an impartible estate, and that succession to it was governed by the rule of lineal primogeniture the incidents of impartibility of the watan as well as the rule of lineal primogeniture stand extinguished by Act No. 60 of 1950 and Act No. 22 of 1955.

It has always been the accepted view that the grant of watan to the eldest member of a family did not make the watan properties the exclusive property of the person who is the watandar for the time being. In order to understand the arguments on this point, it is necessary to deal with the incidents of a Deshgat watan. In the Bombay Presidency, it has always been treated to be the joint family property. It may be worthwhile to refer to the decision of the Privy Council in Adrishappa v. Gurshindappa,(1) the headnote of which is that :

> "Deshgat watan or property held as appertaining to the office of Desai is not to be assumed prima facie to be impartible. The burden of proving the impartibility lies upon the Desai, and on his failing to prove a special tenure or a family or district or local custom to that effect, the ordinary law of succession applies."

In a suit for partition of property forming part of a Deshgat estate brought by the younger brothers against their eldest brother who held the hereditary district office of Desai, partly within the State of Jamkhandi and partly within the territory of British India, the defence was that the watan was held by him as an impartible estate and that he was entitled being the watandar to be in full and exclusive possession thereof, subject to a right by custom, that a brother should receive maintenance out of

the income derived from it. The Court of first instance having found that there was no invariable rule against the partition of a Deshgat watan, the High Court refused to allow effect to be given to what had not been proved to be "the established governing rule of the family, class or district" sufficient to establish the impartibility of the estate and held that the watan in question was subject to the general Hindu law, including the presumption as to the right to partition belonging to the members of the family to which it had descended. The Judicial Committee upheld the decision of the High Court holding that there was no general presumption in favour of the impartibility of an estate of this kind as to shift the burden of proof; the burden of proof was upon the Desai, who seeks to show that the property devolved upon him alone, in contravention of the ordinary rule of succession according to the Hindu law, and that no sufficient evidence had been given by the watandar either of family custom, or of district custom, to prevent the operation of the ordinary rule of law whereby the property would be partible.

In Vinayak Waman Joshi Rayarikar v. Gopal Hari Joshi Rayarikar & Ors.,(1) the Court of first instance held that by custom a Deshgat Inam had become impartible and hence dismissed the suit for partition. On appeal, the High Court reversed upon the view that the mere fact that the management remained in the hands of the eldest branch was not sufficient to establish the plea that the estate was impartible. While affirming the decision of the High Court, the Privy Council followed its earlier decision in Adrishappa's case (supra), and agreed with the conclusion arrived at by the High Court that :

> "Neither by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession (if such there could be in a case like this, the eldest branch of the family acquired a right to perpetual management of the village or in consequence to resist its partition)."

It is a trite proposition that property though impartible may be the ancestral property of the joint Hindu family. The impartibility of property does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line.

As observed by Sir Dinshaw Mulla in his celebrated judgment in Shiba Prasad Singh v. Rani Prayag Kumari Debi & Ors (1) "The keynote of the whole position, in their Lordships view, is to be found in the following passage in the judgment in the Tipperah case :(2) "Where a custom is proved to exist, it supersedes the general" law, which, however, still regulates all beyond the custom"

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in Sartaj Kuari's(1) case and the first Pittapur case;(2) and so also the third as held in the second

Pittapur case.(3) To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in Baijnath's case.(4) To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivor ship still remains. Nor is this right a mere spes succession is similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate."

Since the decision of the Privy Council in Shiba Prasad Singh's case (supra), it is well-settled that an estate is impartible does not make it the separate and exclusive property of the holder : where the property is ancestral and the holder has succeeded to it, it will be part of the joint estate of the undivided family.

The incidents of impartible estate laid down by the Privy Council in Shiba Prasad Singh's case, supra, and the law as there stated, have been reaffirmed in the subsequent decisions of the Privy Council and of this Court : Collector of Gorakhpur v. Ram Sundar Mal & Ors.!(1) Commissioner of Income Tax, Punjab. v. Krishna Kishore(2) Anant Bhikappa Patil v. Shankar Ramchandra Patil (3) Chinnathavi Alias Veeralakshmi v. Kulasekara Pandiya Naicker & Anr(4). Mirza Raja Shri Pushavathi Viziaram Gajapathi Raj Manne Sultan Bahadur & Ors. v. Shri Pushavathi Viseswar Gajapathi Raj & Ors.(5) Rajah Velugoti Kumara Krishna Yachendra Varu & Ors. v. Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu & Ors.(6) and Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo & Ors.(7) In Collector of Gorakhpur v. Ram Sundar Mal's Case, supra, it was observed that though the decision of the Board in Sartaj Kuari's case and the First Pittapur's case appeared to be destructive of the doctrine that an impartible zamindari could be in any sense joint family property, this view apparently implied in these cases was definitely negatived by Lord Dunedin when delivering the judgment of the Board in Baijnath Prasad Singh's case. In Commissioner of Income Tax, Punjab v. Krishna Kishore's case dealing with an impartible estate governed by the Madras Impartible Estates Act, 1904, it was held that the right of junior members of the family for maintenance was governed by custom and was not based on any joint right or interest in the property as co-owners. In Anant Bhikappa Patil's case supra, it was observed that an impartible estate is not held in coparcenary though it may be joint family property. It may develove as joint family property or as separate property of the last male holder. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom e.g. lineal male primogeniture. In the latter case, jointness and survivorship are not as such in point the estate devolves by inheritance by the last male holder in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom.

In Chinnathavi's case. supra, it was observed that the dictum of the Privy Council in Shiba Prasad Singh case, supra, that to establish that an impartible estate has ceased to be joint family property for purposes of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. In Mirza Raja Gajapathi's case, supra, it was observed that an ancestral impartible estate to which the holder has succeeded by the custom of primogeniture is part of the joint estate of the undivided Hindu family. Though the other rights enjoyed by the members of a joint Hindu family are inconsistent in the case of an impartible estate, the right survivorship still remains. In Rajah Velugoti Kumara Krishna's case, supra, it was observed that the only vestige of the incidents of joint family property, which still attaches to the joint family property is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. In Bhaiya Ramanuj Pratap Deo's case, supra, the principles laid down by the Privy Council in Shiba Prasad Singh's case were reiterated.

In the course of argument, great reliance was placed on the two decisions of this Court in Mirza Raja Ganapathi's case, supra and Raja Velugoti Kumara Krishna's case, supra, for the proposition that the junior members of a joint family in the case of an ancient impartible joint family estate take no right in the property by birth and therefore have no right of partition having regard to the very character of the estate that it is impartible. To our mind, the contention cannot be accepted. Both the decisions in Mirza Raja Ganapathi's case, supra, and Raja Velugoti Kumara Krishna's case, supra, turned on the provision of the Madras Estates (Abolition & Conversion into Ryotwari) Act, 1948 and the Madras Impartible Estates Act, 1904. There are express provisions made in ss. 45 to 47 of the Abolition Act for the apportionment of compensation to the junior members of zamindari estates and sub.s (2) of s. 45 thereof provides for payment of the capitalised value of the compensation amount to them on the basis of extinction of the estate. The scheme of the Abolition Act therefore contemplates the continued existence of the rights of the holder of an impartible estate vis-a-vis the junior members of such an estate. The facts involved in those cases were also entirely different.

In Mirza Raja Ganapathi's case, supra it was a suit for partition for Vizianagram Estate, an ancient impartible estate governed by the Madras Impartible Estates Act 1904. The claim of the junior members regarding buildings which had been incorporated in the impartible estate as also their claim with regard to jewels treated as state regalia and therefore impressed with the family custom of impartibility was negatived. It was held that despite the fact that Vizinagram Estate had been notified to be an estate within the meaning of s.3 of the Madras Estate(Abolition and Conversion into Ryotwari) Act, 1948, the extinguishment of the proprietary right, title and interest of the zamindar did not affect his right or title to the impartible properties outside the purview of that Act and governed by the Madras Impartible Estates Act, 1904, but as regards other properties falling within the zamindari including lands were held to be partible. With regard to the buildings, it was held that the buildings in question were not partible by virtue of sub-s. (4) of s. 18 of the Act as the buildings falling within the section vested in "the person who owned them immediately before the vesting". The expression "the person who owned" in sub-s. (4) of s. 18 of the Act was held to refer to the land-holder and not to any other person. Further, the buildings were outside the limits of the

zamindari estate and therefore not covered by s. 3 of the Abolition Act. The claim with regard to jewels failed because they were part of the impartible estate.

In Raja Velugoti Kumara Krishna's case, supra, it was a suit for partition by the junior members of Vankatgiri Estate, an ancient impartible estate governed by the Madras Impartible Estates Act, 1904. The suit was principally confined to the claim for a share to the Schedule B properties. The contention was that the impartibility was continued under that Act but ceased when the estate vested in the State Government under s. 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 and this had the effect of changing character of the properties in the B Schedule and making them partible. It was said that the junior members had a present right in the impartible estate and were entitled to share in the properties once it lost its character of impartibility. The Court had to consider the effect of the Abolition Act on the rights and obligations of the members of the family and held that the Abolition Act has no application to properties which are outside the territorial limit of the Venkatgiri Estate. The claim that failed was in relation to properties which did not form part of a `zamindari estate' within the meaning of s. 1 (16) and therefore did not come within the purview of s. 3 of the Abolition Act but continued to be governed by the Madras Impartible Estates Act, 1904.

The contention that the plaintiff holding the District Hereditary Office of Desai and being the watandar of the Kundgol Deshgat Estate was entitled to remain in full and exclusive possession and enjoyment thereof to the exclusion of the other members of the joint Hindu family, runs counter to the scheme of the Bombay Hereditary Offices Act, 1874 (for short `the Watan Act'), and is against settled legal principles. The plaintiff's rights to such watan properties whatever they were, subject to the rights of the other members of the family.

The terms `Watandar' is defined in s. 4 of the Watan Act.

It reads :

> Watandar means a person having a hereditary interest in the Watan. It includes a person holding watan property acquired by him before the introduction of British Government into the locality of the watan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a watan or part of a watan subject to the conditions specified in sections 33 to 35".

If the words used in the definition are strictly and literally construed, it would mean that before a person can be said to be a watandar, he must have a hereditary interest both in the watan property and in the hereditary office, because it is these two that constitute the watan. There is no basis whatever for such a strict construction. The definition is undoubtedly in two parts : the first sets out what "watandar" means and the other states what is included in it and the question arises whether the primary definition i.e. the meaning portion of it should be regarded as primary and the inclusive part as illustrative or both the parts should be regarded as constituting one whole definition, the inclusive part being supplementary to the former. The controversy arising from the rival

constructions placed on the definition of "watandar" in s. 4 of the Watan Act was set at rest by the Full Bench decision of the Bombay High Court in Vijayasingrao Bala Saheb Shinde Desai v. Janardanrao Narayanrao Shinde Desai.(1) Prior to that decision, two conflicting constructions on the definition had been placed by two Division Benches of the Bombay High Court. In Kadappa v. Krishtappa,(2) an alienation of watan land by a watandar to his bhaubandh for maintenance was challenged and Rangnekar and Divatia, JJ. held that the alienation was valid beyond the life time of the watandar inasmuch as it was to a watandar of the same watan, in other words, the alience who was a bhaubandh to whom a watan land had been transferred for maintenance regarded as a watandar though he had no interest in the hereditary office and the rights and privileges attached to it. It would, therefore, appear that in Kndappa's case, supra; the entire definition of watandar in s. 4 was looked upon as one, the latter part being supplementary and additional to what is contained in the first part. In Smt. Tarabai v. Murtacharya.(3) Sir John Beaumont C.J. and Wadia, J. however, struck a discordant note. It was that a person who merely acquired a watan property without acquiring the office and without being under any obligation to perform services attached to the office was not a watandar within the meaning of the aforesaid definition; in other words, it held that the first part of the definition was exclusive and exhaustive, the latter part being merely illustrative and the illustrations given in the latter part should fall within the ambit of the exclusive definition given in the first part, that is to say, the primary definition of a "watandar" in s.4 was that he was a person having a hereditary interest in a watan, i.e. the office and a property if any, and the subsequent words were merely explanatory of the primary definition and did not curtail it. In view of this conflict, the specific question referred to the Full Bench in Vijayasingrao's case, supra, was "Whether the term `watandar' as defined in s. 4 of the Watan Act necessarily and always meant a person who had a hereditary interest not only in the watan property but also in the hereditary office". And, on a consideration of the scheme and the relevant sections of the Watan Act and the two earlier decisions, the Full Bench preferred the construction placed on the term 'watandar' in Kadappa's case, supra, and concluded that a person who acquired watan property or held hereditary interest in it without acquiring the hereditary office and without being under an obligation to perform the services attached to each office was also a "watandar' within the meaning of the Watan Act.

There can be no doubt that the Watan Act was designed to preserve the pre-existing rights of the members of joint Hindu family. The word 'family' is defined in s. 4 of the Watan Act to include 'each of the branches of the family descended from an original watandar' and the expression 'head of a family' is defined therein to include 'the chief representative of each branch of a family'. 'Representative watandar' defined in s. 4 meant 'a watandar registered by the Collector under section 25 as having a right to perform the duties of a hereditary office'. Section 5 of the Watan Act prohibited alienations of watan and watan rights. Clause

(a) of sub-s. (1) of s. 5. thereof, referred to a watander in general and provided that it would not be competent to such a watandar to mortgage, charge, alienate or lease, for a period beyond the term of his natural life, any watan, or any part thereof, or interest therein, to or for the benefit of any person who is not a watandar of the same watan, without the requisite sanction. The expression 'watandar of the same watan' occurs in many sections of the Act. As already indicated the term 'watandar' as defined in s. 4 includes the members of a joint Hindu family. It must follow as a necessary corollary

that the expression 'watandar of the same watan' would include members of the family other than the watandar, who were entitled to remain in possession and enjoyment of the watan property.

It is necessary to emphasize that commutation of service had not the effect of changing the nature of the tenure. The effect of the Gordon Settlement came up for consideration in The Collector of South Satara & Anr. v. Laxman Mahadev Deshpande & Ors.(1) when the Court referred to the decision in Appaji Bapuji v. Keshav Shamrav.(2) and quoted the following passage from the judgment of Sargent, C.J., with approval:

> "What is termed a Gordon Settlement was an Arrangement-entered into in 1864 by a Committee, of which Mr. Gordon, as Collector, was Chairman, acting on behalf of Government-with the watandars in the Southern Maratha Country, by which the Government relieved certain watandars in perpetuity from liability to perform the services attached to their offices in consideration of a 'judi' or quitrent charged upon the watan lands..... the reports of Mr. Gordon's Committee on the Satara and Poona Districts and their correspondence with Government can, we think, leave no doubt that the settlements made by that committee, unless it was otherwise, specially provided by any particular settlement, were not intended by either party to these settlements, to convert the watan lands into the private property of the vatandars with the necessary incident of alienability, but to leave them attached to the hereditary offices, which although freed from the performance of service remained intact."

The Court continued:

> "But the Commutation settlement does not confer an indefeasible title to the grantee, for the right affirmed by the settlement under s. 15(2) of the Watan Act is liable to be determined by lapse, confiscation or resumption (s. 22 of the Watan Act). The State having created the watan, is entitled to put an end to the watan i.e. to cancel the watan and to resume the grant (1): Bachharam Datta Patil v. Vishwanath Pundalik Patil.(1) Therefore if there be mere commutation of service, the watan office ordinarily survives without liability to perform service, and on that account the character of watan property still remains attached to the grant. But the State Government may abolish the office and release the property from its character as watan property."

The Court then dealt with the scheme of the Act No. 60 of 1950 and observed that in the light of the incidents of the watan and the property granted for remuneration of the watandar, that the relevant provisions of the Act had to be considered in regard to the right of the watandar to regrant of the watan lands. It was observed that on a combined operation of sub-s. (3) of s. 3 and s. 4 of the Act, the holder of the watan land is entitled to regrant of the land in occupancy rights as an unalienated land. As to the effect of the legislation, it was observed that s. 3 in terms provides for abolition of the watan, extinction of the office and modification of the right in which the land is held. The abolition, extinction and modification arise by operation of s. 3 of the Act, and not from the exercise of the

executive power of confiscation or resumption by the State, and it was then said:

> "Undoubtedly the power of resumption of a watan may be exercised under s. 22 of the Watan Act and such a resumption may destroy the right of the holder both to the office and the watan land, and in the absence of any provision in that behalf no right to compensation may arise. But where the abolition of the watan is not by executive action, but by legislative decree, its consequences must be sought in the statute which effectuates that abolition."

As to the effect of the resumption of the watan lands under sub-s. (3) of s. 3 and their regrant under sub-s. (1) of s. 4 of the Act it was observed:

> "It must be remembered that the power which the State Government always possessed by the clearest implication of s. 22 of the Bombay Hereditary Offices Act, 1874, of resumption is statutorily enforced by s. 3 in respect of the Paragana and Kulkarni Watans. The State Government having the power to abolish a watan office, and to resume land granted as remuneration for performance of the duties attached to the office was not obliged to compensate the watandar for extinction of his rights. But the Legislature has, as a matter of grace, presumably because of settlement between the holders and the Government under the Gordon Settlement, provided by s. 6 that cash compensation be awarded for loss of the right to cash allowance or remission of land revenue and has by s. 4 conferred upon the holder of the watan land, for loss of his right, a right to regrant of the land as occupant and free from the obligation imposed by its original tenure as watan land..... But the operation of s. 3 all Paraganas and Kulkarni watans falling within the Act are abolished, the right to hold office is extinguished, and the land granted as remuneration for performance of service is resumed. The holder of the land is thereafter liable to pay land revenue, and is entitled, on payment of the occupancy price at the prescribed rate, to be regranted occupancy rights as if it is unalienated land. The right so conferred is, though not a right to cash compensation, a valuable right of occupancy in the land. By the resumption of watan land and regrant thereof in occupancy right, all the restrictions placed upon the holder of watan land are by the provisions of the Watan Act, and the terms of the grant, statutorily abolished. But the right of occupancy granted by s. 4 adequately compensates the holder for loss of the precarious interest of a watandar, because the land regranted after abolition of the watan, is held subject only to the restrictions imposed by sub-s. (2) of s. 4, and is freed from the incidents of watan tenure, such as restriction on alienation beyond the life time of the holder, devolution according to the special rule of succession, and the liability to consideration or resumption."

It must therefore be observed that the commutation of service under sub-s. (1) s. 15 of the watan lands by which the watandars were relieved in perpetuity from liability to perform the services attached to their offices in consideration of 'judi' or quit-rent charged upon the watan land, unless where it was otherwise provided for, had not the effect of converting watan land into the private

property of the watandars with the necessary incident of alienability but to leave them attached to the hereditary offices which, although freed from the performance of services, remained intact. Despite commutation of service, the office of watandars ordinarily survived without liability to perform service, and on that account the character of the watan lands still remained attached to the grant. By the end of the first half of the 19th century, the watandars had lost much of their raison d'etre. The British thought it expedient to dispense with their services and the watandars were given an offer to convert their watans into private property by the annual payment of a Nazrana but they were opposed to this. At their own request, the Government agreed to continue their watans as unalienable after the service commutation settlements, subject to payment of 'judi' or quit-rent. After the service commutation settlements and the appointment of Mamlatdars, the watandars had practically no function to perform but the watans were not discontinued till the Government decided upon their abolition.

It is said that although co-ownership of the joint family may exist in impartible property, a distinction must be drawn between present rights and future rights of the members of a family. This is because of the peculiar character of the property. Thus, while the junior members have future or contingent rights such as right of survivorship, they have, apart from custom or relationship, no present rights, as for instance, a right to restrain alienation or to claim maintenance. It is upon this basis that the submission is that the courts below manifestly erred in passing a decree for partition of the watan property described in Schedules B and C appended to the plaint. We are afraid, these submissions based upon the alleged impartibility of the watan properties or the applicability of the rule of lineal primogeniture regulating succession to the estate cannot prevail, as these being nothing more than incidents of the watan, stand abrogated by sub-s. (4) of s. 3 Act No. 60 of 1950 and s. 4 of Act No. 22 of 1955.

It seems plain to us that the effect of Act No. 60 of 1950 and Act No. 22 of 1955 was to bring out a change in the tenure or character of holding as watan land but they did not affect the other legal incidents of the property under personal law. It will be convenient to deal first with the provisions of Act No. 60 of 1950. Section 3 of the Act lays down that, with effect from, and on, the appointed day, notwithstanding anything contained in any law, usage, settlement, grant, sanad or order, all watans shall be deemed to have been abolished and all rights to hold office and any liability to render service appertaining to the said watans shall stand extinguished. It further lays down that subject to the provisions of s. 4, "all watan land is hereby resumed" and "shall be deemed to be subject to the payment of land revenue under the provisions of the Code and the rules made thereunder as if it were an unalienated land". The term 'Code' as defined in s. 2 (b) means "the Bombay Land Revenue Code, 1879". All incidents pertaining to the said watans stand extinguished from the appointed day.

Sub-s. (1) of s. 4 of the Act, insofar as material, provides:

"4 (1). A watan land resumed under the provisions of this Act shall..... ..be regranted to the holder of the watan to which it appertained, on payment of the occupancy price..... and the holder shall be deemed to be an occupant within the meaning of the Code in respect of such land and shall primarily be liable to pay land revenue to the State Government in accordance with the provisions of the Code and the rules made thereunder; all the provisions of the Code and rules relating to

unalienated land shall, subject to the provisions of this Act, apply to the said land."

Clause (2) of Explanation to s. 4 reads:

"Explanation-For the purposes of this section the expression "holder" shall include-

(i) all persons who on the appointed day are the watandars of the same watan to which the land appertained, and xx xx xx The provisions of Act No. 22 of 1955 are more or less similar. Likewise, s. 4 of the Act provides that, notwithstanding anything contained in any usage, settlement grant etc., with effect from the appointed day, all alienations shall be deemed to have been abolished and all rights legally subsisting on the said date in respect of such alienations and all other incidents of such alienation shall be deemed to have been extinguished. Section 7 of the Act provides that "all land held under a watan is hereby resumed" and "shall be regranted to the holder in accordance with the provisions contained in sub sections (1) to (3) therein. Clause (1) of Explanation to s. 7 reads:

"Explanation-For the purpose of this section, the expression "holder" shall include-

(1) an alienee holding land under a watan, and (2) xx xx xx xx Upon a plain reading of sub-s. (1) of s. 4 of Act No. 60 of 1950 and of s. 7 of Act No. 22 of 1955, it is clear that watan lands resumed under the provisions thereof, have to be regranted to the holder of the watan, and he shall be deemed to be an occupant within the meaning of the Code in respect of such land.

The expression 'holder' as defined in cl. (i) Explanation to s. 4 of the former Act includes "all persons who, on the appointed day, are the watandars of the same watan" and cl. (1) of Explanation to s. 7 of the latter Act defines it to include 'an a lienee holding land under a watan". The term "an alienee" is defined in s. 2 (1) (iii) to mean "the holder of an alienation and includes his co-sharer".

The Watan Act contemplated two classes of persons. One is a larger class of persons belonging to the watan families having a hereditary interest in the watan property as such and the other a smaller class of persons who were appointed as representative watandars and who were liable for the performance of duties connected with the office of such watandars. As already indicated, it would not be correct to limit the word "watandar" only to this narrow class of persons who could claim to have a hereditary interest both in the watan property and in the hereditary office. Watan property had always been treated as property belonging to the family and all persons belonging to the watan family who had a hereditary interest in such watan property were entitled to be called "watandars of the same watan" within the Watan Act. That being so, the members of a joint Hindu family must be regarded as holders of the watan land along with the watandar for the time being, and therefore the regrant of the lands to the watandar under sub-s. (1) of s. 4 of Act No. 60 of 1950 and under s. 3 of Act No. 22 of 1955 must enure to the benefit of the entire joint Hindu family.

It appears that the same view has been taken in a Full Bench decision of the Bombay High Court in Laxmibai Sadashiv Date v. Ganesh Shankar Date(1).

A controversy had arisen as to the purport and effect of the non-obstante clause contained in s. 4 of the Bombay Inferior Village Watans Abolition Act, 1959. Malvankar, J. in Dhondi Vithoba v. Mahadeo Dagdu(2) held that the effect of sub-s. (3) of s. 4 read with s. 5 of the Act was to bring about a change in the tenure or character of holding as Watan land, but it did not affect the other legal incidents of the property under personal law. The learned Judge therefore held that even though the watan was abolished and the incidents thereof were extinguished and the land resumed under s. 4, the Act maintained the continuity of the interest in the lands of persons before and after the coming into force of the Act provided, of course, the holder pays occupancy price in respect of the land. In other words, the property continues to be the joint family property or the property held by the tenants-in-common, as the case may be. In Kalgonda Babgonda v. Balgonda,(1) a Division Bench of the High Court took a view to the contrary and observed:

> "The words "all incidents appertaining to the said watans shall be and are hereby extinguished", must include every kind of incident, including the so-called incident of a right to partition as claimed by the plaintiff in this case, even if such right existed. Further, the lands were resumed by the Government on that date in law and vested in the Government till the lands were re-granted under s. 5 or 6, or 9 of that Act."
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> xx xx xx xx "It is not possible for us to consider it reasonable to held that although the lands were resumed by the Government and the holder himself had lost all his rights till the lands were re-granted to him except the right of asking, for re-grant, the incidents of the property under personal law appertaining to impartible property would survive the extinguishment of the tenure and resumption of the land by the State."

It was obviously wrong in reaching the conclusion that it did.

In Laxmibai Sadashiv Date's case, supra, the Full Bench reversed the decision of the Division Bench and upheld the view taken by Malvankar, J. in Dhondi Vithoba's case, supra, observed:

> "It is undoubtedly true that s. 4 starts with a non-obstante clause, but it is a well recognised canon of construction to give effect to non-obstante clause having regard to the object with which it is enacted in a statute. The non-obstante clause is contained at the inception of s. 4 and the sole object of s. 4 is to abolish alienation and rights and incidents in respect thereof. The right of a member of joint Hindu family to ask for partition of a joint family property cannot be regarded as a right relating to grant of land as service inam or as an incident in respect thereof.
>
> xx xx xx xx The object of s. 4 was not to affect in any manner rights created under the personal law relating to the parties and if the property belonged to joint Hindu family, then the normal rights of the members of the family to ask for partition were not in any way affected by reason of the non-obstante clause contained in s. 4."

These observations, in our opinion, are clearly in consonance with the true meaning and effect of the non- obstanate clause.

It still remains to ascertain the impact of sub-s (2) of s. 4 of Act No. 60 of 1950 and sub-s. (3) of s. 7 of Act No. 22 of 1955, and the question is whether the occupancy of the land regranted under sub-s. (1) of s. 4 of the former Act and sub-s. (2) of s. 7 of the latter Act is still impressed with the character of being impartible property. All that these provisions lay down is that the occupancy of the land regranted under sub-s. (1) of s. 4 of the former Act shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may, by general or special order, determine. It is quite plain upon the terms of these provisions that they impose restrictions in the matter of making alienations. On regrant of the land, the holder is deemed to be an occupant and therefore the holding changes its intrinsic character and becomes Ryotwari and is like any other property which is capable of being transferred or partitioned by metes and bounds subject, of course, to the sanction of the Collector and on payment of the requisite amount.

It is the policy of the law to prevent the land-working classes being driven into the state of landless proletariats so far as may be, and accordingly it is provided by these provisions that alienations of such holdings or partition thereof shall be ineffective unless the sanction of the Collector has first been obtained. It is of the utmost importance that this important safeguard should be maintained in full force and effect so that the parties must exactly know what they have bargained for. The condition for the grant of sanction by the Collector as a pre-requisite for a valid transfer of a holding or the making of a partition by metes and bounds, is to ensure that the actual tiller of the soil is not deprived of his land except for valid consideration, or that the partition effected between the members of a family is not unfair or unequal. These provisions therefore do not create a statutory bar to a transfer or a partition once the conditions mentioned therein are fulfilled.

In the result, the appeals must fail and are dismissed. There shall however be no order as to costs.

P.B.R. Appeals dismissed.