

SA 285/1934

In His Majesty's High Court of Judicature,
Appellate Side, Bombay

(CIVIL JURISDICTION)



Appeal
Civil Revision Application No. 285 of 1934 from Original Appellate Decree

Putalaji Vishram Desai;
and others

Appellant ✓
Applicant

(Original Defts.)
11, 15, 17, 20, 22, 26, 28
30 & 32.

versus

Damodar Vishram Vaidya;
and others. (Original Plff &
Defts No. 158 & heirs of Defts No. 9
& 10 & 15, 19, 21's heirs, 23 & 25, 27 & 31

Respondent ✓
Opponent

(Original)

Claim Rs.

„ for Advocate's fee.

Advocate for Appellant Applicant — Mr. *A. A. Idarkar*

Advocate for Respondent Opponent — Mr. *G. V. Desai to No. 1.*

In His Majesty's High Court of Judicature,
Appellate Side, Bombay

S. APPEAL No. 285 of 1934
CIVIL REVISION APPLICATION

District Ratnagiri

No. of paper.

Particulars.

I. Papers to be preserved.

- 1 Copy of the Judgment of the lower appellate Court if printed.
- 2 Copy of the Judgment of the original Court (if printed).
- 3 Interlocutory Judgment of the High Court (if any).
- 4 Findings.
- 5 2 Judgment (Final) of the High Court.
- 6 3 Decree of the High Court.
- 7 Judgment in Review Petition.
- 8 Judgment of the High Court in the matter of leave to appeal to the Privy Council.
- 9 Judgment, decree and order of the Privy Council.
- 10 Printed copy of the Privy Council record.
- 11 Memo. of appeal in appeals or applications summarily dismissed.

II. Papers to be destroyed under the Rules.

- 1 Memo. of appeal (in admitted cases).
- 2 Manuscript copy of the Judgment of appellate Court.
- 3 Manuscript copy of the decree of appellate Court.
- 4 Manuscript copy of the Judgment of original Court.
- 5 Manuscript copy of the decree of original Court.
- 5A Application for return of the above copies.
- 6 Vakalatnama of Mr. A. A. Adarkar for the appellant.
- 7 Civil application for delay being excused with affidavit.
- 8 Application for copies.
- 9 Application for search.
- 10 Letter intimating dismissal where the order is of dismissal.
- 11 7 Notice.
- 12 8 Letter transmitting notice with District Judge's endorsement thereon, etc.
- 13 8A R. and P. writ.

14 9 Application No. 140 of 1935 for substitution of heirs.
fresh notice.

10. Notice

11. Letter transmitting notice with D.J.'s endorsement thereon

12. *Applic. NO. 1016/35 for fresh notice.*
 13. *Notice*
 14. *Letter transmitting notice with D.J's endorsement thereon.*
 14A. *Applic. NO. 1019/35 for fresh notice*
 No. of paper. Particulars.

15 *15* Fresh Notice (to heir).

16 Letter transmitting notice with District Judge's endorsement thereon, etc.

17 *Applic. NO. 241/36*

18 Vakalatnama of Mr. _____ for the respondent.

19 *Letter transmitting notice*

20 Memo. of cross-objections.

20 *Applic. NO. 881/36*

21 Application for copies.

21 *Notice*

22 Application for search.

22 *Letter transmitting notice*

23 Writ sending down issues when there is a separate Judgment.

23 *Vakalatnama of Mr. J.V. Desai for respondent*

24 Notice of receipt of findings.

24 *Memo of cross-objections*

25 Objections to findings.

25 *25* Writ communicating final decree or order to the lower Court.

26 Receipt of R. and P. by the District Judge.

27 Review Petition.

28 Affidavit in support of do. if any.

29 Vakalatnama if any.

29A Application for a certificate to appeal under the Letters Patent.

30 Application for leave to appeal to His Majesty's Privy Council.

31 Notice in do.

32 Writ for R. and P. in do.

33 Certificate granting leave to appeal.

34 Writ or letter of intimation in cases where rule is discharged.

35 Receipt of papers.

Clerk.

8988
 Assistant Sheristedar.

1572/38

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

day the

day of

193

APPEAL No. 285 OF 1934 FROM APPELLATE DECREE.

1 Putalaji Vishram Desai; 2 Gopal Santaji Desai;
 3 Jagannath Narayan Desai; 4 Gopal Taty Desai;
 5 Baji Narayan Desai; 6 Dattatraya Ramchandra Mulye;
 7 Yeshwant Narayan Mulye; 8 Kashinath Ganesh
 Puranik; 9 Anant Parasharam Kulkarni; 10 Rajaram Bal-
 want Kolvankar; 11 Bacha Balu Gurav; 12 Ragho
 Laxman Padya; 13 Krishna Panda Barguda. } *Appellants.*
 (Original Defendants Nos. 11 to 17 and 20, 22, 26, 28, 30
 and 32)

versus

1 Damodar Vishnu Vaidya; 2 Krishnaji Keshav Vaidya;
 3 Ramchandra Keshav Vaidya; 4 Vishwanath
 Narayan Bapat; 5 Shankar Narayan Bapat;
 6 Dattatraya Narayan Bapat, minor by his guardian
 Respondent No. 4 Vishwanath Narayan Bapat; ~~Govind~~
~~Krishna Ranade~~; 8 Shridhar Narayan Vaidya; 9 Udhav
 Ballal Vaidya; 10 Dhondo Vasudeo Vaidya; 11 Shriram
 Vasudeo Vaidya; 12 Yeshwant Vasudeo Vaidya;
 Nos. 10 to 12 heirs of the deceased Vasudeo Ballal Vaidya;
 13 Damodar Bhaskar Vaidya; 14 Ganesh Pandurang
 Mulye; 15 Vasudeo Vishnu Mulye; 16 Padmakar alias
 Raoji Ganesh Mulye; 17 Ramkrishna Vaman Mulye;
 18 Kashinath Vaman Mulye; 19 Dattatraya Vaman
 Mulye; Nos. 18 and 19 minors by their guardian *ad litem*
 Satyabhamabai w/o Vaman Ganesh Mulye; 20 Radhabai
 kom Krishnaji Ganesh Mulye; 21 Narayan Ramchandra
 Kulkarni; 22 Keshav Sakharan Kulkarni; 23 Laxman
 Anant Nimkar; 24 Raghunath Govind Kulkarni; 25 Balka
 Ganu Sitap; 26 Zilu Rama Sitap. } *Respondents.*
 (Original Plaintiffs and Defendants Nos. 1 to 8 and heirs
 of Defendant No. 9, and 10 and 18, 19, 21's heirs, 23,
 24, 25, 27, 29, 31)

+ 7. Narayan Keshav
 Ranade, President
 of managing board,
 Sanskrit Pathshala
 Ratnagiri.
 substituted vide Court's
 order of 8-11-35 in C.A.
 1019/35.

Claim—Rs. 215.

Rs. 215 for Advocate's fees.

The Plaintiff sued to obtain a declaration that he and Defendants Nos. 3 to 10 were the Inamdars of all rights to trees, canals, water courses etc., standing on or existing in Mouje Kondye, and that as Inamdars they were entitled to all kinds of lands, stone, quarries etc. to obtain a permanent injunction to Defendants Nos. 11 to 32 and all persons claiming under them preventing them from doing any act prejudicial to the Plaintiff's rights.

The Original Suit No. 458 of 1929 was decided by the Subordinate Judge of Devrukh, who dismissed it ordering the parties to bear their own costs.

The Appeal No. 339 of 1931 of the District File was decided by the District Judge of Ratnagiri, who reversed the decree of the Court of first instance and decreed the claim with costs in both the Courts and dismissed Defendants Nos. 13's and 16's cross-objections with costs.

An appeal has been admitted in the High Court from the decision of the lower court. Notice was ordered to issue by the Honourable Mr. Justice Divatia on the 1st day of August 1934.

The grounds of objection to the decision appealed against are :—

1. The decision of the lower Appellate Court is wrong in law.
2. The Inamdar's sanads have not been properly construed. They are merely grantees of the revenue.
3. Dharekari-Mahajans' (Defendants Nos. 16 to 20) sanad has not been properly construed.
4. Pleadings have not been properly understood.
5. It is erroneous in law to hold that the Inamdars are the owners of the soil, viz. quarries, minerals, timber, fuel, growing on the village lands occupied and unoccupied, such as Ain, Kinjal, Nana, Teak, Sisav, Khair, Tahman and Jack.
6. It should have been held that the Inamdars were not in possession of the several rights claimed by them and that therefore they could not maintain a suit for declaration.
7. At any rate, having regard to the priority of occupation of the different classes of holders, it should have been held that the grant of the Inamdars was one of revenue only.
8. It should have been held that the grant, if one of the soil, was subject to the rights by the parties existing before the date of the Inamdars' grant which embraced all the items claimed by the Plaintiff.
9. The evidence of the Plaintiff and Defendant No. 16 and exhibit 160, when properly read, was sufficient to non-suit him—the Plaintiff.
10. Proper weight has not been given to the Plaintiff's admissions.
11. The lower Appellate Court has erred in law in holding that the Inamdars are owners of timber and fuel trees.
12. It is erroneous in law to hold that the Inamdars are owners of such trees standing or growing on lands permanently occupied by Khots, Dharekaris and Kuls.
13. The lower Appellate Court has not properly understood and appreciated the respective rights of the Khots, Dharekaris and Kuls.
14. It should have been held that the Khots by virtue of their *khoti* are entitled to several items claimed by the Plaintiff.
15. It should have been held that at any rate the Khots have proprietary interest in lands in their permanent occupation as *khoti nisbat* or *khoti khasgi* and are entitled to the trees standing on their lands.
16. It should have been held that the Dharekaris own a proprietary interest in their lands, and are therefore the owners of the trees in their holdings and are entitled to the several items claimed by the Inamdar.
17. The sale-deeds, exhibit 140 for instance, which the Khots used to pass, show that they—the Khots—were the owners of the trees.
18. It should have been held that the Kuls are entitled to the trees standing on the lands in their occupation.
19. It should have been held that the occupation of the lands by Khots and Dharekaris before the inam grant of the Appellant had vested in them, the proprietary rights over their lands which the subsequent grant could not divest.
20. It is an error to hold that the Khots holding *khoti nisbat* or *khoti khasgi* lands and the Dharekaris holding their *dhara* are no better than the occupants as defined by section 3, clause (16) of the Land Revenue Code.
21. It should have been held that the Kuls have a claim over the items claimed by the Plaintiff.
22. The lower Appellate Court has not approached the case from the correct point of view.
23. The declaration and injunction prayed for should have been totally refused.
24. It should have been held that the Inamdars are not the owners of the soil, quarries, minerals, all kinds of timber, jungle trees such as Ain, Kinjal, Nana, Sisav, Teak, Khair, Tahman and Jack, standing on all lands in the village, whether permanently occupied or otherwise.

25. It should have been held that the contending Defendants have acquired rights by custom and adverse possession to the items claimed by the Plaintiff.

26. The Plaintiff's suit is barred by time.

27. A new case has been made out for the Plaintiff.

28. Pleadings have not been properly understood.

29. Plaintiff's suit should have been dismissed in its entirety with costs.

30. Order as to costs is wrong.

31. Damages should not have been awarded.

32. It is an error to hold that the Khots, Dharekaris and Kuls must seek for the Inamdar's permission to take timber for their building purposes and agricultural purposes.

33. It is erroneous in law to grant an injunction against the Khots, Dharekaris and Kuls in the terms described in the lower Appellate Court's decree, restraining them from interfering with the Inamdar's rights which have been declared by the decree of the District Court.

34. It should have been held that so far as Defendants Nos. 11 to 15 are concerned, the present suit is barred by *res judicata* by reason of the decision in Suit No. 638 of 1901, to which Defendants Nos. 7 to 10 were parties.

35. It should have been held that in any case the rights of Defendants Nos. 16 to 20 have been reserved in the Plaintiff's sanad.

Sanad
order 45-4-72 on 24
10/7/25

Appeal filed on 21st December 1931.

Appeal decided on 29th September 1933.

Duration of the Appeal—One year, nine months and eight days.

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EXHIBIT 56.

In the District Court of Ratnagiri, at Ratnagiri.

20 APPEAL No. 339 OF 1931 FROM DECREE IN REGULAR CIVIL SUIT
No. 458 OF 1929 OF THE COURT OF THE SUBORDINATE
JUDGE (MR. S. A. LAL) OF DEORUKH

Damodar Vishnu Vaidya, aged 62, Brahmin, agriculturist and
Khoti, residing at Kondye, taluka Sangameshwar (original APPELLANT ;
Plaintiff)
(Pleaders—Messrs. Nanal and Chitale.)

against

- 30 (1) Krishnaji Keshav Vaidya, aged 34, Brahmin, service,
Bombay ; (2) Ramchandra Keshav Vaidya, aged 31,
Brahmin, service, Bombay ; (3) Vishwanath Narayan
Bapat, aged 34, Brahmin, service, Bombay ; (4) Shankar
Narayan Bapat, aged 24, Brahmin, service, Bombay ;
(5) Dattatraya Narayan Bapat, minor by his guardian
No. 3 ; (6) Govind Krishna Ranade (Manager and Pre-
sident of Sanskrit Pathashala), aged 46, Brahmin, trader,
residing at Ratnagiri ; (7) Shridhar Narayan Vaidya,
aged 57 ; (8) Udhao Ballal Vaidya, aged 57 ; (9) Vasudeo
40 Ballal Vaidya, deceased by his heirs : (1) Dhondu Vasudeo
Vaidya, aged 35, (2) Shivram Vasudeo Vaidya, aged 32,
(3) Yeshvant Vasudeo Vaidya, aged 30—all Brahmins,
service, residing at Mahad ; (10) Damodar Bhaskar Vaidya,
aged 31—Nos. 7 to 10, Brahmins, No. 7 residing at Bombay,
No. 8 at Nandivade, taluka Ratnagiri, No. 9 at Mahad,
No. 10 at Sangli ; (11) Putalaji Vishram Desai, aged 59 ;
(12) Gopal Santaji Desai, aged 61 ; (13) Jagannath Narayan
Desai, aged 47 ; (14) Gopal Tatya Desai, aged 66 ; (15) Baji
Narayan Desai, aged 51—Nos. 11 to 15 Marathas, agricul-
50 turists residing at Kondye, taluka Sangameshwar ;
(16) Dattatraya Ramchandra Mulye, aged 46 ; (17) Yeshwant
Narayan Mulye, aged 33 ; (18) Ganesh Pandurang
Mulye, aged 33—Nos. 16 to 18 Brahmins, service—
No. 16 residing at Medhe, taluka Sangameshwar, No. 17
at Bombay ; (19) Vasudeo Vishnu Mulye, aged 66 ;
(20) Kashinath Ganesh Puranik, aged 26 ; (21) Padmakar
alias Raoji Ganesh Mulye, aged 26 ; (22) Ramkrishna
Vaman Mulye, aged 26 ; (23) Kashinath Vaman Mulye, aged
16 ; (24) Dattatraya Vaman Mulye, aged 12 ; (25) Radhabai
60 *kom* Krishnaji Ganesh Mulye, aged 33—Nos. 19 to 25
Brahmins, Nos. 19 and 20 agriculturists, Nos. 21 and 22
service, Nos. 23 and 24 schooling and No. 25 housework,
Nos. 19, 20, 22 to 25 residing at Kondye, taluka Sangamesh-
war, No. 21 Bombay, Nos. 23 and 24 minors by their
guardian *ad litem* Satyabhamabai *kom* Vaman Ganesh

Mulye residing at Kondye, taluka Sangameshwar; (26) Anant Parsharam Kulkarni, aged 29; (27) Narayan Ramchandra Kulkarni, aged 41; (28) Keshav Sakharam Kulkarni, aged 41; (29) Laxman Anant Nimkar, aged 41; (30) Rajaram Balshet Kolvankar, aged 36; (31) Raghunath Govind Kulkarni, aged 41; (32) Bacha Balu Gurao, aged 51; (33) Balka Ganu Sitap, aged 56; (34) Ragho Laxman Padya, aged 32; (35) Zilu Rama Sitap, aged 41; (36) Krishna Panda Barguda, aged 41; Nos. 26 to 29 and 31 Brahmans, No. 30 Vani, No. 32 Gurao, Nos. 33 to 36 Kunbi. Nos. 26 and 32 to 36 agriculturists—No. 30 trader, No. 31 trader and Khoti, Nos. 27 to 29 service—No. 27 residing at Ratnagiri, No. 29 at Islampur, No. 30 Phungus, taluka Sangameshwar, No. 31 Phungus, taluka Sangameshwar, Nos. 26 and 32 to 36 residing at Kondye, No. 28 at Bombay (original Defendants)

RESPONDENTS.

(Pleaders—Mr. G. R. Purohit for Respondents Nos. 13 and 16; Mr. N. V. Shitut for Respondent No. 16; Rest absent)

CLAIM—Rs. 100 for Court-fee.

Rs. 300 for jurisdiction.

The suit which gives rise to this appeal was brought by the Plaintiff-Appellant, under Order I, rule 8, of the Civil Procedure Code, against the representatives of different classes of holders of land in the inam village of Kondye to establish certain rights which the Appellant claimed to be incidental to his inam. The suit was principally raised against three classes of holders, namely, the Khots, the Dharekaris and the Kuls or permanent tenants, and I shall presently describe the reliefs claimed by the Appellant.

2. A few material facts which are common ground among the different parties might be stated at the outset. With the exception of 5 bighas of land which are kadim or prior inam, the entire village of Kondye, taluka Sangameshwar, was granted as personal or jat inam to the ancestors of Defendants Nos. 1 to 10 by the Peshwa Government, in the year 1778. A copy of the original sanad is exhibit 105. The grant was confirmed by the British Government under the Summary Settlement of 1863, by the sanad exhibit 109, subject to the holders paying to the Government an annual quit rent or *judi*. Defendants Nos. 1 and 2 who held a four-anna share in the inam grant sold it to the present Appellant by the deed, exhibit 108, dated 15th November 1923. Thus the Appellant and Defendants Nos. 3 to 10 are the present holders of the inam village, except of course the 5 bighas of kadim inam.

3. The village is also what is known as a *khoti khichadi* village; that is to say, the village lands are in the occupation of certain classes of holders among whom might be mentioned, for the purposes of this appeal, the Dharekaris and the Kuls. The Khots are also in occupation of several lands as *khoti khasgi* or *khoti nisbat*. The Sawants known in this suit as the Desais, represented by their leaders Defendants Nos. 11 to 15, owned the entire *khoti* at one time. More than a century ago, they parted with an eight-anna share of the *khoti* in favour of one Biwalkar by sale. His successor got the share partitioned by means of a decree in 1888, and later sold it to the Plaintiff-Appellant in 1897, by the deed exhibit 140. The Appellant is thus both an Inamdars and a Khot of a moiety, the other moiety being owned by the Desais. Defendants Nos. 16 to 26 are representatives of the Dharekaris, the highest class of the privileged occupants of the village, who permanently occupy their lands on payment of no more than the assessment levied on them. Some of them, namely, Defendants Nos. 16 to 19 are, in addition, the Kadim Inamdars of 5 bighas of land under a grant similar to that of the Appellant made by the Peshwa Government in 1728. Exhibit 127 is their sanad. The status of Defendant No. 27 cannot be ascertained with precision, and he seems to have been impleaded because he is the purchaser of certain timber alleged to have been wrongfully felled by Defendant No. 18. The remaining Defendants Nos. 28 to 32 are the leaders of the Kuls or permanent tenants of the village.

4. The Appellant's main prayer was a declaration that the Inamdars were the owners of the soil of the village, the rest of the reliefs being vindications of rights alleged to be incidental to such ownership. Briefly described, the Appellant claimed ownership of the soil, namely, quarries and minerals; timber and fuel growing on the village lands, occupied and unoccupied, such as Ain, Kinjal, Nana, Teak, Sisav, Khair, Tamhan and Jack. He also included the mango in the category. Further, the Appellant asked for a declaration of his right as an Inamdar to rushes and reeds growing spontaneously by the river side. He asked for an injunction to restrain the several classes of holders from interfering with the Inamdar's ownership of these several items, and claimed a sum of Rs. 95 for value of the timber alleged to have been wrongfully felled by Defendant No. 18 and bought by Defendant No. 27.

5. The co-Inamdars, Defendants Nos. 3 to 10, made common cause with the Appellant, and supported his claim. The Khots, the Dharekaris and Kuls joined hands in resisting it. Their common defence was that the Inamdars were only grantees of the revenue, and were therefore not entitled to anything more than the assessment payable by the different holders. Alternatively, they contended that in case the grant was held to be one of soil, it was subject to the right of the parties existing before the date of the grant which, they contended, embraced an ownership of all the items claimed by the Appellant.

6. Mr. S. A. Lal, Subordinate Judge, Deorukh, dismissed the Appellant's suit holding, in the first place, that the Inamdars were not in possession of the several rights claimed by them, and therefore could not maintain a suit for declaration. He further held that it was timebarred under Article 120 of the Limitation Act. Next, he held that although the inam grant was one of soil, it was subject to such rights as had been carved out in favour of the different holders of land before the date of the grant. In substance, he held that although the grant to the Inamdars purported to be one of the soil, it was no better than a grant of revenue having regard to the priority of occupation of the different classes of holders. The contending Respondents in this appeal are the Khots and the Dharekaris. The third class of holders, namely, Kuls do not put in any appearance, nor do the co-Inamdars.

7. Before I set the points for determination it will be well to clear a great deal of ground in view of reciprocal concessions made in appeal. The learned trial Judge has recorded an exhaustive judgment running over 40 typed pages from which I have derived the greatest assistance. A greater part, however, is taken up by the consideration of the question of the Inamdars' possession of the several rights alleged to be incidental to the ownership of the soil. The learned Judge appears to have thought that physical occupation of the lands by the Inamdars was an inseparable accident of their possession of such rights. And having found that the village lands were in the occupation of several classes of holders, a fact which was never denied, the learned Judge came to the conclusion that a suit for declaration was incompetent. The finding on the point of limitation followed as a corollary. But the learned Judge seems to have overlooked an important aspect of the case. It was not the case of the Inamdars that they were entitled to actual possession of the lands. Moreover, Kondye is a *khoti* village and the right to occupy and cultivate village lands lies in the Khots having regard to their undisputed position as farmers of land revenue. Occupation is a parcel out of the totality of rights, connoted by the ownership of the soil. A grant of the occupation by either the Government or by its grantee will not derogate from their general rights of ownership. In other words, the owner of soil can carve out certain rights and grant them to others while retaining the rest. Therefore, the grant of a right of occupation will not necessarily annihilate the rest of the rights of ownership which the State or its grantee may yet possess. In such a case, the State or its grantee will be presumed to be in constructive possession of those rights. On this point there is a clear decided authority of the Privy Council in 33 Bom.L.R. 1273. The learned Vakil for the Respondents Khots and Dharekaris candidly declared at the outset that he did not propose to rely upon this part of the learned trial Judge's judgment, and that he could not equally support it on the ground of limitation.

8. A greater part of the learned trial Judge's judgment was also taken up by what seems to me to be an infructuous comment upon several statements made by

the Appellant and the few witnesses cited in this case, and their so-called admissions. These statements and admissions were, however, no better than admissions of law, i.e. the parties' own conception of their legal rights. Neither side has relied upon these statements or admissions, and it is conceded that the rights of the several parties will have to be determined from their fundamental legal position. I also find that a greater part of the criticism of the learned trial Judge was due to the parties taking up a much higher position than they could possibly sustain, to which the local legal talent and ingenuity contributed not a little. Fortunately, in appeal I have had on the opposite sides the valuable assistance of two leaders of the Appellate Bar who, with their usual fairness and precision, have very much simplified the position, rendering my task much easier than it might have been.

9. I shall, therefore, sum up the plain and simple position which is taken up in appeal by the parties. It is conceded on behalf of the Respondents that the Appellant and his co-sharers are grantees of the soil subjects, of course, to the limitation placed by the grant, namely, the rights of existing Hakdars. The Inamdars' right to quarries and minerals is not contested; nor even to the timber and fuel trees standing or growing in forest and unoccupied lands. Such kinds of lands, however, are not found in the village to any great extent. On the other hand, it is equally conceded on behalf of the Appellant that the Inamdars have no intention against the kadim inam of Defendants Nos. 16 to 19 and several others of the 5 bighas of land, and it is admitted that they are owners of soil having all incidental rights just as much as the Appellant and his co-sharers of the rest of the lands of the village. Further, it is conceded that both the *khoti* and *dhara* holdings are older than the Appellant's inam grant of 1778.

10. The points for determination therefore are:—

Issues.

(1) Whether the Appellant and Defendants Nos. 3 to 10 as grantees of the soil are owners of timber and fuel trees, as well as reeds and rushes growing by the river side, seeing that the village is held in *khoti*.

(2) Whether the Inamdars are owners of such trees standing or growing on lands permanently occupied by the Khots, Dharekaris and Kuls or occupancy tenants.

(3) If so, what are the limitations to such a right in favour of the three classes of holders in question.

Findings.

11. My answer to the first point is in the affirmative except with regard to reeds and rushes to which the Khots are entitled; to the second in the affirmative; and to the third, limitations more particularly described in the final order.

Reasons.

12. It will be clear from the foregoing narration that the ambit of enquiry in this appeal is narrowed down to determining the rights of the several parties to timber and fuel trees standing on occupied lands of the village, and to reeds and rushes spontaneously growing by the river side. The Inamdars, being acknowledged grantees of the soil, rely upon the doctrine '*Quid Quid plantatur Solo Solo cedit.*' But the Khots, Dharekaris and Kuls also invoke the aid of the same principle on their side. A brief examination of their respective cases is therefore necessary. The contention of the Khots is two-fold. In the first place they contend that being prior holders of the village they are substantially the owners of the trees. In other words they claim an ownership over the different kinds of trees described in the plaint in virtue of their khotiship. Alternatively, they contend that, at any rate, they are entitled to the trees standing on lands in their permanent occupation as *khoti nisbat* or *khoti khasgi*. They rely upon their prior occupation of such lands in support of their particular alleged right. This part of the case presents features which are common to the holdings of the Dharekaris also, for their holdings, too, were more ancient than the Appellant's inam grant. Thus in regard to the trees standing on permanently occupied lands priority of occupation is cited in support of the ownership of the trees, and indirectly of the soil also. On this point the Khots and the Dharekaris rely upon

an important limitation placed upon the Inamdar's grant which was subject to the rights of the existing Hakkadars, in which class the Khots and Dharekaris in their character of existing occupants of the lands would naturally fall. These defences commended themselves to the learned trial Judge who held that although the inam grant of the Appellant and Defendants Nos. 3 to 10 was a grant of the soil, the prior occupation of the village by these several classes of holders substantially frittered it down to a grant of the revenue alone. He stretched the finding to the holdings of the Kuls, that is to say, permanent tenants also, apparently on the assumption that they too were prior holders. Unfortunately, they do not put in appearance in appeal, and therefore the precise nature of their claim cannot be ascertained. But I do not find that there was any suggestion in the lower Court that they were holding the lands prior to the inam grant. For, in that case they would fall under the class of Dharekaris, that is to say, the highest class of occupants, having regard to the definition of "Dharekaris" and "*dhara* land" contained in clauses 6 and 9 of section 3 of the Khoti Act. I do not think that even the co-Respondents-Khots would concede such a position to the Kuls, implying as it does a total change in the status of the Kuls, and the character of their holdings which are "*khoti* lands" within the meaning of clause 10 of section 3 of the Khoti Act. In common with the Dharekaris they have a fixity of tenure, not because they are prior holders, but by reason of antiquity of their tenure. But unlike the Dharekaris the Kuls have no right of transfer of their holdings and can lay no claim whatsoever to a fixity of rent which is liable to be revised at the end of every settlement period. I have described the position taken up by the several contesting parties, for I think their rights will have to be determined with reference to the character of their respective holdings, and not merely on the ground of priority of occupation.

13. The first point then is whether by virtue of their *khoti* the Khots-Respondents are entitled to the several items claimed by the Appellant. They are described as Vatandar Khots. It is, however, a mistake to suppose that their *khoti* is a *vatan*, i.e. a hereditary office useful to the State and remunerated by it. A Khot is a farmer of land revenue, and this position is admitted. The Respondents-Khots do not claim to hold their *khoti* by virtue of grant of a hereditary office. And the expression "Vatandar" as applied to them means nothing more than that they are hereditary Khots. The case of *Moro Abaji v. Narayan Dhondbhat*, I.L.R. 11 Bom. 680 raised a very similar controversy, the Khots claiming to be Vatandars. And it was held that the mere fact that the Khots were Vatandars did not make them owners of the soil. The position of a Khot was also exhaustively reviewed in an earlier case of *Tajubai v. Sub-Collector of Kolaba*, 3 B. H. C. R. page 132 (App.). In that case too the Khots were hereditary holders of the village since the time of the Peshwas. Their Lordships however held that even under the Peshwas Government the Khot was no better than a hereditary farmer, and that the recognised mode of his remuneration for his services was his right to cultivate waste or other lands as may be at his disposal, or to give them out for cultivation on terms most advantageous to him. These two decisions make it perfectly clear that a Vatandar Khot has very little in common with a Vatandar in the real sense of the expression, that is to say, the holder of a hereditary office under the Bombay Hereditary Offices Act III of 1874. Therefore, the bare fact that the Khots-Respondents are Vatandars will not vest in them any proprietary interest in the soil having regard to their primary status as revenue farmers. It makes no difference that the *khoti* had been granted before the inam, for a mere priority of the Khot's advent in a village will not advance his position higher than the one just described. Indeed, in *Narayan Dhondbhat v. Trimbak Vithal*, P. J. 1881, page 188, as well as in *Moro Abaji v. Narayan Dhondbhat*, I.L.R. 11 Bom. 680, Defendants' *khoti* was prior to the inam grant of the Plaintiffs. But it did not help to establish their proprietorship of soil. Another case on the point is *Collector of Ratnagiri v. Antaji Lakshman*, I.L.R. 12 Bom. 534 in which it was held that in the absence of a sanad to the contrary neither ownership of the soil nor of cultivated or uncultivated land passed to the Khot by virtue of the grant, and that he was not entitled to cut timber by virtue of his *khotiship*. These several decisions rest on the principle that proprietary rights are not essential to the conception of *khotiship*. In the present case the Khots-Respondents do not hold any sanad conferring on them a grant of the soil, nor is there anything else to indicate that they were owners or proprietors of the village lands.

14. The learned vakil for the Khot-Respondents relied upon some of the sale-deeds which the Khots used to pass from time to time out of which exhibit 140, which is the deed which the Appellant took when he bought the 8 anna *khoti* share, might be cited as typical. It contains several expressions conveying *zad*, *pan*, *dhar* i.e. trees, leaves, assessment, etc. These expressions do not however necessarily imply that the Khots exercised proprietary rights over timber and fuel. They are perfectly consistent with a Khot's right of user of such trees for the purposes of revenue or cultivation, seeing that he is entitled to make the most of the village lands. It is therefore extremely difficult to hold with the view that Khots are owners of the soil or timber or fuel growing on it by virtue of their *khotiship*. 10

15. The Khot's right to rushes and reeds however stands on a somewhat different footing. Such weeds are of spontaneous growth, and it is conceded that their only use lies in the preparation of *rab* i.e. manure. If, as admitted, the Khot is entitled to make the most of the village lands for the purposes of revenue, I do not see how he can be deprived of his right to the weeds in question, seeing that they are useful in the cultivation of such lands. The point is not further pressed by the Appellant. 20

16. The next point is whether the Khots have proprietary interest in *khoti khasgi* or *khoti nisbat* lands, i.e. lands in their occupation personally or through tenants, and consequently in the trees standing or growing thereon. For the purposes of the present question it is not necessary to notice the distinction between these two classes of lands, except that such lands are held by the Khot on reversion by lapse or forfeiture. The Khot's ownership of such lands does not depend upon his tenure of *khotiship*, for even on termination of the *khoti* the erstwhile Khot will continue to hold these lands as an ordinary occupant. While considering the question of Khot's proprietary interest in the soil of such lands I will deal with the case of Dharekaris side by side with it. For, although the *dhara* holder derives his distinctive denomination in relation to the Khot and other classes of holders in a *khoti* village to denote the limit of his liability in respect of rent and several other privileges not enjoyed by the latter, yet he falls within the generic class of "privileged occupants". Occupancy right is therefore an important common feature of the Khot's private holdings as well as those of Dharekaris. The question then will be whether these two classes of holders own a proprietary interest in the soil of their holdings in an inam village. 30

17. In *Secretary of State v. Narayan Namshet*, 1 Bom. L.R. page 19 it was held that the Khot had a proprietary interest in the trees standing on his *khasgi* land. As much might be said of the Dharekaris also, having regard to the common feature of the two classes of holdings. It is, however, clear that in the case just cited Their Lordships were considering the question of proprietorship of trees in occupied lands in an unalienated *khoti* village. On this point there is a clear distinction between the latter and an alienated inam village. With the advent of the British rule in Konkan about the year 1820 it was discovered that the rayat was indifferent to the growth and preservation of useful forest due to the pre-British Government claiming proprietorship over timber and jungle trees standing even on occupied holdings. Therefore, on 1st March 1824, the Government issued a proclamation commonly known as the "Dunlop Proclamation", granting proprietary interest to the occupants in timber and other jungle trees standing or grown in their holdings. The effect of this proclamation on alienated villages came to be considered in *Gajanan v. Nilo*, 6 Bom. L.R. 864, and it was held that it did not apply to villages granted in inam prior to its date. Obviously, therefore, it does not affect the Appellant's inam grant which came off in 1778. 40 50

18. The learned vakil for the Respondents-Khots and Dharekaris must have realised his difficulty, and rested his case upon the priority of occupation of the Khots and the Dharekaris. It is argued that the occupation of the lands by Khots and Dharekaris before the inam grant of the Appellant had vested them with proprietary right over lands which the subsequent grant could not divest. The question therefore is whether priority of occupation of these classes of holders carried with it proprietary rights in the soil. The expression "occupant" defined in section 3, clause 16 of the Land Revenue Code means a holder in actual 60

possession of unalienated land, other than a tenant. An occupant, therefore, is only a holder having merely an occupancy right, that is to say, a fixity of tenure so long as he pays the assessment. All other rights of ownership of the soil vest in Government by virtue of section 37 of the Code. The doctrine of State ownership of the soil is not an innovation of the Land Revenue Code, but was the basic principle upon which all the different pre-British land revenue system were founded. Speaking of a Khot's right to occupation of alluvial land in a *khoti* village, Chandawarkar J. remarked in *Secretary of State v. Wasudeo*, I.L.R. 31 Bom. 436 that according to the theory prevailing in British India, generally speaking, the State is the owner of all land, and that its holders were occupants even before the Land Revenue Code. Having regard to the Khot's position as a revenue farmer it is extremely difficult to imagine his occupation of *khot khasgi* and *khot nisbat* lands as connoting any higher rights than those of an occupant. The Dharekaris too cannot possibly take up a higher position, for, as I have pointed out, they are included in the class of "privileged occupants" described in clause 5 of section 3 of the Khoti Act. The expression "occupant" is not defined in the Act. But there is no apparent reason why it should convey a different meaning from that given to it in the Land Revenue Code which preceded the Khoti Act of 1880. It follows therefore that the Khots holding *nisbat* or *khasgi* lands, and the Dharekaris holding their *dharas* are no better than occupants.

19. A point which often arises in cases of this kind is whether the holders of land in the pre-British days were merely occupancy holders, or whether they had any higher, that is to say, proprietary rights in the land. I have already remarked that the conception of State ownership of all lands within its territories is not new. Indeed it is clear from Dunlop's proclamation itself that the Peshwas Government claimed ownership of the soil and all kinds of timber and jungle trees growing on occupied and unoccupied lands. Therefore, in the absence of evidence of grant of the soil in favour of the Khots or Dharekaris neither of them can be held to have owned proprietary interest in the trees merely by virtue of their being prior holders. In my opinion, priority of occupation by itself will not help them to establish proprietary interest claimed by them. There is also evidence to establish that the Khots who used to pass management *kabulayats* to the Inamdars admitted the latter's title to *दस्ती* and *गैरदस्ती* i.e. assessed and unassessed trees. Exhibits 112 to 118 are some of the *kabulayats*. It is therefore difficult to hold with the lower Court's view that the Khots and Dharekaris, as prior occupants, held vested right of ownership of the soil and trees growing on it so as to cripple the inam grant of the Appellant to one of revenue in this respect.

20. The case of the tenants alone remains. As I have stated they do not put in any appearance in appeal. In dismissing the Appellant's claim even as against them, the lower Court apparently placed them on a level with the Dharekaris. The learned trial Judge does not appear to have taken into account the circumstance that they were only tenants by virtue of antiquity of their tenure. They can in no sense be regarded as occupants of lands, for in that case they would fall under the class of "occupancy" holders or Dharekaris. In a *khoti* village they go by the denomination of "occupancy tenants", an expression which is, in my opinion, somewhat misleading for according to section 3, clause 6 of the Land Revenue Code an occupant is a holder other than a tenant. I think that the compound expression is used to distinguish a permanent tenant from an ordinary tenant as can be seen from section 8 of the Khoti Act. Section 5 of the Act, however, speaks of an ancient holder of the tenant class as possessing a right of occupancy in the land occupied or cultivated by him. Several decided authorities, among which might be cited *Yesa v. Sakharam* I.L.R. 30 Bom. 290, dealing with such a tenant's power of alienation of his holding speak of it as an occupancy right. Assuming, therefore, that a tenant in a *khoti* village is just as good as a holder of occupancy right it will make no difference in his right to the soil and the trees. For in such a case his right will fall in line with that of Khots and Dharekaris which I have just discussed. The Kuls cannot therefore lay any claim to timber and jungle trees standing on their lands except to such user as equity might allow them.

21. I must, therefore, hold that the Appellant and Defendants Nos. 3 to 10 are owners of the soil, and therefore of the trees of the kind described in the plaint. But their ownership must, of course, be subject to other rights which long and undisputed custom has evolved in favour of holders of land entitled to make the

most of it. Such a right was recognised as long as 1881 in the case of Narayan Dhond-bhat v. Trimbak Vithal, P. J. 1881, page 188, in which Westropp C. J. held that the Inamdars were entitled to the jungle trees subject to the rights of holders of land and their tenants to cut and use so much jungle wood as may be necessary for their agricultural and domestic purposes in accordance with the custom of the country, but not to cut or take away the same for sale or gift or other purposes. The decree which the lower Appellate Court passed in a similar case of Gajanan v. Nilo, 6 Bom. I.L.R. 864, and which the High Court substantially approved was based on the same principle. The Khots and Dharekaris as well as the Kuls or permanent tenants will, therefore, be entitled to brushwood, reeds, grass, and loppings of trees for the purposes of manure or domestic uses consistently with the growth and preservation of the trees in question. The Khot's rights to reeds and rushes growing by river side must also be placed on the same footing. These weeds are useful only for the purposes of preparing manure, and the Khot who is entitled to make most of the village for the purposes of revenue must be allowed their use. They must also have a free use of timber within reasonable limits for the purposes of their buildings and agricultural implements, with the permission of the Inamdars, which permission will have to be given as a matter of course, within reasonable limits. The Inamdars cannot also lay claim either to the fruit or flower bearing trees such as mango, cocoanut, betel-nut, and plantains planted or grown by permanent occupants in lands in their occupation. Such an equity in the favour of permanent occupants found recognition in I.L.R. 38 Bom. 716. 10 20

22. With regard to the damages it is not denied that Defendant No. 18 felled one Jack and 13 Teak trees and sold them to Defendant No. 27. There is, however, no clear evidence as to their value, and Mr. Nanal on behalf of the Appellant is content to have nominal damages in vindication of the Appellant's right. I would, therefore, allow the Plaintiff and Defendants Nos. 3 to 10 Rs. 15 for value of timber wrongfully felled. 30

23. The result, therefore, is that the appeal must be substantially allowed, and the decree of the lower Court set aside, and a decree passed in favour of the Appellant and Defendants Nos. 3 to 10 in the following terms:—

1. It is hereby declared that Appellant and Defendants Nos. 3 to 10 as Inamdars of Kondye are owners of the soil, quarries and minerals (and of all timber and jungle trees, such as, Ain, Kinjal, Nanha, Sissav (black wood) Teak, Khair, Tamhan, and Jack standing and growing on all lands in the village, whether permanently occupied or otherwise, subject to the following conditions:— 40

- (a) That Appellant and Defendants Nos. 3 to 10 will not be entitled to any such trees in the 5 bighas of kadim inam land in the possession of Defendants Nos. 16 to 19 and their bhaubands who are owners of the soil of these 5 bighas.
- (b) That the Appellant and Defendants Nos. 3 to 10 will not be entitled either to trees such as mango, betel-nut, plantain and other fruit or flower-bearing trees, planted or reared by permanent occupants in the lands in their occupation.
- (c) That the Respondents-Khots, Dharekaris and permanent tenants will be entitled to brushwood, leaves, grass and loppings of trees for the purposes of rab or other domestic uses consistently with growth and preservation of the trees. The Khots will be also entitled to the reeds and rushes growing on the river banks either for the purposes of revenue or cultivation. 50
- (d) That these several classes of holders will be also entitled to the free use of timber within reasonable limits for the purposes of their buildings and agricultural implements, the Inamdars being liable to give the required permission which must be sought for on such occasions.
- (e) A permanent injunction to issue in these terms to the Khots, Dharekaris and Kuls represented by the respective Defendants to restrain them from interfering with the rights of Appellant and Defendants Nos. 3 to 10 which are hereby declared. 60

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(ii) The Appellant will recover Rs. 15 as damages from Defendants Nos. 18 and 27 or either of them.

(iii) The Appellant's claim to the reeds and rushes growing by the river side is dismissed.

10 24. The appeal substantially succeeds and the Appellant will have his costs in both Courts from the three sets of Defendants, namely, Nos. 11 to 15, 16 to 26, and 28 to 32 equally i.e. each set finding one-third of the costs. The Respondents will bear their costs. This order of costs disposes of the cross-objections as well which are dismissed with costs.

29th September 1933.

(Signed) N. R. GUNDIL,
District Judge.

[True copy]

(Illegible)

Clerk of the Court,
District Court, Ratnagiri.

20

(17) The Applicant will receive the fee in the amount of \$100.00
in a 12-month period of time.
(18) The Applicant's claim to the trade and service mark is the right
to use the mark.

19. The Applicant's business is a retail store of clothing and accessories
in the City of New York. The store is located at 1234 5th Avenue, New York, N.Y. 10020.
The store has been in operation since 1980. The store's principal business is the sale of
clothing and accessories. The store's principal products are men's and women's
clothing and accessories. The store's principal customers are men and women
of all ages. The store's principal competitors are other retail stores of clothing
and accessories in the City of New York.

(Signed) N. B. GORDON
Applicant

The Law Firm of

[Signature]
(Attorney)

Office of the
Registrar of Trademarks

S.—412/34

APPEAL No. 285 OF 1934 FROM APPELLATE DECREE.

APPEAL No. 339 OF 1931.

10

Grounds of Appeal.

Claim—Rs. 100.

1. The lower Court has erred in holding that Plaintiff and Defendants Nos. 1 to 10 are not entitled as Inamdars to the soil, stones, reeds etc. in the lands in the occupation of the contending Defendants. Finding on issue no. 1 is erroneous.
2. The lower Court has misunderstood and misconstrued the deposition of the Plaintiff, and has drawn erroneous inferences therefrom.
- 20 3. The lower Court has erred in holding that Plaintiff is not entitled to declaration and injunction prayed for by him.
4. It was wrong to hold that Plaintiff is not in possession of the rights claimed by him when he filed the suit.
5. It was wrong to hold that the inam of Plaintiff was subject to the rights of the Dharekaris to the soil, trees, quarries. Finding on issue no. 4 is erroneous.
6. The lower Court has erred in holding that the Khots, Dharekaris and the privileged occupants are entitled to the soil, trees, stones, reeds etc. belonging to the lands in their occupation.
- 30 7. The lower Court has erred in holding that the Plaintiff is not entitled to damage as claimed by him.
8. It was wrong to hold that the Plaintiff was not in possession of rights to the trees when they were cut by Defendants.
9. The lower Court has erred in holding that the present claim of Plaintiff for declaration, injunction and damages was barred by limitation.
10. The lower Court has erred in believing Defendants' witnesses, who are all interested persons and are hostile to Plaintiff.
- 40 11. It was wrong to hold that the Plaintiff's claim was barred by Article 120 of the Indian Limitation Act.
12. The lower Court has erred in not following the proper procedure. The issue of limitation was framed after the whole case was closed by the Court on its own notion.
13. Several expressions used by the lower Court when the suit was being heard as well as the procedure followed clearly indicated that the lower Court was prejudiced against the present claim of the Plaintiff.
14. The lower Court has erred in disregarding the evidence of Plaintiff and his witness exhibit 132.
- 50 15. The lower Court has failed to take into consideration that the rights of Inamdars as regards the present claim were never denied and there was no adverse assertion at all on the part of the Defendants.
16. The lower Court has misread and misconstrued the sanad, exhibit 106, as well as the sanad granted by British Government.
17. The lower Court has not at all considered the documentary evidence adduced on the side of the Plaintiff which clearly proves the Plaintiff's claim.
18. The lower Court has misunderstood and misread the law bearing on the case.
- 60 19. Assuming that occupants removed trees from their lands, sometimes, it was only proper and just to hold that this was done with the license or permission of the Inamdars.
20. The lower Court has not attached due importance to the kabulayats, exhibits 112 to 117, 133 and 134 as well as other documentary evidence in the case.

21. Proper issues in proper form have not been framed by the lower Court.

22. The lower Court has not properly appreciated the oral and documentary evidence in the case and has approached the case from a wrong standpoint of view.

23. Proper opportunity was not given to Plaintiff to adduce his evidence in the case. Certain documents put in by Plaintiff have been wrongly excluded. 10

24. Proper opportunity was not given to Plaintiff to cross-examine witnesses for the Defendants.

25. Order as to costs is wrong. Plaintiff's costs should have been awarded.

26. Presumptions made in favour of Defendants and inferences drawn against Plaintiff are improper and unjust.

27. It was wrong to hold that Plaintiff is not entitled to declaration and injunction.

28. Plaintiff is entitled to the full relief claimed and his entire claim should have been decreed with costs. 20

29. The decree of the lower Court is contrary to law and against the weight of evidence in the case.

21st December 1931.

Cross-objection on behalf of Respondents Nos. 13 and 16.

(1) The lower Court should have awarded the Defendants' costs. 30

Ratnagiri, 22nd January 1932.

[True copy]

(Illegible)

Clerk of the Court,
District Court, Ratnagiri.

S.—412/34

APPEAL NO. 285 OF 1934 FROM APPELLATE DECREE.

Suit filed on 7th December 1929.

Suit decided on 3rd December 1931.

10 Duration of the suit—One year, eleven months and twenty-seven days.

EXHIBIT 83.

IN THE COURT OF THE SECOND CLASS SUBORDINATE JUDGE
AT DEVRUKH.

CIVIL SUIT No. 458 OF 1929.

20 Damodar Vishnu Vaidya PLAINTIFF;
(Pleaders—Messrs. S. B. Halbe and M. P. Pitre)

against

30 (1) Krishnaji Keshav Vaidya ; (2) Ramchandra Keshav Vaidya ;
(3) Vishwanath Narayan Bapat ; (4) Shankar Narayan
Bapat ; (5) Dattatraya Narayan Bapat, minor guardian
ad-litem Defendant No. 3 ; (6) President “managing
board” Govind Krishna Ranade, Sanskrit Patha Shala,
Ratnagiri ; (7) Shridhar Narayan Vaidya ; (8) Udhav
Ballal Vaidya ; (9) Vasudeo Ballal Vaidya ; (10) Damodar
Bhaskar Vaidya ; (11) Putalaji Vishram Desai ; (12) Gopal
Santaji Desai ; (13) Jagannath Narayan Desai ; (14) Gopal
Tatya Desai ; (15) Baji Narayan Desai ; (16) Dattatraya
Ramchandra Mulye ; (17) Yeshwant Narayan Mulye ;
(18) Ganesh Pandurang Mulye ; (19) Vasudeo Vishnu
Mulye ; (20) Kashinath Ganesh Puranik ; (21) Ganesh
Pandurang Mulye Kolambekar died after suit, his heirs—1.
40 Padmakar *alias* Raoji Ganesh Mulye ; 2. Ramkrishna
Waman Mulye ; 3. Kashinath Vaman Mulye, minor ;
4. Dattatraya Vaman Mulye, minor, Nos. 3 and 4 minors
their guardian *ad-litem* Sattyabhamabai w/o Waman Ganesh
Mulye ; 5. Radhabai w/o Krishnaji Ganesh Mulye ;
(22) Anant Parashram Kulkarni ; (23) Narayan Ram-
chandra Kulkarni ; (24) Keshav Sakham Kulkarni ;
(25) Laxman Anant Nimkar ; (26) Rajaram Balshet
Kolvankar ; (27) Raghunath Govind Kulkarni ; (28) Bacha
Balu Gurav ; (29) Balka Ganu Shitap ; (30) Ragho
50 Laxman Padya ; (31) Zilu Rama Shitap ; (32) Krishna
Panda Barguda DEFENDANTS.

(Pleaders—Messrs. Ketkar and Joshi for Defendants
Nos. 11 to 13 ; Mr. Pandit for Defendants Nos. 16, 20
and 23. Mr. Ketkar for the guardian *ad-litem* of
minor heirs 3 and 4 of the deceased Defendant No. 21.
Messrs. Pandit, Ketkar and Joshi for Defendant No. 26 ;
Mr. Shetye for Defendant No. 27 ; Mr. Pendharkar for
Defendants Nos. 28 to 32. The rest absent)

60 CLAIM—Rs. 100.

The Plaintiff sues to obtain the following reliefs :—

(a) A declaration that he (Plaintiff) and Defendants Nos. 3 to 10 are the
Inamdars of all rights to trees, canals, water-courses, plants, grass, wood,
stones etc., standing on or existing in Mouje Kondye described in para-

graph 1 of the plaint and that as Inamdars they are entitled to all kinds of land, stone-quarries, reeds along the creek, and all varieties of mango, jack-fruit, teak, black-wood and other timber or jungle trees, lying or being at the said village.

(b) A permanent injunction be issued to Defendants Nos. 11 to 32 and all persons claiming under them, as well as to all persons interested in the said village as cultivators or otherwise preventing them from doing any act prejudicial to the rights of Plaintiff and Defendants Nos. 3 to 10 as claimed in clause (a) above. 10

(c) Damages be awarded to him from Defendants Nos. 18 and 27 to the extent of Rs. 65 for the value of the trees mentioned in paragraph 4 of the plaint, and Rs. 30 for price of trees cut by them.

(d) The costs of the suit from proper party.

2. The case of the Plaintiff is briefly this. In or about the Shake year 1700 (i.e. 1778 A.D.) the said village of Mouje Kondye was granted in inam with all the aforesaid rights by the Peshwas to Ramchandrabhat, Dhondbhat and Sadashivbhat *bin* Raghunathbhat Vaidya Narwankar and the descendants of these original grantees were confirmed in their inam by the British Government who have issued a sanad to that effect. An eight-anna share in the said inam is now owned by the Defendants Nos. 7 to 10 and a four-anna share was purchased by the Plaintiff by registered sale-deed dated 15th November 1923 from Defendants Nos. 1 and 2, while the remaining four-anna share belonging to the original owner Gangadharbhat *bin* Dajibhat has been purchased from the heirs by Defendants Nos. 3 to 5 and the same is now in the possession of Defendant No. 6 as mortgagee. 20

3. The Survey Settlement has not been introduced in the village Kondye. Plaintiff owned an eight-anna share in the *khoti* and Defendants Nos. 11 to 15 with their *bhaibands* are the owners of the remaining eight-anna share. The *khoti* was partitioned through Court in conformity with the above shares and since then these shares are managed separately subject to the dues payable to the Inamdars. Defendants Nos. 16 to 26 and their *bhaibands* are the Dharekari tenants in some of the lands in the said village but their lands are not divided in the said partition between the Khots and the same are jointly held. Similarly, Defendants Nos. 28 to 32 and many others are tenants cultivating lands in the village. These Defendants Nos. 11 to 32 are the leaders of the Khots, Dharekaris, occupancy tenants, and other persons interested in the said village in one way or another. And thus they are in league with one another in committing acts subversive of the rights of the Plaintiff and Defendants Nos. 3 to 10. Hence the prayer for declaration as above. 30 40

4. In contravention of the above rights of Plaintiff and Defendants Nos. 3 to 10 are Inamdars, on or about 15th September 1929, Defendant No. 18 sold to Defendant No. 27 one jack-fruit tree and 13 teak trees worth about Rs. 65 and they were hewed down by Defendant No. 27. When making inquiries in this connection, it was discovered that Defendants Nos. 11 to 32 and other people in the village are openly laying claim to the trees, woods, quarries, reeds and surplus and other lands in the village; and even declare that the Inamdars have no right beyond the Government assessment payable to them. Hence the above prayer for perpetual injunction. Plaintiff also claims damages for the said trees amounting to Rs. 65 and further compensation of Rs. 30 for the loss sustained by the same being cut down. 50

5. In addition to Defendants Nos. 11 to 32 there are numerous other Khots, Dharekaris, occupancy tenants and others interested in the said village Kondye but as it would be very expensive, inconvenient and almost impossible to implead them all as parties, the suit is instituted against Defendants Nos. 11 to 32, they being the leaders.

6. For the prayer of declaration a Court-fee stamp of Rs. 15 is affixed while for damages the suit is valued at Rs. 95 and for injunction at Rs. 5 and Court-fee thus is paid on Rs. 100. For the purposes of jurisdiction the suit is valued at Rs. 300. 60

7. Defendants Nos. 11 and 12 file written statement (exhibit 73) in which *inter alia* they contend that the suit is bad for misjoinder of parties and causes of

action. They admit that Plaintiff and Defendants Nos. 1 to 6 are owners of a moiety of the *inamat* and Defendants Nos. 7 to 10 are owners of the other moiety. They further state that Defendants Nos. 11 to 13 and their *bhaibands* got their eight-anna share in the *khoti* partitioned through Court in Suit No. 638 of 1901 to which Defendants Nos. 7 to 10 were parties and since then the inam dues are paid by each co-sharer for his respective share to Defendants Nos. 7 to 10 but Plaintiff and Defendants Nos. 1 to 6 had never had any interest in this eight-anna share and the inam dues for the same were never paid to them, nor have they any right to the dues. They deny that Plaintiff and Defendants Nos. 1 to 10 have any right or title to any lands, quarries, reeds along the creek, situate within their eight-anna *khoti* property or to any fruit, timber or other trees in the village. They also deny that Plaintiff and Defendants Nos. 1 to 6 had or have any joint interest with them, or that Defendants Nos. 11 to 13 and the other Defendants have any common interest. They assert that the ancestors of Defendants Nos. 11 to 15 purchased eight-anna share in the *khoti* in 1878 and the same was subsequently partitioned among Defendants Nos. 11 to 15 and their *bhaibands* in Suit No. 638 of 1901 since when each of the co-sharer is in independent possession of his share together with all rights to trees, water-courses etc., and Defendants Nos. 7 to 10 were parties to these transactions. They, therefore, claim that the suit is barred by section 11 of Civil Procedure Code. They deny that they ever recognised the rights of the Inamdars as alleged by Plaintiff or that there was a partition among all the sixteen anna *khoti* co-sharers. They further affirm that excepting the lands of the Dharekaris and Kadim Inamdars, they as Khots have the right and title to all the lands, trees, etc., and that Plaintiff and Defendants Nos. 1 to 10 were never in possession of any such rights.

8. Defendants Nos. 16 and 20 file written statement (exhibit 75) in which among other things they contend that Plaintiff and Defendants Nos. 1 to 10 were in or about 1778 granted the inam subject to the then existing rights of the original settlers, Dharekaris, and other occupants of the lands and that beyond receiving the fixed assessment and other customary dues from these people, the Inamdars have neither exercised nor possessed any other rights. Plaintiff's claim is barred by limitation. They also contend that the *khoti* lands of Defendants Nos. 11 to 15 and others and the *dhara* and ancestral land of Defendants Nos. 16 to 27 and others are held by these people since long before the grant of the inam to Plaintiff and Defendants Nos. 1 to 10 or their ancestors, and so the latter have acquired no such rights under the grant. They further contend that they are Inamdars under a prior grant of 1728 and so Plaintiff and Defendants Nos. 1 to 10 have no rights to the trees etc., in *dhara* lands as Inamdars. And therefore if Defendant No. 18 had sold any trees to Defendant No. 27, Plaintiff has no right to sue for damages or other relief for the same. They further assert that their ancestors have at great expense planted trees of various kinds in their *khoti*, *dhara*, inam and occupancy lands and they have been and are entitled to be in enjoyment of these trees as well as of the quarries. And that the Inamdars having recognised these rights they are estopped from bringing this action. From times immemorial the reeds from the creek banks is used for burning the soil and thatching the roofs and the Inamdars have no right to it.

9. The heirs of Defendant No. 21 file written statement exhibit 72 denying Plaintiff's right to the trees in their *dhara* and claiming the same as their own.

10. Defendant No. 27 in his written statement exhibit 71 denies that he ever purchased the trees from Defendant No. 18 as alleged by Plaintiff for Rs. 65. He admits having purchased some trees from Defendant No. 18 for Rs. 35 but says that they turned out to be useless and he on the contrary incurred a cost of Rs. 75 for hewing down and removing them.

11. Defendants Nos. 29 to 32 in their written statement exhibit 69 repeat the contentions of Defendants Nos. 11, 12, 16 and 20 and add that the trees in their occupancy lands belong to them and deny Plaintiff's allegation regarding them. They also state that they never paid any dues to Plaintiff and Defendants Nos. 3 to 10 as inam dues but they have always paid their *khoti* dues to their Khots. They deny that they are leaders of the Defendants Nos. 10 to 32 or that they have been in league with them. They further contend that the value of the property in suit being more than Rs. 5,000, this Court has no jurisdiction.

12. Defendant No. 28 by his *purshis* exhibit 68 supports Defendants Nos. 29 to 32.

13. On an application by Plaintiff (exhibit 3) praying that there being numerous parties this suit be proceeded against the Defendants in accordance with the provision of Order I, rule 8, and the application was granted by my predecessor who ordered due publication to be made regarding this suit.

14. The following preliminary issues were framed :—

10

Issues.

(1) Is the suit properly valued and is it within the pecuniary jurisdiction of this Court ?

(2) What order ?

15.

Findings.

(1) Yes.

(2) The suit to proceed.

20

Reasons.

16. The objection is to the valuation of this suit which is for declaration and injunction with a subsidiary relief for damages. In my opinion the suit comes within section 8 of the Suit Valuation Act and the objection is concluded by the case of Govind Krishna Sathe v. Hanmaya Lingaya Fulmali (22 Bom.L.R. 1450). For injunction the suit has been valued at Rs. 5 and the valuation for the purposes of jurisdiction is the same. No objections have been or could be raised to the other items or relief in this suit. It is conceded by the learned pleader for the contending Defendants that as regards Court-fees the case does fall under section 7, clause (iv) of the Court Fees Act. He only questions whether the Court-fees are payable *ad-valorem* as required by section 8 of the Suit Valuation Act. But when injunction is prayed as consequential relief to declaration the Court-fees are payable *ad-valorem* on the value fixed in the plaint. I, therefore, see no valid objection to this Court hearing the suit.

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17. The suit will be proceeded with.

(Signed) S. A. LAL,

6th February 1931.

Subordinate Judge.

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18. The following issues were raised :—

Issues.

(1) Does Plaintiff prove that he and Defendants Nos. 1 to 10 are entitled as Inamdars not only to the revenue but also to the soil with trees, grass, quarries and other appurtenances as claimed by him ?

(2) Is Plaintiff entitled to declaration and injunction in case it is found that he is not in possession of the rights claimed by him in prayer clause (paragraph 10) of plaint ? Was Plaintiff in possession of these rights when he filed the suit ?

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(3) Do Defendants Nos. 11 to 13 show that Defendants Nos. 7 to 10 are not proper parties in view of Suit No. 638 of 1901 and that Plaintiff cannot seek any remedy against the Khots Defendants Nos. 11 to 15 ?

(4) Do Defendants Nos. 16 to 26 prove that they are Inamdars of five *bighas* in the village out of their *dhara* under Inam Sanad of 1728 A.D. ? Do they prove that the inam of Plaintiff was subject to the rights of the Dharekaris to the soil, trees, quarries etc., which rights existed prior to the inam ?

(5) What are the rights of the Khots, Dharekaris and the privileged occupants as against the Plaintiff Inamdar ?

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(6) Is the suit bad for multifariousness ?

(7) Is Plaintiff entitled to any damages for the trees cut and against which of the Defendants ? Was Plaintiff in possession of any right to the trees when they were cut by Defendants ?

(8) What order regarding declaration and injunction ?

(9) Is the claim of Plaintiff for declaration and injunction in respect of the alleged rights to the trees, wood, water-courses, stones, quarries, grass, reeds, etc. ; as stated in plaint, barred by limitation ? If so, as regards which of these rights ? And to what extent ?

19.

Findings.

10 (1) No. Not to the soil, trees, stones, reeds, etc. belonging to the lands in the occupation of the Defendants.

(2) No. No.

(3) Unnecessary but if required ; No.

(4) Yes. Yes.

(5) They are entitled to the soil, trees, stones, reeds, etc. belonging to the lands in their occupation.

(6) Unnecessary.

20 (7) No. No.

(8) Nil.

(9) Yes. As regards all. Entirely.

Reasons.

20. The facts in dispute could be brought into a narrow compass. Plaintiff is admittedly the owner of a quarter share in the inam of Mouje Kondye having purchased the same on 15th November 1923 under sale-deed exhibit 108. What he claims is that he and his fellow Inamdars, Defendants Nos. 1 to 10, are the absolute owners of the entire soil of the village together with the trees, stones, quarries, reeds on the creek bank, etc. standing or situated on the same. He even asserts that the Defendants and other *rayats* of the village are no more than his yearly tenants. He has sued them under the provisions of Order I, rule 8 as they were too numerous.

21. Defendants (other than the *proforma* Defendants Nos. 1 to 10 who are fellow Inamdars of Plaintiff) fall into three categories. Defendants Nos. 11 to 15 are the Khots of a moiety of the *khotki* of the village, the other moiety being vested in Plaintiff himself who fills the double role of a Khot and an Inamdar. Defendants Nos. 16 to 26 are the Dharekaris and Defendants Nos. 28 to 32 the privileged occupants. All these Defendants agree in repudiating the claims of the Plaintiff that the Inamdars are the owners of the soil, trees, stones, reeds, etc. on or belonging to the lands in their occupation. They even go to the other extreme and assert that the Inamdars are the grantees of merely the revenue of the village and not the soil.

22. The deposition of Plaintiff himself (exhibit 104) all but disposes of the suit. He himself has exposed the utter hollowness of his claim that the Defendants, are no more than the yearly tenants of the Inamdars. According to him the Khots, Dharekaris and privileged occupants had settled in the village before the Inamdars came. But no sooner the sanad of the inam was granted to the Vaidyas these settlers suddenly assume the status of yearly tenants. As if the sanad like a magician's wand transformed in a trice their permanent tenures into tenancies-at-will. But still more wonderful is Plaintiff's conception of a yearly tenancy. Let him speak for himself : " So long as", says he in paragraph 13 of his deposition exhibit 104, " the Khots, Dharekaris and occupants pay their respective dues, the Inamdars cannot eject them". This he was bound to confess seems he himself as Khot purchased through Court the lands of the occupants and Dharekaris. He admits (see paragraph 8) that the right so purchased was not a right of yearly tenancy but a permanent right. In the same paragraph he goes on to define the rights of the occupants very unequivocally. " From the view point of the Inamdars", says he, " the distinctive rights of the Khots, Dharekaris and occupants of the village Kondye are the same as those defined in the Khoti Act which is applicable to the village". No man in his senses will ever contend that the rights of the Khots in their *khasgi* lands or of the Dharekaris and occupancy tenants in their lands are mere rights of yearly tenancy and to the credit of the learned pleader for Plaintiff it must be stated that no such theory was propounded by him.

23. The learned pleader then contends that what Plaintiff wants is this : that whatever the rights of the Defendants may be to the soil they are not supposed to remove the trees, reeds, stones, etc. without the permission of the Inamdars. Here too let the Plaintiff speak for himself : "There is no instance of the Inamdars having enjoyed the fruits of trees or stones of the quarries or reeds on the creek bank" (see paragraph 6). "Nor can the Inamdars remove the trees on the lands of the Khot, Dharekaris or occupants so long as they pay the dues but if a tree becomes dead or barren the Inamdars can remove it. I have given three trees to the Inamdars from my land. I do not know if other occupants have allowed the Inamdars to remove the trees from their lands. The Inamdars have not removed any stones from the quarries. There is no forest in the village as such". (See paragraph 13.) 10

24. He admits (see paragraph 8) that the Khots, Dharekaris and occupants have grown Teak, mango, Jack fruit and other trees. So also have they planted mango grafts (that is the finer qualities of mangoes). Even Plaintiff himself in his capacity of Khot has grown numerous such trees on his land for which he realises the not inconsiderable income of Rs. 200 yearly. He admits he does not pay any extra rent to the Inamdars for this trees. So, the whole case of Plaintiff boils down to this, that the Inamdars are entitled to dead and barren trees. And as for this right, too, he is not able to cite a single instance of the occupant allowing the Inamdars to cut such trees except that he himself has on two or three occasions given three trees to them. He is admittedly a permanent resident of the village and owns half the *khoti*. On his own showing he has been acting as the Mukhtyar or Manager of the Inamdars since 1898. Is it conceivable that he would not know of a single such instance ? As for his own example that leads us nowhere even if believed. He stood in a peculiar relation to the Inamdars and if he gave them three trees out of his vast estates it by no means prove the general practise. Moreover why should the occupants grow Teak trees if not for timber. If the Inamdars were owners of the trees, the occupant would never go to the expense and trouble of growing them, especially those trees which, like Teak, do not yield fruits and are only of value as commercial timber. Nor would they do this if their right to the trees depended on the permission to be given by the Inamdars. 20 30

25. It was urged on behalf of Plaintiff that although the occupants were removing the trees from their lands they did so only with the permission of the Inamdars. In other words they were *qua* the trees, etc. only in the position of licensees. And what is the warrant for this assumption ? The testimony of Plaintiff. That testimony is so replete with contradictions, mis-statements and even false statements that one must have to be a rash man to believe it, especially when it happens to be in his own interest. Moreover, it is in Plaintiff's evidence that no charge was levied for such alleged permission and it was issued as a matter of course. Is this in consonance with human nature in general and that of the Inamdars in particular ? On the contrary it is a matter of common experience that wherever such feudal proprietary rights or privileges exist the possessors thereof, be they Inamdars, Khots or other classes of overlords, are in the habit of exacting the last pie that the occupants could be made to pay before the favour is conferred on them. A striking instance of the benevolence (sic) of this class of men and particularly of Plaintiff was provided by a fact elicited by Plaintiff's own pleader in the cross-examination of one of Defendants' witnesses. Plaintiff had dragged this witness (exhibit 161) to the Mamlatdar's Court in an Assistance suit in order to recover the mighty sum of an anna and a half which this witness in common with eight others owed to Plaintiff. That was not a test case but a simple action to recover the balance of dues which remained in arrears. The right of Plaintiff to recover it was not in dispute. This is made clear by the witness. He was cross-examined on this point because Plaintiff wanted to show that the witness was not well disposed towards him as a result of the assistance suit. But the answers have furnished a strange commentary on the generous nature of the Plaintiff-Inamdar. All the circumstances go to shew that Plaintiff is certainly not the type of Inamdar who would distribute permission quite gratis to the needy occupants or as remain content with oral request. He is of such a litigating trend of mind that he would not suit to insist on written applications. As regards the reeds on the creek bank his theory is that every year the occupants used to come to him for the permission. Presumably they used to wait on him in a body to beg 40 50 60

for the permission. But his own evidence shows that in a suit between the Khots and the occupancy tenants it was decided that the reeds formed the *rab* with which to burn the fields in preparation for cultivation. It is true that the Inamdars were not parties to that suit. But I do not use the admission as an estoppel against Plaintiff or as creating the bar of *res judicata*. I point to it as proving the fact that the right of the occupants to use the reeds for agricultural purposes was recognised and the Khots were precluded from realising rent in respect thereof. It is inconceivable that their use was dependent upon the sweet-will of the Inamdars when they have been claiming it as a right. But it is useless to discuss this topic further because I am definitely of the opinion that Plaintiff's assertion of permissive use of any of the rights claimed by him is false. He has made no attempt to prove by independent evidence a single instance where such permission was asked for, not even by way of rebuttal. His own statement is refuted by the evidence of Defendant No. 16 (exhibit 126) not to speak of other witnesses. Although Defendant No. 16 is as much an interested witness as Plaintiff I have no hesitation in preferring his word to that of Plaintiff apart from the other convincing and independent evidence with which I shall deal presently.

26. The only witness examined on behalf of Plaintiff is his vendor Mr. Krishnaji Keshao Vaidya whose evidence was recorded on commission at Bombay (see exhibit 132). The only thing this evidence reveals is the utter ignorance of the dependent in matters concerning the facts in dispute. He at first makes a bald assertion that he as hereditary Inamdar did exercise the proprietary rights of the Inamdar as enumerated in paragraph 1 of plaint. As a matter of fact having himself conveyed these supposed "rights" to Plaintiff he could not possibly state otherwise. But a further perusal of the deposition makes it abundantly clear that what he stated was his inference and not a fact personally known to him. Let him speak for himself: "I cannot give any concrete instance through which I exercised my proprietary right over the Dharekari as an Inamdar. I can reply if I refer to my Manager..." Further on, at the end of cross-examination he says, "I have not personally exercised any of these rights". He has, however, the confidence to state: "In spite of the absence of any knowledge of any specific instances on my part, the right was exercised". He admits that he has no knowledge of the removal of any trees, water, grass, wood, stones, etc. by the Dharekari. But the absence of any complaint from his Manager the Khot that there was any obstruction from anybody to the rights mentioned in paragraph 1 of the plaint leads him to believe that his rights were not infringed. Beyond the absence of such complaints he has nothing to show that the rights were actually exercised by him. This is no doubt a very ingenious way of getting out of an awkward position. The witness has practically referred the Court to his Manager who is no other than the present Plaintiff. This can hardly be called an evidence. It is merely the record of the opinion of the witness given by him for the benefit of the Court. I however feel some difficulty in making out what the witness means by saying that he did not receive any complaints about the "obstruction of his rights". It is plain from Plaintiff's evidence that all these rights were in practice exercised by the occupants. His only grievance is that they should exercise them with the permission of the Inamdars. If no such permission was asked for it was on Plaintiff's own showing the duty of the Inamdar to obstruct them. The witness is an attorney-at-law and I should make it plain that although I have no hesitation in rejecting his testimony I do so not because I believe that he has made deliberately wrong statements on oath but because I consider that he is unaware of the true position and has drawn wrong inferences in his own favour (as is quite natural) from insufficient data.

27. Thus it is clear that on consideration of the evidence tendered by Plaintiff and Defendant No. 16 the suit must fail. Because the enjoyment of the various rights by Defendants is proved or admitted and I do not believe that this enjoyment was permissive.

28. I however abstain from disposing of the suit on this ground alone. In the argument it was urged that the suit was hopelessly out of time. But there was no issue on this point although in the written statement of Defendants Nos. 16 and 20 (exhibit 75) the plea of limitation was raised. It is possible that the frame of issue no. 2 misled the Defendants into the belief that the point of limitation was embraced by it. Whatever it may be, such an issue could have been

limitation

raised even in appeal and the whole case remanded for a finding thereon with consequent hardship and expense to the Plaintiff as well as the large number of Defendants. I therefore deemed it proper to frame a clear issue on the point and give the parties ample opportunity to lead evidence thereon. As the point was raised by Defendants I placed the onus on them.

29. The evidence on this issue (No. 9) has only served to reinforce the case of Defendants. One of the witnesses is no other than Udhav Ballal Vaidya (Defendant No. 8) a fellow Inamdar of Plaintiff and one of these on whose behalf Plaintiff claims the plaintiff reliefs. This witness (exhibit 160) owns a substantial *dhare* of the inam. He and his brother, Defendant No. 9 are entitled to annas and four odd pies, that is more than half the share of Plaintiff. He is one of the most can did witnesses I have ever come across. Notwithstanding the fact that by siding with the Plaintiff even strictly he stood to gain considerably as an Inamdar, he had the honesty to state the truth on oath. He clearly states that the Inamdars do not remove the trees, reeds, stones, etc. but these who are in occupation of the lands enjoy these rights. He also says, "The Khots Dharekaris and other occupants do not ask our permission before removing the trees, etc. Plaintiff did not consult us before filing this suit". No suggestion was made against this witness either in his cross-examination or in the arguments. He was questioned as to why did he keep silent if he knew that Plaintiff did not possess the rights claimed by him for himself and other Inamdars including the witness. But came his answer with his characteristic frankness; "Although we Inamdars are not entitled to the rights claimed by Plaintiff, if the Court were to give any relief to him I am prepared to have a share of it". Surely in these hard times no one would be sorry to have a windfall however underserved it may be. The merit of this Inamdar however lies in the fact that he has not allowed his desire to get the better of his regard for truth as his fellow Inamdar, the Plaintiff, has done. Another suggestion which was made to him in cross-examination was that he has not seen the sanad and was therefore unaware of his rights, to which he readily assented. But in this question the Plaintiff inadvertently let the cat out of the bag. He (Plaintiff) is laying claim to rights which he does not know or believe to exist in the Inamdars but "rights" which on a construction of the sanad he thinks should belong to them. In other words what he want is, so to speak, the specific performance of the grant supposed to be contained in the sanad and not a declaration and injunctions in respect of rights actually exercised by the Inamdars. After a careful consideration of the whole evidence I am convinced that the suggestion conveyed by the line of cross-examination is fully born out. The testimony of this witness is completely fatal to Plaintiff's claims.

30. Another independent and equally honest witness is Balaji Daji Mukadam (exhibit 161) who is the resident of the neighbouring village of Devakhhol. He is also one of the Kadim Inamdars whose inam is expressly saved by the sanad to Plaintiff's predecessors. He has also acted for ten years as a "panch" for Plaintiff when Plaintiff as the Khot made appraisements of his tenant's lands. He has thus ample opportunities to be acquainted with the state of things in the Kondye village and besides he evidently enjoys the confidence of Plaintiff being one of his chosen *panchas*. This witness has purchased both timber and firewood trees from the Kondye village on at least 25 occasions from the Dharekaris. He also testifies to the fact that occupants enjoy both the fruit and the timber of the trees on their lands and also sell these trees. Similarly they gather the reeds and remove the stones. He also avers that the Inamdars including the Plaintiff have seen him removing the trees but they never objected to his so doing. He was even prepared to give the names of the *thikans* from which he purchased the trees and one of the *thikan* is the Gharparda of Mulye Defendants. The trees about the removal of which Plaintiff complains in this suit are also removed from this very *thikan* as will be seen from the Court Commissioner's report (exhibit 131). Two things were suggested against this witness. One was the fact that Plaintiff has instituted an assistance suit in the Mamlatdar's Court against the witness and his co-sharers for the recovery of arrears of dues amounting to one anna and six pies. Although this fact may go to demonstrate that Plaintiff is a twentieth-century Shylock, I do not think that it would serve as a motive for this old and infirm man of 70 to give out an invented story and that too with such consistency and candour as not to be shaken in cross-examination. Another fact which was also promptly admitted

by the witness was that the daughter of the witness was married to a son of Defendant No. 21 who is (or rather was) one of the Dharekaris. But the insinuation looks almost cruel when it is seen that not only Defendant No. 21 is dead but that the son-in-law died more than 15 years ago leaving the witness's daughter a childless widow. I see absolutely no reason to discredit this witness.

10 31. The other witness is one of the Desai Khots (exhibit 159). Although this witness might well be considered an interested party being Defendant No. 13 in this suit, the evidence of the two foregoing witnesses amply corroborate his testimony and I have no difficulty in accepting it. One circumstance deposed to by this witness and confirmed by the decree in suit no. 638 of 1901 (exhibit 141) is that in that suit the Savant Desai khots had asked for the partition of their *khoti* lands together with trees, reeds, stones, etc., and the inam co-sharers who were in the management of that *khoti* moiety, viz. Defendants Nos. 7 to 10 were parties to that suit and must have known this claim. It is contended by Plaintiff in his evidence that they were formal Defendants and had filed a written statement protesting that their presence in that suit was not necessary. But this is beside 20 the point. What is important is the fact that these Inamdars being Defendants to that action must have had notice of the plaint and all the claims averred therein. If they as Inamdars had really possessed the rights to the trees, etc., they would never have remained content with protesting that they were unnecessary parties. On the contrary they would have challenged the claims of the Plaintiffs and joined issue with them on this head. The very fact that the Inamdars considered their presence superfluous goes to show that they were not interested in these rights.

32. Plaintiff has no rebutting evidence whatsoever except his own deposition in which he contents himself with denying the assertion of the witnesses for 30 defence to the effect that they sold and removed the trees in presence of Plaintiff. I have repeatedly said that I am not prepared to accept the word of Plaintiff alone. It was quite open to him to have led evidence in support of his claims and in rebuttal of those set up by Defendants.

33. As the result of the evidence discussed above I am bound to hold that the Defendants must succeed on the issue of limitation also. Assuming that the Plaintiff or his predecessor had the rights to the trees, etc., claimed by him, at any time in the past, it is evident that his suit for declaration and injunction in respect of those rights is hopelessly barred. Article 120 of the Limitation Act governs the case and the period of limitation is six years from the date when the right to sue 40 accrued. Now, from the evidence of the witnesses for the Defendants, including a co-owner of Plaintiff in the inam, it is evident that the villagers in occupation of the lands have openly, and without any let or hindrance on the part of the Inamdars appropriating the timber of the trees, the reeds and the stones on their respective lands. They are not only using the timber for their own use but also sell the same. The whole case of the Plaintiff rested on the allegation that the occupants used to take the permission of the Inamdars before they did so. But this, in my opinion, is an invention pure and simple and there is not a shred of evidence in support of it except the interested and unreliable testimony of the Plaintiff and the inconclusive evidence of his vendor. There can be no manner of doubt that 50 this practice of removing and appropriating the trees, etc., is general notorious and of long standing. Of course the witnesses for Defendants are deposing from their own experience and they could not be expected to speak to events which happened before their time. These witnesses range from 55 to 70 years in age and excluding the period of their childhood and adolescence we may safely take it that their experience extends over a period of 35 to 45 years. During this period at any rate the villagers have been exercising the right of removing trees, reeds, stones on or pertaining to their respective lands to the knowledge of the Inamdars. It need not therefore to be stated that Plaintiff's right to sue accrued at least 35 years ago. He cannot continue to disregard their acts so long and suddenly seize 60 upon the last of the series of such acts in order to bring his suit within time.

34. A frail attempt to get round this difficulty was made by Plaintiff by suggesting that the villagers did not deny the Inamdars' rights and in support of this reference is made to the statement of some of the witnesses that they did not inform the Inamdars before they cut down the trees. This argument borders on the ludicrous. It is not suggested or argued that the villagers acted stealthily

at dead of night when performing these acts. On the contrary one of the witnesses has definitely stated that sometimes the Inamdars used to be present when he removed the trees purchased by him. What Plaintiff means is that when doing these acts the villagers did not in so many words recite this formula: "Here is your tree. I am not entitled to remove it without your permission. But I defy you and remove it without your permission". According to him some such ceremony is essential before it could be said that the villagers denied the Inamdars' rights. To him the acts themselves, however, open and unequivocal they may be, have no meaning. If the Inamdars have really been so dull of intellect no wonder if they allowed their rights to lapse (if they had any) and left it to a shrewd and enterprising purchaser in the shape of the Plaintiff to make a belated attempt to retrieve their lost position. 10

35. The same argument was presented in another form. It was suggested that the Inamdars were ignorant of the adverse acts of the villagers and so no limitation runs against them. Assuming that they were really ignorant, their ignorance cannot excuse them. If the Inamdars chose deliberately to shut their eyes at what was going on for years they have no reason to complain. Law and Law Courts are meant for those who keep awake and watch their rights and not for those who slumber. To do otherwise would be to put a premium upon negligence and practically to place the absentee landlords—a class which deserves no encouragement—beyond the pale of the Limitation Act. No authority is needed for this obvious proposition. But I may refer to *Vithal Power v. Narayan* (18 Bom. 507) wherein at page 511 it was held that adverse possession would run even against property of which there was no manager. This case is cited with approval at page 538 in *Thakore Fatesingji v. Bamanji* (27 Bom. 515). As a matter of fact however there is no justification for supposing that the Inamdars were ignorant of the acts of the villagers. One of the Inamdars (exhibit 160) takes these acts as the undoubted exercise of their rights by the villagers. Plaintiff's vendor (exhibit 31) asserts that he had a manager on the spot who looked after the Inamat. And to crown all Plaintiff himself has come to the rescue by emphasising that he was himself acting as the Mukhtyar of the Inamdars since 1898 and has been dispensing the so called "permissions" every year. Since 1923 Plaintiff himself has become an Inamdar and he is admittedly a permanent resident of the village. 20 30

36. In the result it is evident that Plaintiff has come to the court years after his right to declaration and injunction was barred and the suit must fail on this ground also. As he cannot have declaration of his rights to trees, etc., it follows that he cannot claim any damages for the trees removed by Defendant No. 18. 40

37. In view of the conclusions to which I have arrived on the facts it will be superfluous to deal with the lengthy arguments based on the sanad and some authorities which, it is said, support Plaintiff. I have carefully considered this argument and the conclusion to which I come is that the sanad and the authorities support Plaintiff in rather a different sense. One who runs may read that the whole case of Plaintiff is studiously reared on certain half-digested passages in the sanad and the authorities and in this sense they literally "support" Plaintiff's case.

38. The copy of the original "sanad" is at exhibit 106. It is issued by the Peshwas to certain Vaidyas in Shake 1700 (1778 A.D.) and was confirmed by the British Government (see exhibit 109). It contains the expression जल, तरु, तृण, काष्ठ, पाषाण (waters, trees, grass, wood, stones, quarries, mines, etc.) which has been held to pass to the grantee "the property in the soil so far as it can be regarded as vested in Government". Plaintiff conveniently overlooks the words underlined by me. All that the authorities lay down is that these words in the sanad pass to the grantee the property in the soil so far as the soil is vested in the Government which grants the sanad. It does not mean that the immediate possession of the entire soil in the village whether it vests in the Government or no passes to the grantee. In other words, it does not mean that the occurrence of this stereo typed phrase in the sanad automatically expropriates the whole body of villagers who might have acquired any vested rights in the land before the grant. That is exactly what Plaintiff wants the Court to do and which it would be little short of outrageous on the part of the Court to do. 50 60

39. Now, what did pass to the grantee under *this* sanad? It cannot be denied that every case must turn upon its own facts notwithstanding the inclusion of the phrase above referred to in the sanad. There can be no cast-iron rule which can lay down that it must be presumed that so many rights necessarily pass under a sanad belonging to this class. The result must turn upon the finding as to the extent of the right which the Government at the time had in the soil. It may, however, be stated that the Government or the State or the Sovereign has the undoubted right to the taxes or revenue which will pass under the grant if so conveyed. Similarly, the unoccupied land, the waste land and the forest, which together may well be classified as the *terra regis*, certainly vest in the Sovereign and will also pass under the grant. It may be that the Sovereign has the prerogative to expropriate the occupants and grant their lands to the grantee. But in that case the accepted rule of construction would require that the Sanad should contain express directions divesting the existing occupants and no such presumptions would be raised in absence of such express terms. In fact, apart from the saving in favour of Hakdars, etc., the granting of the taxes (कुलबाब, कुलकानू) necessarily implies that there are people who will pay those taxes. If the entire soil immediately vested in the grantee the grant of taxes would become meaningless, for the taxes cease to exist when the person who pays them and the person who levies them are identical. To me it appears a truism that the sanad does not destroy the rights of the original occupants.

40. It is admitted by the Plaintiff (exhibit 104) and to some extent by his vendor (exhibit 132) that the Khots, Dharekaries and privileged tenants had settled on their lands in the village even before the sanad of 1778 was issued to Plaintiff's predecessors. It, therefore, follows that the possession of the soil in their occupation did not at that time vest in the Sovereign. Consequently the same did not pass to the grantee.

41. I have already said that this conclusion could be reached even without drawing upon the saving clause which safeguards the rights of the Hakdars and Kadim Inamdars. Who are the Hakdars? This term certainly does not include the prior Inamdars, viz. the Mulyes and Mukadams who are provided for by the expression Kadim Inamdars. Nor is this the case of Plaintiff. According to Plaintiff, however, the Hakdars are the Deshpandes, Deshmukhs and others who are referred to in exhibit produced by Defendant No. 16. This is clearly an after-thought based on a document filed by the Defendant. In the first place the Deshmukhs, Deshpandes, etc., could hardly be called Hakdars. They were rather the servants or officials of the village. No doubt they held hereditary offices but nonetheless they were servants who were remunerated by the villagers for their service. In the days of the Peshwas they were really live officials and not the mere dignitaries we now come across. They were not the owners of haks or rights as such. So long as they served the village they must be remunerated whether the Inamdars wished it or not. The sanad itself shows that an intimation of the grant was transmitted to the Deshmukh and Deshpande of the village Fungus. They were thus the officials of the Government and not the Hakdars. Further there is nothing to show that the persons referred to in exhibit were the same Deshmukhs, Deshpandes, etc., who existed when the sanad was granted. Nor is there any ground for supposing that they exhausted the whole category of Hakdars even assuming that they fell within this class. I see no reason why the natural meaning of this word should not be given to it. It means "possessors of rights" or vested interests. Now, nobody can deny that the Khots have vested interest in their *khasgi* or *khot-nisbat* lands. I deliberately leave out of account the other rights of the Khots which we are not concerned with in this suit. Similarly the Dharekaris and privileged tenants have vested rights in the soil. In general it may be stated that the Khots Dharekaris and privileged tenants have at any rate the right to hold the land in perpetuity. They ought therefore to come within the term Hakdars, and the Inamdars must take the inam subject to their right of permanent occupation.

42. Next question is, did the Khots, Dharekaris and occupants possess any rights to the trees at the time of the grant? This too is an academical question in view of my foregoing findings. My answer is that there is no reliable evidence on this point and judging from the fact that during last 40 years no such rights existed I should think that the Inamdars had no right to the trees standing on the

occupied land. It may be that there were in the distant past some tracts of unoccupied or jungle land in the village which under the sanad vested in the Inamdars. But the great increase in the population of the country during the last 50 years must have brought every available inch of the land under cultivation. Now it is conceded that there is no unoccupied land in the village and the trees, etc., to which Plaintiff lays claim are those which stand on the lands of the Khots, Dharekaris and occupants. When and how the waste and unoccupied lands (if there were any) disappeared there is no evidence. Likewise there is no reliable evidence that the Inamdars had ever any rights to the reeds or weeds on the creek bank or to the stones on the lands of the occupants. On the contrary there is evidence on record that they had no such rights. 10

43. Reliance however is placed on certain Kabulayats (exhibits 112 to 117 and 133 and 134) passed by certain Khots to the Inamdars in the years 1881, 1885 to 1887. They are all cast from the same mould and contain identical clauses. Clause 8 states: "In the said village there are fruit-bearing and other trees which we shall not remove or cause to be removed". In the first place there is no knowing to which trees this condition refers. For aught we know it might refer to the trees on the waste or jungle land which might have existed forty-five years ago. If it referred to the trees on the lands of the Dharekaris and privileged tenants it is difficult to understand why the Khots should hold themselves responsible for them. At the most it might be treated as an admission by these Khots which can be used against them. In any case even if we were to concede that this clause referred to all the trees in the village, it has been so consistently honoured in the breach for the last forty years that it has only a historical interest now. In this connection it is very material to point out that although Plaintiff admits that he passed a kabulayat to the Inamdars in 1898 this kabulayat is not forthcoming while he has dug out the more ancient documents to substantiate a shadowy claim. No serious attempt is made to get the *right* person produce it presumably because it might not be containing any reference to the trees, etc. It is also worth while to observe that none of these kabulayats allude to the stones and the weeds or reeds. Why did not the Khots undertake to guard these "rights" of the Inamdars? If the trees referred to were really all the trees in the village then it follows that by implication the rights of the Inamdars to the reeds and stones are negated by reason of the exclusion. 20 30

44. In passing I may note that Plaintiff made an attempt, and I might add not a very honest attempt to pass off these kabulayats as if they were "rent-note" passed by the Khots in their favour. In his examination-in-chief he relied on the kabulayats to show that the Khots, etc., were his yearly tenants. This was nothing but a pun on the word kabulayat. It literally means an undertaking or a promise but is usually employed to denote a rent-note. Even an idiot would say that in this case it is not used in the latter sense. It is clearly used in the more literal sense. In fact even now the annual undertaking given by the Managing Khot to the Collector is called a kabulayat. That does not constitute him the lessee of the whole village. This meaning is clearly set out in "The Collector of Ratnagiri v. Antaji" (12 Bom. 534 at page 548) as "formal agreements by which the Khot engages to make good the fix sum at which the revenue is assessed, coupled with two securities for the punctual payment of the revenue". It appears that till 1820 the Khots were in the habit of passing the kabulayats to the Government (see exhibit 110) but this seems to have annoyed the Inamdars who thereafter took the kabulayats from the Khots (see exhibit 111 of 1826) as they happen to be the grantees of the village. The Khots being numerous they had to follow the procedure adopted in the unalienated villages of taking kabulayats from certain of the Khots. It was suggested that the Dharekaris in their turn used to pass kabulayats to the Khots but as to this there is no evidence except some vague statements in two ancient mortgage deeds (exhibits 118 and 119). Nor do we know what kind of kabulayats were they or what were their terms. But it is quite possible that certain selected Dharekaris took upon themselves the responsibility of recovering and paying to the Khot the assessment due from the whole body of Dharekaris which in this village is particularly numerous, just as the Managing Khot does with respect to the whole *khotki*. The kabulayats therefore have no bearing whatsoever on the case. 40 50 60

45. Lastly some authorities are drawn upon to support Plaintiff's case. I fail to see how could any authority alter the facts found above. As I have said above, each case of this nature must be decided on its own facts. If the evidence clearly proves that no such rights as claimed by the Plaintiff were ever exercised at any rate within living memory no amount of abstract reasoning or technicalities can show the contrary. Nevertheless I shall briefly refer to some of them.

10 46. *Mor Abaji v. Narayan Dhondbhat Pitre* (11 Bom. 680) was a case between the Inamdars and the Khots, where the latter laid claim to be the proprietors of the soil. That claim was certainly negatived as it would have been negatived in this case if it had arisen. Here we are concerned with the rights of the actual permanent occupants to the trees, etc. on their lands. In that case the dispute was only as regards the forest or jungle trees. In the present case it is admitted that there is no jungle or forest. The order of the Court in that case is very carefully worded (see page 389 last paragraph) and is confined to jungle wood alone. I have already said that had there been any waste or jungle land in the village, Plaintiff would have been absolutely entitled to it. The whole present case, however, has
20 proceeded on the basis that the rights claimed relate entirely to the lands admittedly in the occupation of the Defendants whether as Khots, Dharekaris or privileged tenants.

47. The same should be said of the Collector of Ratnagiri *v. Antaji* (12 Bom. 535) where too the dispute was as to the forest land and the timber and wood growing therein. The Khot also, as in the preceding case, claimed proprietary rights in the soil of the forest. None of these questions arise in this suit.

30 48. The case of *Ravaji Narayan Mandlik v. Dadaji* (1 Bom. 523) is in my opinion quite against the extreme proposition set up by Plaintiff that he is entitled to the immediate possession of the soil as its full proprietor. While holding that the inclusion of the words "waters, trees, etc." implies a grant of the soil, at page 528 the judgment goes on to state "whatever rights . . . Hakdars or Inamdars may have had, as against the State, at the date of the sanad have, no doubt, been saved to them and even, if they had not been expressly named in the sanad, would have remained intact inasmuch as Government could have not granted away the rights of third parties. This is in consonance with the view of such grants expressed by Elphinstone in his History of India at page 75. "The king can alienate his share in the village." In like manner he often alienates large portions of territory, including numerous villages as well as tracts of unappropriated waste. But in all these cases it is only his own rights that he makes over; those
40 of the village landlords and permanent tenants, of district and village officers, and of persons holding by previous grants from himself or his predecessors, remaining unaffected by the transfer." This opinion of a historian is valuable in this case inasmuch as the sanad in this suit is by a Native State before the advent of the British, and throws some light on what the State had in mind when saving the rights of the "Hakdars and Kadim Inamdars." Incidentally it shows that the village and district officers (Deshmukhs etc.) might come within these exemptions but they certainly do not exhaust them. I am aware that in this case (*Ravaji v. Dadaji*) Their Lordships expressly refrained from saying whether a Khot could come within either of these denominations. All that was necessary for them
50 to decide, on this point, was that the Government itself cannot avail of these exceptions to prove that the ownership of the soil did not pass. Nor is it necessary in this suit to consider whether the rights of the Khots as such are saved by the saving clause. I note that in their written statement (exhibit 73) the Khots have made some attempt to claim for themselves the rights asserted by Plaintiff. In other words the Khots are competing with the Inamdars in order to get hold of the right to squeeze the permanent occupants. It very much looks like two butchers fighting over a poor lamb which left to itself would much rather escape the clutches of both. But in this suit the question does not arise and I have studiously avoided it. It may well be that the rival rights may come into conflict
60 when the permanent tenancy of any of the occupants determines due to failure of heirs or other causes. But then they may raise the point in a suit and I need not speculate about it now. All that I am concerned with in this suit is the right of those in actual possession of lands to the trees etc. on the lands. As Khots have undoubted rights of permanent occupancy in their *hasgi* lands they are naturally interested in this suit; but only to that extent and no farther. As regards these various rights to trees etc. this authority is helpful.

49. Much is made of the case of *Gajanan Wasudev v. Nilo Sakharam* (6 Bom.L.R. 864). But I entirely fail to see its bearing on the present action. This is rather an authority on points of estoppel applicability of Dunlop proclamation to alienated villages and of Khots rights to lands lapsed to him. With none of them we are here concerned. Certain findings of facts on the rights set up by the Inamdars to trees etc. in that suit are relied on to prove the same rights in this case. This is an unheard of procedure. It is evident from that judgment that an issue was remanded to the lower Appellate Court for its findings on this question and the "rights" enumerated on page 869 are no more than the learned District Judge's finding of facts based on the evidence in that case. They are not enunciations of legal principles applicable to all cases in which the rights of Inamdars to trees etc. are in dispute. There can be no warrant for lifting them bodily from that case and thrusting them into this without any regard to the evidence on record before me. A reference to the head note in that case will show that these findings were not incorporated therein which indicates that they were not regarded as legal principles of general applicability. At page 866 His Lordship distinctly states that "had the trial Judge drawn from the evidence the conclusion that the Inamdars had never such rights, no exception perhaps would have been taken to his finding as a finding of fact". Some misconception seems to have arisen on account of Mr. Desai in his learned commentary on the Khoti Act enumerating at pages 170 and 171 these findings as the "rights" of the Inamdars as "laid down" in *Gajanan v. Nilo*. It is quite possible that to some extent Plaintiff has been led into planning his case on an ill-digested reading of this and the preceding cases, as he no doubt struck me to be of a very litigating turn of mind a fact confirmed by the suit to recover 18 pies lodged by him and legal wranglings during his examination.

50. The case of *Amrit Waman v. Hari* (22 Bom.L.R. 275), too is not in point. It only approves and, to certain extent, explains the rule of construction of a sanad propounded in *Ravaji v. Daji* and other cases. Similarly the old case of *Govind v. Sub-Collector of Kolaba* (6 Bom. High Court Ruling 188 A. C. J.) does not apply. Firstly because that was case of Landlord and Tenant and secondly because in that case the land on which the trees grew was admittedly Government property. In this case there is no Government land which could be said to have vested in the Inamdars under the grant. On the contrary the Defendants are admitted to have settled on the lands even before the sanad and they are not affected by the grant.

51. Thus it will be seen that after a respectful consideration of these and other cases I find no reason to alter the conclusions to which I have arrived namely that the Inamdars have no rights to the fruits or timber of the trees growing on the *khasgi* lands of the Khots and on the lands of the Dharekaris and privileged tenants nor have they any right to the reeds growing on the creek banks or the stones on the occupied lands. And even if it is assumed that such rights did exist once upon a time the present suit is barred as having been instituted years after the right to sue lapsed under Article 120. I would therefore answer issues nos. 1 and 9 as already stated in the findings. It may be that this conclusion means that the rights of the Inamdars are practically restricted to a share of the revenue and the remote possibility of an abandoned land reverting to them as grantees of the soil. If it is so, I cannot help it. If they ever had any more rights they must thank themselves for having lost them, either through negligence or on account of a desire to earn more revenue by allowing the villagers to bring more lands under cultivation. It is also probable that in spite of the inclusive grant they were shrewd enough, in those troubled times, to remain content with what they actually got, namely a share of the revenue and had sense enough not to look a gift horse in the mouth.

52. One material circumstance to which I have not hitherto alluded is the purchase of a four-anna share of the *khotki* by the Plaintiff from the original Khot Biwalkar on 23rd December 1897. Plaintiff was asked to produce the original sale-deed (see exhibit 76) but he very discreetly abstained from so doing. The copy of it is at exhibit 140. It shows that Plaintiff himself has purchased the *khoti taxim* including the *khasgi* lands with the water, trees, grass, stones etc. This is not a sale *in invitum* which in *Gajanan v. Nilo* (6 Bom.L.R. 864) was held not to create an estoppel. It is a voluntary sale and the purchaser must be taken to have contracted for the purchase of these rights along with the land.

Moreover from Plaintiff's own evidence it appears that he paid in all about 10 to 12 thousand rupees for the eight-anna share in the *khoti* which now vests in him. Of course were his theory that the Khots are merely yearly tenants accepted, the value of this *khoti taxim* would evaporate almost completely. It is for this reason rather than a desire for truth that has made the Plaintiff resile from this position. But apart from that it is clear that Plaintiff has paid this large sum for the *taxim* and the *khasgi* lands because he took into consideration the value of the trees then standing and to be grown on these lands. This is borne out by the fact that Plaintiff is deriving a handsome income from these trees. He has, on the other hand, paid only Rs. 4,000 for the inam share (see exhibit 108) which sum would fetch a reasonable return in the shape of inam dues even if no other rights are considered. From his own evidence it appears that Plaintiff is more concerned about his *khoti* rights than the so-called inam rights set up in the plaint. It is even possible that he has preferred this hopeless suit with a view to remove any cloud that may hang over his valuable *khoti* rights. If so, he will be leaving the Court as the most successful litigant in the suit notwithstanding his apparent failure. I have, however, not taken these circumstances into consideration in coming to the above conclusions.

53. Issue no. 2 needs no finding. It was primarily framed having regard to the proviso to section 42 of the Specific Relief Act. The Plaintiff had alleged that he was in possession of the soil, quarries etc. The other side contended that he was not and that he ought to ask for the further and primary relief of possession. I have of course found that Plaintiff was not in possession of any of the rights alleged by him. But having disposed of the suit on other grounds this issue does not survive. If required, it follows from the above observations that the answer must be in the negative. The remedy by way of injunction is not available to a man who is out of possession. Nor can he claim mere declaration when he could claim the further relief of possession and does not do so. To do otherwise would be to legalise the evil so commonly resorted to (as in the present case) of escaping the proper court-fees. From the various sale-deeds it is clear that the value of the soil, trees, etc. in the Kondye village might well run up to half a lac of rupees. But Plaintiff has valued the suit at Rs. 100 including the claim for damages!

54. The third issue, too, does not survive. Defendants Nos. 11 to 13 who are the Khots of the moiety of the *khotki* other than that of Plaintiffs contend that their moiety was allotted to the inam moiety belonging to Defendants Nos. 7 to 10 in suit no 638 of 1901 and therefore they have nothing to do with the Plaintiff and his inam. It is an admitted fact that for the last 40 years or so the two inam moieties are separately managed by two different groups of Inamdars. But it is also conceded that there was no formal partition through Court. In the suit of 1901 the Khots of the moiety belonging to the Sawant Desais had asked for partition among the co-sharers in that moiety and only Defendants Nos. 7 to 10 (or their predecessors) were impleaded as the Inamdars. This fact by itself cannot be treated as tantamount to a final partition between the two groups of Inamdars. But this question does not call for any definite finding because in my view Defendants Nos. 7 to 15 are proper parties. It is admitted that the inam rights are the same as regards both the groups of Inamdars. In substance this suit was framed for the determination of such rights and all persons likely to be affected by the decision are proper parties. As a matter of fact the whole village is likely to be affected by the decision and the Defendants are sued in their capacity as representatives of the various interests at stake. It is true that Plaintiff in his evidence admits that he has no grievance against most of the Defendants. But the suit as framed rightly impleads all the Defendants. If it turns out that they were unnecessarily bothered with this litigation in spite of the fact that Plaintiff had no case, that circumstance can be taken into account when considering the question of costs. But it would not mean that the Defendants were wrongly impleaded. I will, therefore, answer the issue in the negative if so required.

55. As regards the 4th issue there is no dispute. Plaintiff admits that the Mulyes are the Inamdars of five *bhighas* and in fact in his own sanad issued by the British Government the rights of these prior Inamdars are excluded. The sanad (exhibit 127) produced by the Mulye Defendants also proves this fact. It is further admitted that as Dharekaris also the Mulyes came in the village long before the Vaidya Inamdars. The second part of this issue is already considered when discussing the 1st issue and for the reasons then given it must be answered in the affirmative.

56. The 5th issue is worded in general terms but it does not mean nor was it understood to mean, that the entire collection of rights vested in the Khots, Dharekaris and privileged occupants as against the Inamdars was in issue. The rights referred to therein are the rights claimed in the plaint. I have considered these questions at length in dealing with the first and 9th issues and I have simply to repeat the conclusions there arrived at, namely that the Khot is entitled to the soil, trees, reeds, quarries, stones, etc. standing on and pertaining to their *khasgi* or *khot-nisbat* lands and similarly the Dharekaris and privileged tenants are entitled to the soil, trees, reeds, quarries, stones, etc. standing on or pertaining to the lands in their occupation; and that the Inamdars have no title to any of these rights as against the Khots, Dharekaris and privileged tenants. 10

57. As I have gone into and discussed the case at length it is fruitless now to consider whether the suit is bad for multifariousness. I may however say that had the Khots and the Inamdars insisted on exploring the question of their rival rights against the Dharekaris and privileged tenants I would have dealt with this issue as a preliminary point in order to see if such different and disconnected claims should be considered in one suit. But that contingency did not arise. No finding is therefore called for now. 20

58. Both parts of the 7th issue must be answered in the negative for reasons already given. Plaintiff is not entitled to any damages.

59. It also follows from what has been said before that Plaintiff is not entitled to declaration and injunction.

60. The only question that remains for consideration is that of costs. On the one hand I have to consider the conduct of the Plaintiff. This, in my opinion, is not a bona fide action. Plaintiff has taken advantage of easy terms provided by the court-fees and suit valuation acts for declaration, and, injunction by way of consequential relief to launch a speculative and totally unsubstantial litigation against the whole village. It is very significant that none of the original Inamdars (except of course the vendor of Plaintiff) has come forward to support his invented claim. Even his vendor did not appear as a party but was examined as witness on commission. One of the Inamdars has expressly repudiated on oath the rights that Plaintiff claimed. But as against this I should bear in mind that Plaintiff has not attempted to prop up his claim with the aid of hired witnesses. Nor has he stuck obstinately to all the untruths, he uttered in his examination-in-chief. In short he has not unnecessarily prolonged the hearing. This is in sharp contrast to the conduct of the Defendants who have lived up to the old saying: "What is everybody's business is nobody's business." Out of these numerous Defendants not one cared to put in his appearance on the first day of hearing and their excuse was that they were celebrating the *Navaratra* holidays. Probably each of them thought that the other would attend and his absence would not matter. The Court had therefore to take upon itself the task of elucidating the extraordinary statement of the Plaintiff that the Khots, Dharekaris, etc. were merely yearly tenants. It was only this fortuitous delay that enabled the Defendants to put in their appearance just in time to cross-examine the Plaintiff. They similarly did not point out the omission of an issue on the point of limitation in due time with the result that the conclusion of the case was delayed by month or so. These circumstances must deprive them of the costs which they would have otherwise got. Had they been more diligent I would, indeed, have deemed it fit to award separate sets of costs in view of the false and frivolous nature of the suit. 30 40 50

Order.

Plaintiff's suit is dismissed. Parties to bear their own costs.

(Signed) S. A. LAL,

Sub-Judge.

3rd December 1931.

[True copy]

(Illegible)

Clerk of the Court,
District Court, Ratnagiri.

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'APPEAL No. 285 OF 1934 FROM APPELLATE DECREE.

Putalaji Vishram Desai; and others. (Original Defendants }
Nos. 11 to 17 and 20, 22, 26, 28, 30 and 32) ... } Appellants.

versus

Damodar Vishnu Vaidya; and others. (Original Plaintiff }
and Defendants Nos. 1 to 8 and heirs of Defendants Nos. 9 } Respondents.
and 10 and 18, 19, 21's heirs, 23 to 25, 27, 29 and 31) ... }

Second Appeal against the decision of N. R. Gundil, Esquire, District Judge at Ratnagiri in Appeal No. 339 of 1931.

Counsel Dr. Ambedkar with Mr. A. A. Adarkar for the Appellants.

Counsel Mr. H. C. Coyajee with Mr. Y. V. Dixit for Respondent No. 1.

15th December 1938.

(Coram :—N. J. Wadia and Sen, JJ.)

Oral Judgment (per Wadia, J.).—The 1st respondent is one of the Inamdars of the village of Kondye in the Ratnagiri District having purchased a four anna share in the Inam from the 1st and the 2nd defendants on the 15th November 1923. He brought the suit out of which this appeal arises for a declaration that he and defendants Nos. 3 to 10 were as Inamdars the owners of all rights to trees, canals, water-courses, plants, grass, wood, stones, etc., in the village and entitled to all kinds of lands, stone-quarries, reeds along the creeks, and all varieties of mango, jack-fruit, teak, black-wood and other timber or jungle trees in the village. He further prayed for an injunction to defendants Nos. 11 to 32 and all persons claiming under them or interested in the village as cultivators or otherwise preventing them from doing any act prejudicial to the rights of the plaintiff and defendants Nos. 3 to 10, and for Rs. 65 as damages against defendants Nos. 18 and 27 for the value of certain trees sold by defendant No. 18 to defendant No. 27 and removed by the latter. The trial Judge dismissed the suit holding that the plaintiff and the other Inamdars defendants Nos. 3 to 10 were not as Inamdars entitled to the soil, trees, stones, reeds, etc., on lands in the occupation of the defendants and that the plaintiff's claim was barred by limitation. In appeal the learned District Judge reversed the decision of the trial Court and decreed the plaintiff's suit so far as the rights to trees were concerned. Defendants Nos. 1 to 10 are the Inamdars of the village, the shares of defendants Nos. 1 and 2 having been sold to the plaintiff. The village is a Khoti Khichadi village and defendants Nos. 11 to 15 are the representatives of some of the Khots holding 8 annas share in the village. The other 8 annas share of the Khoti was purchased by the plaintiff himself in the year 1897. Defendants Nos. 11 to 26 are the representatives of the Dharekaris in the village, while defendants Nos. 28 to 32 are the representatives of the permanent tenants. In the pleadings both sides put forward exorbitant claims, many of which were subsequently given up. The plaintiff had contended that the defendants were no more than annual tenants. This contention was given up. He had also claimed the right to the reeds growing along the creek and river beds. That claim also was given up. The defendants on the other hand conceded that the grant made to the Inamdars by the Sanad of the Peshwas in the year 1778 was a grant of the soil and not merely of the royal share of the revenue. The Inamdars' rights to quarries and minerals were not contested nor were their rights to timber in forest and unoccupied lands disputed. It was also not disputed by the Inamdars that the Khots, the Dharekaris and the permanent tenants were on the lands prior to the grant of the Inam in 1778.

In the trial Court an issue was raised with regard to the plaintiff's claim being barred by limitation. A good deal of evidence was led on the issue and the learned Judge recorded a finding that the claim was barred.

In the appeal before the District Judge, it appears that the learned Pleader for the defendants, the Khots and the Dharekaris, did not press the question of limitation. The only issues framed were whether the appellant-plaintiff and defendants Nos. 3 to 10 as grantees of the soil were owners of timber and fuel trees and of reeds and rushes growing by the river side; whether the Inamdars were owners of such trees standing or growing on lands permanently occupied by the Khots, Dharekaris and Kuls or occupancy tenants, and if they were what were the limitations to such rights in favour of the three classes of holders. The learned Judge found in the affirmative on the 1st and the 2nd issues and made a decree declaring the rights of the plaintiff as Inamdar and the limitations to which those rights were subject. The order which he has made is that the plaintiff and defendants Nos. 3 to 10 as Inamdars of Kondye are owners of the soil, quarries and minerals and of all timber and jungle trees, such as Ain, Kinjal, Nanha, Sissav (black-wood) Teak, Khair, Tamhan and Jack standing and growing on all lands in the village, whether permanently occupied or otherwise, subject to certain conditions which he has laid down. Against that decree some of the defendants representing the Khots and some of the Dharekaris and permanent tenants have appealed, and the plaintiff has filed cross-objections with regard to the finding of the learned Judge that the plaintiff was not entitled to the mango trees, and the reeds and rushes growing along the river side. It may be mentioned that the permanent tenants did not appear before the District Judge though they had been served.

Two questions arise in the appeal. The first question is whether the plaintiff as Inamdar is the owner of the soil and of the trees in the village including the trees on the lands in the occupation of the Khots, Dharekaris and permanent tenants. The second is whether if he is the owner of the soil and of the trees, his right to the trees is barred by limitation.

It has been conceded before us by Dr. Ambedkar for the appellants that the Inam was a grant of the soil and on the terms of the Sanad (exhibit 105) no other view is possible. It is contended however that this grant of the soil was subject to the rights of the prior occupants, namely the Khots, the Dharekaris and the permanent tenants, who were admittedly on the lands before the grant of the Inam in 1778. The Sanad mentions that the village of Kondye was granted in Inam to the grantees, the predecessors-in-title of the plaintiff and defendants Nos. 3 to 10 together with all taxes and cesses, the present and future cesses, waters, trees, stones, mines and buried treasures, but exclusive of the rights of the Hakdars and ancient Inamdars. The grant is clearly a grant of the soil and includes in express terms the rights to trees, stones, mines, etc. The question is whether the right to trees which was granted by the Sanad includes the right of ownership over trees which stand on the lands in the occupation of the Khots, Dharekaris and permanent tenants which were in their occupation prior to the grant of the village to the Inamdars.

It has been contended before us on behalf of the appellants that the rights of the Khots in Khoti Khasgi lands, i.e., lands cultivated personally by the Khots, and of the Dharekaris and permanent tenants in the lands in their occupation are proprietary rights and would include rights to timber and fruit bearing trees standing on their lands. Reliance was placed on the decision in *The Secretary of State for India v. Narayan Namshet Kamerkar*, (1899), 1 Bom.L.R. 19. That was a case of an unalienated Khoti village and the suit was brought by the Secretary of State to recover the value of certain teak trees standing in Khoti Khasgi lands which had been cut by the defendants, the contention of the plaintiff being that Government was the sole owner of the trees. It was held that the Khot was the proprietor of his Khoti Khasgi land; that in the case of such Khoti Khasgi lands the proprietary title is proved by the very term itself, for they are lands which belong to the Khot as having been acquired by him either by his expenditure of money in bringing them into cultivation, or by lapse or forfeiture from those who originally owned them or by purchase. It was further held that the Khots were entitled to claim proprietary rights in the trees growing in their Khoti Khasgi lands; that the seigniorial rights

of Government to teak trees were relinquished by Dunlop's proclamation issued in 1824 and that that relinquishment could not be rescinded by any subsequent proclamation of 1851 or notification of 1885. The Dunlop proclamation of 1824 stated that the pre-British Government used to take teak, blackwood and other good timber grown on lands belonging to people, that as a result the people did not take the trouble of raising such timber trees; that Government therefore thought that it would be to the advantage of all if thenceforth teak, blackwood and any other kind of good timber were raised in the country, and it was proclaimed that Government has no intention of claiming such trees growing on the lands of any person whatever situate beyond the limits of the jungles preserved by Government. In an earlier case in *re Antaji Keshav Tambe*, (1893), I.L.R., 18 Bom. 670, which arose out of a prosecution of a Khot under the Indian Forest Act for having cut certain teak trees without the permission of Government, it was held that the land on which the trees in question were growing was the Khōfi Khasgi land of the accused Khot, and he was therefore entitled to the benefit of the Dunlop proclamation by virtue of which the trees thereon became his property, and that proclamation could not be withdrawn by Government in so far as it related to trees planted after that date. Both these cases however related to Khoti lands in unalienated villages. On the view which was taken about the Dunlop proclamation it was clear that Government had expressly given up their rights to trees standing on lands in private occupation whether of Khots or of any other kind of holders. Those decisions therefore cannot apply to the case before us which is that of an alienated village, the alienation being prior to the British occupation, and the question which arises for decision is whether the grant which was made by the Peshwa in 1778 did or did not confer upon the grantees, the Inamdars, the ownership of trees standing on lands which at the time of the grant were already in the occupation of Khots, Dharekaris and permanent tenants. On this question there is a decision of a Division Bench of this Court in *Gajanan v. Nilo*, (1904), 6 Bom.L.R. 864, which, in our opinion, applies to the facts of the present case. In that case also the Inam had been granted by the Peshwas, the grant being of the same year 1778 as the grant in the present case, and the suit was brought by the Inamdars against the Khots claiming that the Inamdars were the owners of the forest and trees in the village, and for an injunction restraining the defendants from cutting such trees without the plaintiffs' permission. The defendants had contended that the grant to the Inamdars was a grant of the revenue only and not of the soil, that they had no right to the trees and had never been in enjoyment of such trees and had on the contrary purchased trees from the Khots and tenants. The Subordinate Judge held that the Inamdars were the owners of the soil and of the trees, subject to the rights of privileged occupants of lands to enjoy the lands in their occupation, and granted an injunction restraining the Khots from acting in violation of the rights of the Inamdars. In appeal the District Judge held that the plaintiffs Inamdars were estopped from setting up their title, because for over 40 years before the suit they had admitted that they had not been the owners of the forest and trees. Evidence had been led on behalf of the Inamdars in that case to show that on several occasions permission had been obtained by the occupants of the lands for the cutting of timber and that payment had been made to them on account of the trees cut. This evidence was brushed aside by the learned Judge on the ground that under the Dunlop proclamation the occupants had become the owners of the trees on their holdings and therefore the transaction showing that the permission of the Inamdars had been obtained for cutting the trees were void as no permission was necessary. In appeal it was held by the High Court that there was no estoppel against the Inamdars so far as the particular defendants were concerned and that the Dunlop proclamation could not apply to villages which had been alienated to Inamdars before the date of the proclamation. Their Lordships therefore remanded the appeal to the lower appellate Court for fresh findings as to the rights set up by the Inamdars, and it was held by the lower appellate Court on

remanded that the Inamdars were the owners of all timber trees in lands permanently occupied and of all trees and jungle in all other lands in the village. "Lands permanently occupied" were defined as meaning lands held on a permanent tenancy whether *bagayat*, *jiayat*, rice or *varkas* such as those held by privileged occupants and Khoti Nisbat including Khoti Khasgi lands. Although from the report of the case it is not clear whether any of the defendants in that case were Dharekaris, the decision of the High Court clearly includes Dharekaris and permanent tenants, as well as Khots, since it defines lands permanently occupied as lands held on a permanent tenancy such as those held by privileged occupants and Khoti Khasgi lands. "Privileged occupant" in section 3 of the Khoti Settlement Act, means a Dharekari, or a quasi-Dharekari, or a permanent tenant. The appellants have not adduced any evidence to show that the right to trees was expressly granted to them either by the Peshwa's Government prior to the grant of the Inam to the Inamdars or subsequently by the Inamdars. That being so under the terms of the Inam Sanad and the view taken in *Gajanan v. Nilo* it must be held that the plaintiff as Inamdar is the owner of all timber trees in the Khoti Khasgi lands of the Khots and in the lands held by the Dharekaris and permanent tenants. The decree which has been made by the learned District Judge laying down the limitations on the plaintiff's rights follows very closely the decree made by the High Court in *Gajanan v. Nilo*.

The next question is whether the appellants' contention that the plaintiff's right to trees, even if it existed, has been barred by limitation, is correct. The learned trial Judge discussed the evidence on this point at some length and came to a very emphatic conclusion that the plaintiff and the other Inamdars had never been in enjoyment of the various rights to trees which they had claimed. He also held that their right with regard to trees was barred by limitation, because on the admissions of the plaintiff himself and of his vendor defendant No. 1, as well as on the evidence which has been led on behalf of the defendants, it was proved that the Khots, Dharekaris and permanent tenants had for a period extending over 35 to 40 years been openly exercising the right of cutting and removing trees on their lands to the knowledge of the Inamdars and without their permission. As I have pointed out the contention with regard to limitation was for some reason not pressed before the learned District Judge and he held relying on a decision of the Privy Council in *Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakat*, (1931), 33 Bom.L.R., 1273, that there could be no bar of limitation to the plaintiff's claim with regard to the trees. The decision in that case however was based on different grounds. The question there was with regard to the rights to minerals. The tenants, the Putnidars, had claimed that they were entitled to the minerals under the terms of their leases and that alternatively they had acquired a prescriptive right to them by adverse possession, and it was held that where the tenant was in adverse possession of a sub-soil stratum of stones and gravel and a different and lower stratum of minerals is discovered, the possession of the latter must be presumed to be with the *zamindar* until adverse possession by the tenant for the statutory period of 12 years is established, and that such adverse possession cannot be presumed from the tenant's adverse possession of the superincumbent stratum of stone and gravel. The learned District Judge took the view that the grant of a right of occupation will not necessarily annihilate the rest of the rights of ownership which the State or its grantee may yet possess, and that in such a case the State or its grantee will be presumed to be in constructive possession. In his view the Inamdar therefore must be regarded as having been throughout in constructive possession of the rights to trees which he claimed. The defendants' contention however was that they had publicly, continuously and to the knowledge of the plaintiff and without his permission exercised their right to cut and remove trees standing on the lands in their occupation without any objection by the plaintiff. There was no question of inferring the defendants' adverse possession as regards the right to trees from their possession of the lands. Mr. Coyajee for the respondent Inamdar referred to various decisions, *Radhamoni Debi v. Collector of*

Khulna, (1900), I.L.R., 27 Cal. 943, (P.C.), *Jogendra Nath Rai v. Baladeo Das*, (1907), I.L.R., 35 Cal. 961 and *Gobinda Narayan Singh v. Sham Lal Singh*, (1931), 58 I.A. 125 to show that before the possession of the defendants with regard to the right to trees could be held to be adverse to the plaintiff Inamdar, it must be shown that that possession was adequate, in continuity, in publicity and in extent. As held in *Jogendra Nath Rai v. Baladeo Das*, such adverse possession must be actual, visible, exclusive, hostile and continued. The cases to which he has referred were cases of adverse possession of lands. It is obvious that where the question is, as in this case, of rights to trees the same kind of evidence in proof of adverse possession could not be expected. The rights of cutting and removal of trees would necessarily be exercised intermittently. The exercise of such rights could not be expected to be continuous in the sense in which adverse possession of land can be said to be continuous. Subject to this necessary difference arising from the nature of the right, the possession of which is claimed by the defendants, it appears to us that the evidence on which the appellants rely is sufficient to prove that they have been, for a long period extending to over 30 years, exercising rights of ownership over the trees standing on their lands, and that these rights have been exercised constantly, openly and to the knowledge of the plaintiff without his permission, and without any protest from him except in the one instance of the sale of trees by defendant No. 18 to defendant No. 27 which led to the filing of the present suit. Not merely is there considerable evidence with regard to the rights claimed by the defendants, but that evidence is all on one side. While the defendants have proved by the evidence of several witnesses that they and other persons have exercised the rights of selling, cutting and removing trees standing on their own lands, the plaintiff and his vendor defendant No. 1, who were the only witnesses examined on his side, have not been able to prove a single instance in which they exercised the right which they claimed, or in which trees were cut by the defendants or by any other Khots, Dharekaris and permanent tenants with the permission of the Inamdar. Plaintiff's own admissions make this clear. It is to be noted that the plaintiff himself has been a Khot since 1897 and an Inamdar since 1923, and that from 1898 onwards he acted as the agent or manager on behalf of the Inamdars. He was therefore in a position to know of any instance in which he or other Inamdars had exercised rights of ownership over the trees or in which they had granted permission to the Khots, Dharekaris and permanent tenants to cut trees. He has admitted that he has nothing in writing to show that the occupants took the permission of the Inamdars for cutting trees. He has admitted that as Khot he has himself grown several trees on his land from which he gets an appreciable income and that he does not pay any extra rent to the Inamdar for these trees. He has admitted also that there is no instance of the Inamdars having enjoyed the fruits of trees or stones of the quarries or reeds on the banks of the creek. Considering the position in which the plaintiff stood this admission is of the greatest importance since it bears out the statement made by the defendants and the evidence which they have led to show that they have consistently enjoyed the rights to the trees standing on their lands. It may be noted in passing that the plaintiff himself does not in his statement claim the rights over trees standing on defendants' lands to the extent to which the learned Judge has conceded them. The decree made by the learned District Judge declares that the plaintiff and the other Inamdars are the owners of all timber and jungle trees standing on all lands in the village whether permanently occupied or otherwise. The plaintiff himself on the other hand admits that the Inamdar cannot remove the trees on the lands of the Khots, Dharekaris or occupants so long as they pay the dues, and all that he claims is that they can remove the trees when dead or barren. The defendants have examined one of the Inamdars, defendant No. 8, in support of their contention, and this witness, Udhav Ballal Vaidya (exhibit 160), has fully supported the defendants' claim. He says that he himself is an Inamdar owning a one anna and two pies share in the Inam. According to him neither he nor the other Inamdars have any right to remove the trees, reeds, stones, etc., and those who are in occupation of the lands enjoy these rights. He has also stated that the Khots, Dharekaris and other occupants did not ask their permission before

removing trees and that no dues are specially received for the trees. One of the other witnesses examined on behalf of the defendants, Balaji Daji Mukadam (exhibit 161), is a person who is a Khot of the adjoining village and who has on several occasions acted on behalf of the plaintiff himself as a *panch*. He is a Kadim Inamdar of the village. He was therefore evidently in a position to know what the rights of the parties with regard to trees were, and he has stated that on at least twenty-five occasions he has purchased timber as well as firewood trees of different kinds from Dharekaris and Khots in the village and that the Inamdars including the plaintiff himself had seen him removing these trees and have never objected to his doing so. Defendant No. 13 one of the Khots who has given evidence in the case has stated that the Khots removed trees, reeds, etc., and had all the rights which the plaintiff has claimed and that they had never taken any permission of the Inamdars for the exercise of these rights. The witness has stated that he has removed trees from his land every year for a very long period. It appears from the evidence of this witness that in the year 1901 a suit was filed by some of the Khots of the village against other Khots for partition of their Khoti lands. In this suit they had claimed trees, reeds, stones, etc., along with the lands. Defendants Nos. 7 to 10 who are Inamdars, were parties to that suit as defendants and filed a written statement contending that they were not necessary parties to the suit. The learned trial Judge has rightly pointed out that this evidence shows that in 1901 although the Khots openly claimed the right to trees in a suit filed by them to which the Inamdars were parties, the Inamdars raised no contention with regard to the claim, but merely stated that they were not necessary parties to the suit, evidently because they were not interested in the claim which was made. Another circumstance which may be mentioned as affording some evidence in support of the defendants' contention is that the sale-deed exhibit 140 by which the plaintiff purchased the 8 annas share in the Khoti of the village mentions trees, etc., standing on the lands as also being sold to the plaintiff.

The evidence which has been led by the defendants shows satisfactorily that they have been exercising rights of ownership over the trees standing on their lands openly and continuously for over 30 years to the knowledge of the plaintiff and without his permission. The plaintiff on the other hand has failed completely to show that either he or any of the other Inamdars have at any time exercised the rights over trees which he claims. The view taken by the learned trial Judge that the suit is barred by limitation is, in our opinion, correct.

The appeal will therefore be allowed and the decree made by the learned District Judge varied. The first paragraph of the order made by him will run as follows: It is hereby declared that the appellant and defendants Nos. 3 to 10 as Inamdars of Kondye are owners of the soil, quarries and minerals in all the lands in the village whether permanently occupied or otherwise except of the five bighas of Kadim Inam land in the possession of defendants Nos. 16 to 19 and their *bhaubands*, and that they are the owners of the timber and fuel trees standing or growing in forests and unoccupied lands. The rest of the decree will be deleted.

Although the appellants have failed as regards their contention that the plaintiff is not under the terms of his Sanad entitled to the rights over trees which he claimed, they have succeeded in proving that his right is barred by limitation, and the rights which we have held the plaintiff entitled to are rights which the appellants had conceded in the lower Court. In the circumstances we think that a fair order with regard to costs will be that the appellants should get half of their costs throughout from the first respondent, the plaintiff.

The cross-objections are dismissed with costs.

By order of the Court,

Exd. by: M.V.A.

M. V. A.
Registrar.

Appellate
Appeal No.285 of 1934 from ~~Original~~ Decree.

Putalaji Vishram Desai; and others.
(Original Defendants Nos.11 to 17 and 20,
22, 26,28,30 and 32). . . .Appellants.

Vs.

Damodar Vishnu Vaidya; and others.
(Original Plaintiff and Defendants Nos.
1 to 8 and heirs of Defendant No.9, and
10 and 18,19,21's heirs,23 to 25,27,29
and 31).Respondents.

Second Appeal against the decision of
~~Exhibit, Esquire~~ N.R.Gundil, Esquire, -
District Judge at Ratnagiri in Appeal
No.339 of 1931.

Counsel Dr.Ambedkar with Mr.A.A.
Adarkar for the Appellants.

Counsel Mr.H.C.Coyajee with Mr.Y.V.
Dixit for Respondent No.1.

15th December 1938.

(Coram: N.J.Wadia and Sen J.J.)

Oral Judgment (Per Wadia J.): x x

By order of the Court,

 BVB.

Registrar.

Appeal No. 285 of 1934 from Original
Appellate Decree.

Date of decision 15-12-38.

For approval and signature

The Hon'ble Mr. Justice Wadia. y/h
The Hon'ble Mr. Justice Sen. y/h

Whether Reporters of Local Papers may be allowed to see the judgment?
To be referred to the Reporter or not? y/h

Whether Their Lordships wish to see the fair copy of the judgment? y/h

Agreed
19-12-38.

with copy
23-12-38.

Appeal No. 285 of 1934 from Appellate Decree.

Dr. Ambedkar with Mr. A.A. Adarkar for the Appellants.

Mr. Coyajee with Mr. Y.V. Dixit for Respondent No. 1.

Coram:- N.J. Wadia and Sen JJ.

15th December 1938.

Oral Judgment (per Wadia J.):-

The 1st respondent is one of the Inamdars of the village of Kondye in the Ratnagiri District having purchased a four anna share in the Inam from the 1st and the 2nd defendants on the 15th November 1923. He brought the suit out of which this appeal arises for a declaration that he and defendants Nos. 3 to 10 were as Inamdars the owners of all rights to trees, canals, water-courses, plants, grass, wood, stones, etc., in the village and ~~entitled~~ to all kinds of land, stone-quarries, reeds along the creek, and all varieties of mango, jack-fruit, teak, black-wood and other timber or jungle trees in the village. He further prayed for an injunction to defendants Nos. 11 to 32 and all persons claiming under them or interested in the village as cultivators or otherwise, preventing them from doing any act prejudicial to the rights of the plaintiff and defendants Nos. 3 to 10 and for Rs. 65 as damages against defendants

Nos. 18 and 27 for the value of certain trees sold by defendant No. 18 to defendant No. 27 and removed by the latter. The trial Judge dismissed the suit holding that the plaintiff and the other Inamdars defendants Nos. 3 to 10 were not as Inamdars entitled to the soil, trees, stones, reeds, etc. on lands in the occupation of the defendants, and that the plaintiff's claim was barred by limitation. In appeal the learned District Judge reversed the decision of the trial Court and decreed the plaintiff's suit so far as the rights to trees were concerned. Defendants 1 to 10 are the Inamdars of the village, the share of defendants Nos. 1 and 2 having been sold to the plaintiff. The village is ~~what is called~~ a Khoti Khichadi village and the defendants Nos. 11 to 15 are representatives of some of the Khots holding 8 annas share in the village. The other 8 annas share of the Khoti was purchased by the plaintiff himself in the year 1897. Defendants Nos. 11 to 26 are the representatives of the Dharekaris in the village, while defendants 28 to 32 are the representatives of the permanent tenants. In the pleadings both sides put forward exorbitant claims, many of which were subsequently given up. The plaintiff ~~for instance~~ had contended that the defendants

were no more than annual tenants. This contention was given up. He had also claimed the right to the reeds growing along the creek and river beds. That claim also was given up. The defendants on the other hand conceded that the grant made to the Inamdars by the Sanad of the Peshwas in the year 1778 was a grant of the soil and not merely of the royal share of the revenue. The Inamdars' rights to quarries and minerals were not contested nor were their rights to timber in forest and unoccupied lands disputed. It was also not disputed by the Inamdars that the Khots, the Dharekaris and the permanent tenants were on the lands prior to the grant of the Inam in 1778. / In the trial Court an issue was raised with regard to the plaintiff's claim being barred by limitation. A good deal of evidence was led on the issue and the learned Judge recorded a finding that the claim was barred. In the appeal before the District Judge, it appears that the learned ~~Advocate~~ Pleader for the defendants, the Khots and the Dharekaris, did not press the question of limitation, ~~and that question was not therefore gone into by the learned District Judge.~~ The only issues ~~which he~~ framed were whether the appellant plaintiff and defendants Nos. 3 to 10 as grantees of the soil were owners

of timber and fuel trees and ^{of} reeds and bushes growing by the river side; whether the Inamdars were owners of such trees standing or growing on lands permanently occupied by the Khots, Dharekaris and Kuls or occupancy tenants, and if they were what were the limitations to such ~~a~~ right in favour of the three classes of holders. The learned Judge found in the affirmative on the 1st and the 2nd issues and made a decree declaring the rights of the plaintiff as Inamdar and the limitations to which those rights were subject. The order which he has made is that the plaintiff and defendants Nos. 3 to 10 as Inamdars of Kondya are owners of the soil, quarries and minerals and of all timber and jungle trees, such as Ain, Kinjal, Nanha, Sissav (black-wood) Teak, Khair, Tamhan and Jack standing and growing on all lands in the village, whether permanently occupied or otherwise, subject to certain conditions which he has laid down. Against that decree some of the defendants representing the Khots and some of the Dharekaris and permanent tenants have appealed, and the plaintiff has filed cross-objections with regard to the finding of the learned Judge that the plaintiff was not entitled to the mango trees, and the reeds and bushes growing ^{along} ~~by~~ the river side. It may

be mentioned that the permanent tenants did not appear before the District Judge though they had been served.

Two questions arise in the appeal. The first question is whether the plaintiff as Inamdar is the owner of the soil and of the trees in the village including the trees on the lands in the occupation of the Khots, Dharekaris and permanent tenants. The second is whether if he is the owner of the soil and of the trees, his right to ^{the} trees is ₂ barred by limitation.

It has been conceded before us by Dr. Ambedkar for the appellants that the Inam was a grant of the soil and on the terms of the Sanad (Exhibit 105) no other view is possible. It is contended however that this grant of the soil was subject to the rights of the prior occupants, namely the Khots, the Dharekaris and the permanent tenants, who were admittedly on the lands before the grant of the Inam in 1778. The Sanad mentions that the village of Kondye was granted in Inam to the grantees, the predecessors-in-title of the plaintiff and defendants Nos. 3 to 10 together with all taxes and cesses, ~~the~~ present and future cesses, waters, trees, stones, mines and buried treasures, of the rights but exclusive ₂ of the Hakdars and ancient Inamdars. The

grant is clearly a grant of the soil and includes in express terms the right to trees, stones, mines etc. The question is whether the right to trees which was granted by the Sanad includes the right of ownership over trees which stand on the lands in the occupation of the Khots, Dharekaris and permanent tenants ~~and~~ which were in their occupation prior to the grant of the village to the Inamdar.

It has been contended before us on behalf of the appellants that the rights of the Khots in Khoti Khasgi lands, i.e. lands ^{cultivated} ~~granted~~ ^{and of} personally by the Khots, ^{to} the Dharekaris and permanent tenants ⁱⁿ ~~and~~ the lands in their occupation are proprietary rights and would include ~~the~~ rights to timber and fruit bearing trees standing on their lands. Reliance was placed on the decision in The Secretary of State for India v. Narayen Namshet Kamerkar (1899) 1 Bom L.R. 19. That was a case of an unalienated Khoti village and the suit was brought by the Secretary of State to recover the value of certain teak trees standing in Khoti Khasgi lands which had been cut by the defendants, the contention of the plaintiff being that Government was the sole owner of the trees. It was held that the Khot was the proprietor of his Khoti Khasgi land; that in the case

of such Khoti Khasgi lands the proprietary title is proved
 by the very term itself, for they are lands which belong to
 the Khot as having been acquired by him either by his ~~own~~
 expenditure of money in bringing them into cultivation,
 or by lapse or forfeiture from those who originally owned
 them or by purchase. It was further held that the Khots
 were entitled to claim proprietary rights in the trees
 growing in their Khoti Khasgi lands; that the seigniorial
 rights of Government to teak trees were relinquished by ~~the~~
 Dunlop's proclamation issued in 1824 and that that relin-
 quishment could not be rescinded by any subsequent procla-
 mation of 1851 or notification of 1885. ~~By~~ ^{The} Dunlop
 proclamation of ~~1824~~ ¹⁸²⁴ ~~it had been declared~~ ^{stated} that the
 pre-British Government used to take ~~the~~ teak, blackwood
 and other good timber grown on ~~the~~ lands belonging to ~~any~~
^{people} ~~person whatever~~, that as a result the people did not take
 the trouble ^{and that} of raising such timber trees; ~~the~~ Government
 therefore ^{the object} ~~thinks~~ that it would be to the advantage of all
 if ^{thenceforth} ~~from this day forth~~ teak, blackwood and ^{any} other kind
 of good timber were raised in the country, ^{and it was} ~~it is~~ proclaimed
 to ~~all the people~~ that ~~the~~ Government has no intention ~~(eye)~~
 of claiming such trees growing on the lands of any person

whatever, situate beyond the limits of the jungles preserved
 by Government. In an earlier case in re Antaji Keshav Tambe
 (1893) I.L.R. 18 Bom. 670, which arose out of a prosecution
 of a Khot under the Indian Forest Act for having cut cer-
 tain teak trees without ^{the} permission of Government, it was
 held that the land on which the trees in question were
 growing was the Khoti Khasgi land of the accused Khot, and
 he was therefore entitled to the benefit of the Dunlop
 proclamation by virtue of which the trees thereon became his
 property, and that proclamation could not be withdrawn by
 Government in so far as it related to trees planted after
 that date. Both these cases however related to Khoti lands
 in unalienated villages. On the view which was taken about
 the ^{Dunlop} proclamation, ~~known as the Dunlop proclamation~~ issued
 in ~~1824~~, it was clear that Government had expressly given
 up their rights to trees standing on lands in private
 occupation whether of Khots or of any other kind of holders.
 Those decisions therefore cannot apply to the case before
 us which is that of an alienated village, the alienation
 being prior to the British occupation, and the question
 which arises for decision is whether the grant which was
 made by the Peshwas in 1778 did or did not confer upon the

grantees, the Inamdars, the ownership of trees standing on lands which at the time of the grant were already in ~~the~~ occupation of ~~the~~ Khots, Dharekaris and permanent tenants. On this question there is a decision of a Division Bench of this Court in Gajanan v. Nilo (1904) 6 Bom.L.R. 864, which, in our opinion, applies to the facts of the present case. In that case also the Inam had been granted by the Peshwas, the grant being of the same year 1778 as the grant in the present case, and the suit was brought by the Inamdars against the Khots claiming that the Inamdars were the owners of the forest and trees in the village, and for an injunction restraining the defendants from cutting such trees without the plaintiffs' permission. The defendants had contended that the grant to the Inamdars was a grant of the revenue only and not of the soil, that they had no right to the trees and had never been in enjoyment of such trees and had on the contrary purchased trees from the Khots and tenants. The Subordinate Judge held that the Inamdars were the owners of the soil and of the trees, subject to the rights of privileged occupants of lands to enjoy the lands in their occupation, and granted an injunction restraining the Khots from acting in violation of the

rights of the
 L Inamdars.

In appeal the District Judge held that the plaintiffs Inamdars were estopped from setting up their title, because for over 40 years before the suit they had admitted that they had not been the owners of the forest and trees. Evidence had been led on behalf of the Inamdars in that case to show that on several occasions permission had been obtained by the occupants of the lands for the cutting of timber and that payment had been made to them on account of the trees cut. This evidence was brushed aside by the learned Judge on the ground that under the Dunlop proclamation the occupants had become the owners of the trees on their holdings and therefore the transactions showing that the permission of the Inamdars had been obtained for cutting the trees were void as no permission was necessary. In appeal it was held by the High Court that there was no estoppel against the Inamdars so far as the particular defendants were concerned and that the Dunlop proclamation could not apply to villages which had been alienated to Inamdars before the date of the proclamation. Their Lordships therefore remanded the appeal to the lower appellate Court for fresh findings as to the rights set up by the Inamdars, and it was held by the lower

appellate Court on remand that the Inamdars were the owners of all timber trees in lands permanently occupied and of all trees and jungle in all other lands in the village. "Lands permanently occupied" were defined as meaning lands held on a permanent tenancy whether bagayat, Jirayat, rice or Varkas such as those held by privileged occupants and ^{Khot Nishat including} Khoti Khasgi lands, ~~but not Khot Nishat~~. Although from the report of the case it is not clear whether any of the defendants in that case were Dharekaris, the decision of the High Court clearly includes Dharekaris and permanent tenants as well as Khots, since it defines lands permanently occupied as lands held on a permanent tenancy such as those held by privileged occupants and Khoti Khasgi lands.

"Privileged occupant" in section 3 of the Khoti Settlement Act means a Dharekari, or a quasi-dharekari, or a permanent tenant. The appellants have not adduced any evidence to show that the right to trees was expressly granted to them either by the Peshwa's Government prior to the grant of ^{the Inam to} the Inamdars, or subsequently by the Inamdars. That being so under the terms of the Inam Sanad and the view taken in Gajanan v. Nilo it must be held that the plaintiff as Inamdar is the owner of all timber trees in the Khoti

Khasgi lands of the Khots and in the lands held by the Dharekaris and permanent tenants. The decree which has been made by the learned District Judge laying down the limitations on the plaintiff's rights follows very closely the decree made by the High Court in Gajanan v. Nilo.

The next question is whether the appellants' contention that the plaintiff's right to trees, even if *it* existed, has been barred by limitation, is correct. The learned trial Judge discussed the evidence on this point at some length and came to a very emphatic conclusion that the plaintiff and the other Inamdars had never been in enjoyment of the various rights to trees which they had claimed. He also held that their right with regard to trees was barred by limitation, because on the admissions of the plaintiff himself and of his vendor defendant No. 1, as well as on the evidence which has been led on behalf of the defendants, it was proved that the Khots, Dharekaris and permanent tenants had for a period extending over 35 to 40 years been openly exercising the right ~~to cut and remove~~ of cutting and removing trees on their lands to the knowledge of the Inamdars and without their permission. As I have pointed out the contention with regard to limitation

was for some reason not pressed before the learned District Judge and he held relying on a decision ~~in~~ of the Privy Council in Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakat (1931) 33 Bom.L.R. 1273, that there could be no bar of limitation to the plaintiff's claim with regard to the trees. The decision in that case however was based on different grounds. The question there was with regard to the rights ^{to} ~~of~~ minerals. The tenants, the Putnidars, had claimed that they were entitled to the minerals under the terms of their leases and that alternatively they had acquired a prescriptive right to them by adverse possession and it was held that where the tenant was in adverse possession of a sub-soil stratum of stones and gravel and a different and lower stratum of minerals is discovered, the possession of the latter must be presumed to be with the zemindar until adverse possession by the tenant for the statutory ^{period of} 12 years is established, and that such adverse possession cannot be presumed from the tenant's adverse possession of the superincumbent stratum of stone and gravel. The learned District Judge took the view that the grant of a right of occupation will not necessarily annihilate the rest of the rights of ownership which the

State or its grantee may yet possess, and that in such a case the State or its grantee will be presumed to be in constructive possession. In his view the Inamdar therefore must be regarded as having been throughout in constructive possession of the rights to trees which he claimed. The defendants' contention however was ~~expressly~~ that they had publicly, continuously and to the knowledge of the plaintiff and without his permission exercised their right to cut and remove trees standing on the lands in their occupation without any objection by the plaintiff. There was no question of inferring the defendants' adverse possession as regards the right to trees from their possession of the lands. Mr. Coyajee for the respondent Inamdar referred to various decisions, Radhamoni Debi v. Collector of Khulna (1900) I.L.R. 27 Cal. 943, (P.C.), Jogendra Nath Rai v. Baladeo Das (1907) I.L.R. 35 Cal. 961 and Gobina Narayan Singh v. Sham Lal Singh (1931) 58 I.A. 125 to show that before the possession of the defendants with regard to the right to trees could be held to be adverse to the plaintiff Inamdar, it must be shown that that possession was adequate, in continuity, in publicity and in extent. As held in Jogendra Nath Rai v. Baladeo Das such adverse possession

must be actual, visible, exclusive, hostile and continued. The cases to which he has referred were cases of adverse possession of lands. It is obvious that where the question is, as in this case, of rights to trees the same kind of evidence in proof of adverse possession could not be expected. The rights of cutting and removal of trees would necessarily be exercised intermit^rtently. The exercise of such rights could not be expected to be continuous in the sense in which adverse possession ~~of~~ land can be said to be continuous. Subject to this necessary difference arising from the nature of the right, ~~the~~ possession of which is claimed by the defendants, it appears to us that the evidence on which the appellants ~~defendants~~ rely is sufficient to prove that they have been for a long period ~~of~~ ~~years~~ extending to over 30 years, exercising rights of ownership over the trees standing on their lands, and that these rights have been exercised constantly, openly and to the knowledge of the plaintiff, without his permission, and without ~~even~~ any protest from him except in the one instance of the sale of trees by defendant No. 18 to defendant No. 27 which led to the filing of the present suit. Not merely is there considerable evidence with

regard to the rights claimed by the defendants, but that evidence is all ^{on} ~~one~~ sided. While the defendants have proved by the evidence of several witnesses that they and other persons have exercised the rights of selling, cutting and removing trees standing on their own lands, the plaintiff and his vendor defendant No. 1, who were the only witnesses examined on his side, have not been able to prove a single instance in which they exercised the right which they claimed, or in which trees were cut by the defendants or by any other Khots, Dharekaris and permanent tenants with the permission of the Inamdar. Plaintiff's own admissions make this clear. It is to be noted that the plaintiff himself has been a Khot since 1897 and an Inamdar since 1923, and ^{that} from 1898 onwards he acted as the agent or manager on behalf of the Inamdars. He was therefore in a position to know of any ~~instance~~ instance in which he or other Inamdars had exercised rights of ownership over the trees or in which they had granted permission to the Khots, Dharekaris and permanent tenants to cut trees. He has admitted that he has nothing in writing to show that the occupants took the permission of the Inamdars for cutting trees. He has admitted that as Khot he has himself grown

several trees on his land from which he gets ^{an} appreciable income and that he does not pay any extra rent to the Inamdar for these trees. He has admitted also that there is no instance of the Inamdars having enjoyed the fruits of trees or stones of the quarries or reeds on the banks of the creek. Considering the position in which the plaintiff stood this admission is of the greatest importance since it bears out the statement made by the defendants and the evidence which they have led to show that they have ^{consistently} ~~constantly~~ enjoyed the rights to the trees standing on their lands. It may be noted in passing that the plaintiff himself does not in his statement claim the rights over trees standing on defendants' lands to the extent to which the learned Judge has conceded them. The decree made by the learned District Judge declares that the plaintiff and the other Inamdars are the owners of all timber and jungle trees standing on all lands in the village whether permanently occupied or otherwise. The plaintiff himself on the other hand admits that the Inamdar cannot remove the trees on the lands of the Khots, Dharekaris or occupants so long as they pay the dues, and all that he claims is that they can remove the trees when

dead or barren. The defendants have examined one of the Inamdars, defendant No. 8, in support of their contention, and this witness, Udhav Ballal Vaidya (Exhibit 160), has fully supported the defendants' claim. He says that he himself is an Inamdar owning a one anna and two pies share in the Inam. According to him neither he nor the other Inamdars have ~~got~~ any right to remove the trees, reeds, stones, etc. and those who are in occupation of the lands enjoy these rights. He has also stated that the Khots, Dharekaris and other occupants did not ask their permission before removing ~~the~~ trees and that no dues are specially received for the trees. One of the other witnesses examined on behalf of the defendants, Balaji Daji Mukadam (Exhibit 161), ^{is} ~~was~~ a person who is a Khot of the adjoining village and who has on several occasions acted on behalf of the plaintiff himself as a Panch. He is a Kadim Inamdar of the village. He was therefore evidently in a position to know what the rights of the parties with regard to ~~the~~ trees were, and he has stated that on at least twenty five occasions he has purchased timber as well as firewood trees of different kinds from Dharekaris and

Khots in the village and that the Inamdars including the plaintiff himself had seen him removing these trees and have never objected to his doing so. Defendant No. 13 one of the Khots who has given evidence in the case has stated that the Khots removed ~~the~~ trees reeds, etc. and ^{had} all the rights which the plaintiff has claimed and that they had never taken ^{any} permission of the Inamdars for the exercise of these rights. The witness has stated that he has removed trees from his land every year for a very long period. It appears from the evidence of this witness that in the year 1901 a suit was filed by some of the Khots of the village against other Khots for partition of their Khoti lands. In this suit they had claimed trees, reeds, stones, etc. along with ~~the~~ lands. Defendants Nos. 7 to 10 who are ~~the~~ Inamdars, were parties to that suit as defendants and filed a written statement contending that they were not necessary parties to the suit. The learned trial Judge has rightly pointed out that this evidence shows that in 1901 although the Khots openly claimed the right to trees in a suit filed by them to which the Inamdars were parties, the Inamdars raised no contention with regard to the claim, but merely stated that they were not necessary parties to the suit,

evidently because they were not interested in the claim
 which was made. Another circumstance which may be mention-
 ed as affording some evidence in support of the defendants'
 contention is that the sale deed Exhibit 140 by which the
 plaintiff purchased the 8 annas share in the Khoti of the
 village mentions trees etc., standing on the lands as also
 being sold to the plaintiff. ~~In our opinion~~ ^{u. p.} the evidence
 which has been led by the defendants shows satisfactorily
 that they have been exercising rights of ownership over the
 trees standing on their lands openly and continuously for
 over 30 years to the knowledge of the plaintiff and without
 his permission. The plaintiff on the other hand has failed
 completely to show that either he or any of the other
 Inamdars have at any time exercised the rights over ~~the~~
 trees which he claims. The view taken by the learned
 trial Judge that the suit is ~~clearly~~ barred by limitation
 is, in our opinion, correct.

The appeal will therefore be allowed and the
 decree made by the learned District Judge varied. The first
 paragraph of the order made by him will run as follows:
 It is hereby declared that the appellant~~s~~ and defendants
 Nos. 3 to 10 as Inamdars of Kondye are owners of the soil,

quarries and minerals in all the lands in the village whether permanently occupied or otherwise except of the five bighas of Kadim ^{Inam} land in the possession of defendants Nos. 16 to 19 and their Bhaubands, and that they are the owners of the timber and fuel trees standing or growing in forests and unoccupied lands. The rest of the decree will be deleted.

Although the appellants have failed as regards their contention that the plaintiff is not under the terms of his Sanad entitled to the rights over ~~the~~ trees which he claimed, they have succeeded in proving that his right is barred by limitation, and the rights which we have held the plaintiff entitled to are rights which the appellants had conceded in the lower Court. In the circumstances we think that a fair order with regard to costs will be that the appellants should get half of their costs throughout from the 1st respondent, the plaintiff.

The cross-objections are dismissed with costs.

Saghl
19-12-38.

Expedite



(84) S A 285/34

15-12-38

16 copies

~~847/34~~

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Thurs- day the 15th day of December 1938.

APPEAL No. 285 OF 1934 FROM APPELLATE DECREE.

1 Putalaji Vishram Desai; 2 Gopal Santaji Desai;
3 Jagannath Narayan Desai; 4 Gopal Taty Desai;
5 Baji Narayan Desai; 6 Dattatraya Ramchandra Mulye;
7 Yeshwant Narayan Mulye; 8 Kashinath Ganesh
Puranik; 9 Anant Parasharam Kulkarni; 10 Rajaram Bal-
want Kolyankar; 11 Bacha Balu Gurav; 12 Ragho
Laxman Padya; 13 Krishna Panda Barguda.

(Original Defendants Nos. 11 to 17 and 20, 22, 26, 28, 30
and 32)

Appellants.

versus

1 Damodar Vishnu Vaidya; 2 Krishnaji Keshav Vaidya;
3 Ramchandra Keshav Vaidya; 4 Vishwanath
Narayan Bapat; 5 Shankar Narayan Bapat;
6 Dattatraya Narayan Bapat, minor by his guardian
Respondent No. 4 Vishwanath Narayan Bapat; ~~7 Govind
Krishna Ramade~~; 8 Shridhar Narayan Vaidya; 9 Udhav
Ballal Vaidya; 10 Dhondo Vasudeo Vaidya; 11 Shriram
Vasudeo Vaidya; 12 Yeshwant Vasudeo Vaidya;
Nos. 10 to 12 heirs of the deceased Vasudeo Ballal Vaidya;
13 Damodar Bhaskar Vaidya; 14 Ganesh Pandurang
Mulye; 15 Vasudeo Vishnu Mulye; 16 Padmakar alias
Raoji Ganesh Mulye; ~~17 Ramkrishna Vaman Mulye~~;
18 Kashinath Vaman Mulye; 19 Dattatraya Vaman
Mulye; Nos. 18 and 19 minors by their guardian *ad litem*
Satyabhamabai w/o Vaman Ganesh Mulye; 20 Radhabai
kom Krishnaji Ganesh Mulye; 21 Narayan Ramchandra
Kulkarni; 22 Keshav Sakharan Kulkarni; 23 Laxaman
Anant Nimkar; 24 Raghunath Govind Kulkarni; 25 Balka
Ganu Sitap; 26 Zilu Rama Sitap.

(Original Plaintiffs and Defendants Nos. 1 to 8 and heirs
of Defendant No. 9, and 10 and 18, 19, 21's heirs, 23,
24, 25, 27, 29, 31)

Respondents.

* T. Narayan Keshav
Ramade,
President of managing
board, Sanskrit Pathshala
Ratnagiri.
Substituted vide Court's
order of 8-11-35 on C.A. 109/35

⊗ Struck off. Vide Court's
order of 14-12-38 on
the fored.

Claim—Rs. 215.

Rs. 215 for Advocate's fees.

The Plaintiff sued to obtain a declaration that he and Defendants Nos. 3 to 10 were the Inamdars of all rights to trees, canals, water courses etc., standing on or existing in Mouje Kondye, and that as Inamdars they were entitled to all kinds of lands, stone, quarries etc. to obtain a permanent injunction to Defendants Nos. 11 to 32 and all persons claiming under them preventing them from doing any act prejudicial to the Plaintiff's rights.

The Original Suit No. 458 of 1929 was decided by the Subordinate Judge of Devrukh, who dismissed it ordering the parties to bear their own costs.

The Appeal No. 339 of 1931 of the District File was decided by the District Judge of Ratnagiri, who reversed the decree of the Court of first instance and decreed the claim with costs in both the Courts and dismissed Defendants Nos. 13's and 16's cross-objections with costs.

An appeal has been admitted in the High Court from the decision of the lower Court. Notice was ordered to issue by the Honourable Mr. Justice Divatia on the 3rd day of August 1934.

The grounds of objection to the decision appealed against are :—

1. The decision of the lower Appellate Court is wrong in law.
2. The Inamdar's sanads have not been properly construed. They are merely grantees of the revenue.
3. Dharekari-Mahajans' (Defendants Nos. 16 to 20) sanad has not been properly construed.
4. Pleadings have not been properly understood.
5. It is erroneous in law to hold that the Inamdars are the owners of the soil, viz. quarries, minerals, timber, fuel, growing on the village lands occupied and unoccupied, such as Ain, Kinjal, Nana, Teak, Sisav, Khair, Tahman and Jack.
6. It should have been held that the Inamdars were not in possession of the several rights claimed by them and that therefore they could not maintain a suit for declaration.
7. At any rate, having regard to the priority of occupation of the different classes of holders, it should have been held that the grant of the Inamdars was one of revenue only.
8. It should have been held that the grant, if one of the soil, was subject to the rights by the parties existing before the date of the Inamdars' grant which embraced all the items claimed by the Plaintiff.
9. The evidence of the Plaintiff and Defendant No. 16 and exhibit 160, when properly read, was sufficient to non-suit him—the Plaintiff.
10. Proper weight has not been given to the Plaintiff's admissions.
11. The lower Appellate Court has erred in law in holding that the Inamdars are owners of timber and fuel trees.
12. It is erroneous in law to hold that the Inamdars are owners of such trees standing or growing on lands permanently occupied by Khots, Dharekaris and Kuls.
13. The lower Appellate Court has not properly understood and appreciated the respective rights of the Khots, Dharekaris and Kuls.
14. It should have been held that the Khots by virtue of their *khoti* are entitled to several items claimed by the Plaintiff.
15. It should have been held that at any rate the Khots have proprietary interest in lands in their permanent occupation as *khoti nisbat* or *khoti khasgi* and are entitled to the trees standing on their lands.
16. It should have been held that the Dharekaris own a proprietary interest in their lands, and are therefore the owners of the trees in their holdings and are entitled to the several items claimed by the Inamdar.
17. The sale-deeds, exhibit 140 for instance, which the Khots used to pass, show that they—the Khots—were the owners of the trees.
18. It should have been held that the Kuls are entitled to the trees standing on the lands in their occupation.
19. It should have been held that the occupation of the lands by Khots and Dharekaris before the inam grant of the Appellant had vested in them, the proprietary rights over their lands which the subsequent grant could not divest.
20. It is an error to hold that the Khots holding *khoti nisbat* or *khoti khasgi* lands and the Dharekaris holding their *dhara* are no better than the occupants as defined by section 3, clause (16) of the Land Revenue Code.
21. It should have been held that the Kuls have a claim over the items claimed by the Plaintiff.
22. The lower Appellate Court has not approached the case from the correct point of view.
23. The declaration and injunction prayed for should have been totally refused.
24. It should have been held that the Inamdars are not the owners of the soil, quarries, minerals, all kinds of timber, jungle trees such as Ain, Kinjal, Nana, Sisav, Teak, Khair, Tahman and Jack, standing on all lands in the village, whether permanently occupied or otherwise.

25. It should have been held that the contending Defendants have acquired rights by custom and adverse possession to the items claimed by the Plaintiff.

26. The Plaintiff's suit is barred by time.

27. A new case has been made out for the Plaintiff.

28. Pleadings have not been properly understood.

29. Plaintiff's suit should have been dismissed in its entirety with costs.

30. Order as to costs is wrong.

31. Damages should not have been awarded.

32. It is an error to hold that the Khots, Dharekaris and Kuls must seek for the Inamdar's permission to take timber for their building purposes and agricultural purposes.

33. It is erroneous in law to grant an injunction against the Khots, Dharekaris and Kuls in the terms described in the lower Appellate Court's decree, restraining them from interfering with the Inamdar's rights which have been declared by the decree of the District Court.

34. It should have been held that so far as Defendants Nos. 11 to 15 are concerned, the present suit is barred by *res judicata* by reason of the decision in Suit No. 638 of 1901, to which Defendants Nos. 7 to 10 were parties.

35. It should have been held that in any case the rights of Defendants Nos. 16 to 20 have been reserved in the Plaintiff's sanad.

No1

The Respondent^X abovenamed begs to urge the following
Cross-objections:-

1. That it was wrong to hold that the Respondent was not entitled to mango trees. The lower Court erred in holding that mango trees were fruit bearing trees.

2. That it was an error to hold that the Khots would be entitled to the ^{reeds} ~~trees~~ and bushes growing on the river side.

3. That the lower Court ought to have allowed the full amount of damages to the Respondent.

--
Grounds Nos. 1 and 2 are in the nature of declaration.

Ground No. 3: Rs. 95-Rs. 15-Rs. 80.

Claim Rs. 80/-.

Coram:

(Coram: N.J.Wadia and Sen JJ.)

For the reasons stated in the accompanying Judgment, the Court allows the appeal, varies the decree of the lower appellate Court and - directs that the first paragraph of the decree shall run as follows:- "It is hereby declared that the appellant and defendants Nos.3 to 10 as Inamdars of Kondye are owners of the soil, quarries and minerals in all the lands in the village whether permanently occupied or otherwise except of the five bighas of Kadim Inam land in the possession of defendants Nos.16 to 19 and their Bhaubands, and that they are the owners of the timber and fuel trees standing or growing in forests and unoccupied lands". The rest of the decree shall be deleted.

The appellants to get half of their costs throughout from the 1st respondent, the plaintiff.

The cross-objections are dismissed with costs.

15th December 1938.
BVB.

Wadia
Registrar.

CIVIL APPLICATION No.

OF 193 ~~IN~~ APPEAL No. 285 OF 193 4

FROM ~~ORIGINAL~~
APPELLATE DECREE

Bill of Costs in the High Court.

	By the Appellant or Applicant	By the Respondent or Opponent	By the Respondent or Opponent
	Rs. a. p.	Rs. a. p.	Rs. a. p.
Stamps for Memorandum of Appeal Application ...	6-2-0	✓	
Stamps for Copies of Decrees and Judgments or Orders ...	3-0-0	✓	
Stamps for Vakalatnama ...	2-0-0	2-0-0	✓
Stamps for applications to enter ^{Substitute} the names of the heirs of the deceased Respondent no. 7	4-0-0	✓	
Stamp for application for calling for additional papers ...		✓	
Bhatta for Process ...	24-0-0	✓	
Sectioner's Fee ...	62-10-4	✓	✓
Advocate's Fee ...	30-0-0	30-0-0	✓
Printing Charges ...	30-0-0	✓	
Copying Charges for preparing paper-books ...		✓	
Stamp for affidavit ...	1-0-0	✓	
Search Fee ...			✓
Stamp for Memorandum of Cross-objections ...		6-0-0	✓
Vakil's Fee in the matter of Cross-objections ...	30-0-0	30-0-0	✓
Costs at the trial of issue sent down ...			✓
Translation Fee ...		98-8-0	✓
Copying Fee under Rule 80 or 20 of the High Court, Appellate Side Rules, 1929 ...		✓	✓
Total ...	192-12-4	166-8-0	

Chauhan
Taxing Officer.

23-1-37

m.g. Rao

Deputy Registrar.

The 75th day of Decemb 193 8

21-1-1939

Mr. A. A. Adenstedt
vs. Abbe Hawks
versus

Mr. Y. V. Disal
vs. Richard M. I

3135242

VS.
181211 For
Report No. 1



CIVIL DEPARTMENT.

INWARD No. ¹⁸⁰¹ OF 193 ⁹

The District Judge of *Ratnagiri*
No. *660* dated *20-3* 193 *9*

Certifies full execution of the High Court's
Writ No. *956* dated *27-2* 193 *9*,
forwarding copy of the decree ~~or order~~ in

Appeal No. *285* of 193 *4* from Appellate
Original
Decree

Record.

23/3/39
la
[Signature]
Assistant Registrar.

Received on the *22-3* - 193 *9*

Sent to the Record-keeper with all papers
complete on the *15th July 1939*

[Signature]
Assistant Sheristedar.

Received and entered in Catalogue of
Appeals.

Placed on the Shelf,

[Signature]
Record Keeper.
25-7-39