
(1939) 09 BOM CK 0009

In the Bombay High Court

Case No : Letters Patent Appeal No. 25 of 1938

Shaikh Dawood Abdul Rehman Hurjuk

APPELLANT

Vs

Balaji Dharamnak Mahar

RESPONDENT

Date of Decision : 27-09-1939

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 16(3)

Citation : AIR 1940 Bom 150 : (1940) 42 BOMLR 239

Hon'ble Judges : Wassoodew, J; Indarnarayan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Wassoodew, J.—These are two Letters Patent appeals Nos. 25 and 26 of 1938 from a decision of Mr. Justice Sen. They arise from two suits instituted by the khot of Alsunde in the Kolaba District to recover damages for wrongful felling by the khoti-tenant of certain teak and injayali trees from the land in his possession. The plaintiff-khot claimed the right to the trees on two grounds, first, on the ground that the Dunlop's Proclamation of 1824 conferred the right to the trees growing on the land in the possession of his tenants on the khot, and secondly, on the ground that under the kabulayats of 1863 and 1865 entered into between himself and the Government the ownership of the teak and injayali trees standing on the land outside the reserved forest was expressly conferred on the khot. The learned trial Judge: and the Judge in first appeal upheld that claim of the plaintiff, and passed a decree for damages and costs. In second appeal a contrary view prevailed, and it was held by Mr. Justice Sen that the benefit of the Dunlop's Proclamation could be claimed in the circumstances by the tenants, who are respondents in the appeals. Against that decree the plaintiff has filed these appeals.

2. The principal question argued before us is whether the benefit of the Dunlop's Proclamation of 1824 can be claimed exclusively by the khot in this case, so that the felling of the trees by the defendants-tenants, which is admitted, could be

regarded as wrongful. The relevant portion of the Dunlop's Proclamation, upon which reliance has been placed, is to the following effect :-

And (whereas the Government) thinks that it would be to the advantage of all, if from this day forth teak, blackwood, and any other kind of good timber trees were raised in the country, it is proclaimed to all the people that Government has no intention towards the trees that may be growing on the lands of any person.

3. Now the expression "the trees that may be growing on the lands of any person" has been judicially interpreted in *Sadashiv v. Secretary of State* (1917) 20 Bom. L.R. 141, as implying the trees of any person who could prove that "the land, on which the trees stood, was his in a popular sense, i.e., it was sufficiently marked out as being in his permanent occupation in his own right so as to make it properly described as his land." The question is which of the two rival claimants can be described in a popular sense as persons who can claim the land as theirs. The plaintiff-khot maintained that the land was his in a popular sense, first, because he was the khot of the village and as such entitled to khot fayda from this land under the terms of his tenure; and secondly, because the land in the possession of the defendants being khoti-nisbat land the khot was entitled, upon compulsory acquisition of that land by Government, to compensation under the Land Acquisition Act and also to the reversionary interest, which it is said has been recognized since the decision in *Tajubai v. The Sub-Collector of Kulaba* (1866) 3 B.H.C.R.132, and affirmed in Section 38 of the Survey Act (I of 1865). It is also argued that the reversionary interest or estate becomes in law an estate in possession, when it can be claimed by the khot upon resignation, forfeiture and lapse or escheat in a general way. It has been suggested that on account of that reversionary interest the khot becomes the "occupant" of the rented land in the khoti village u/s 3, Sub-section 16, of the Bombay Land Revenue Code (V of 1879), and has proprietary or quasiproprietary interest in the entire soil of the village.

4. Now the position of the khot in the khoti villages of Kolaba has been judicially considered in several decisions of this Court since 1866 when the Survey Act came into force. The first case is the well-known case of *Tajubai v. Sub-Collector of Kulaba*. There are certain observations in the judgment of the Court that "a khot is a farmer of land revenue, and that right has become hereditary." But the Court was not prepared to say that qua khot he had any proprietary interest in the village, which was the foundation for a claim made in that case to restitution of half share of the village unconditionally during the period of the management by the Collector, and that that position was not affected by the fact that the khot had a transferable interest in the village pertaining to his khotki. The position was later examined in *Collector of Ratnagiri v. Vyankattav N. Surve* (1871) 8 B.H.C.R. 1. But the Court refused to pronounce its opinion on the question as the case was imperfectly put. The decision was therefore limited to the particular case as put before the Court. But in a later case, *Nagardas Sanbhagyadas v. The Conservator of Forests, Bombay* ILR (1879) 4 Bom. 264, P.C., their Lordships of

the Privy Council had an opportunity to discuss the position of the khot in regard to his claim to a right to the trees in the reserved forest. The following observations in the judgment of Sir Barnes Peacock are important (p. 272):-

Without expressing any opinion that no khot is or can be the proprietor of the soil, it is sufficient to say that it is clear that the proprietorship of the soil is not vested in every khot.

5. The later cases of Ahmed Balu Dabir Vs. Ganesh Vishnu Pendse, and Ganpati Gopal Risbud Vs. Secretary of State for India, do not support the view that merely because a person is a khot of a village he has necessarily a proprietary right therein in the sense in which that term is ordinarily understood. A reference was made to the case of The Collector of Ratnagiri v. Vyankatrav N. Surve, where the term " quasiproprietary rights " was used in reference to the claim of the khot to the benefit of the Dunlop's Proclamation. In Ahmed v. Ganesh the dispute was between the khot and other tenants who were not dharekaries, and they were not properly regarded as permanent tenants. The lands were merely khoti-nisbat lands and continued with the defendants as tenants of the khot. And it was held that although there was no general rule that no vatandar khot could claim to be owner of the soil, the khot with regard to khoti-nisbat lands was very much in the position of an owner. In Ganpatti v. Secretary of State the question upon the position of a khot arose between the khot and Government on account of the former's refusal to accept the annual kabulayat in the amended form, and it was held that as stated in Mr. Candy's report, which was quoted with approval, " a khot's interest in his village was limited, not absolute ; he possessed in some measure a proprietary right; in fact he was an occupant with all the rights and liabilities affecting such a status."

6. But the question was not considered in those decisions from the point of view of a claim to the trees by a khot against his tenant under the express provisions of the Dunlop's Proclamation. The decisions referred to however emphasise the fact, and it is incontrovertible in that respect, that the khot besides being the farmer of the revenue has some other interest, which could be described as quasi-proprietary, that is, he has an interest in the village which might under certain circumstances be an estate in possession. The question is whether on that account he can claim the right to the trees against the defendants who are holders of the khoti-nisbat lands.

7. The learned trial Judge has found,-and that finding does not seem to have been challenged,-that the defendants have according to custom the right to alienate the khoti-nisbat lands in the village without the consent of the khot. That right exists and is duly proved. But eventually the Judge came to the conclusion that although the defendants are permanent occupants in the sense that they are permanent lessees or tenants with a hereditary and transferable interest in the property in their occupation, there is superiority of interest claimed by the plaintiff as khot, and that therefore the former must yield to it in a claim to the trees on his lands. Now, ordinarily if a tenant with an occupancy

right or at will plants trees on his holding, the property in those trees, in the absence of custom or contract to the contrary, would attach to the land, and the tenant would not have any power of selling or otherwise transferring those trees. But here we are dealing with royalty trees to which the Government alone can lay claim, and it is upon a concession of those Government rights that the question arises as to the right to remove those trees between the khot and the tenants. In the cases to which we were referred, the tenant had not established a hereditary and transferable tenure. In *Sakharam Bhiku v. Vishnu Krishna* (1936) Second Appeal No. 387 of 1933, decided by Beaumont C.J. and Macklin J. on December 10, 1936 (unrep.) it was held that the defendants-tenants, whether they were permanent or not, could not alienate their land. Therefore the benefit of the Dunlop's Proclamation was given to the khot. The determining test in view of the pronouncement in *Sadashiv v. Secretary of State* would be, who is the person whose land it is in a popular sense? The possibility that he need not necessarily be the khot was assumed in that case. Here the khot has certain proprietary rights which are contingent, while the defendants are in permanent occupation. They have a right to transfer the estate as security without the consent of the khot. They can assign their rights in it without such consent, and they can also will it away as they like. It is not denied that these rights which are claimed have been established. There is some misstatement in the judgment of the trial Court where it says that the defendants do not claim that their ancestors were on the suit land from the beginning, i.e., even before Act I of 1865. That statement is clearly wrong in view of the written statement which has been read over to us. They did make a claim based upon antiquity of possession. Probably they had in mind the obscurity of the origin of that possession to enable them to lay claim to permanency of tenure. But apart from it, it is conceded that they are permanent tenants, although the lands are khot-nisbat lands. The right to reversion would be common to all classes of tenures in the khoti village, even dharekari lands. If the test is which of the claimants in such circumstance can say that the land is his in a popular sense, I am, inclined to the view that upon a balance of the rival claims as proved the preponderance must be in favour of the tenant, for in a popular sense he can say that the land is his for the purpose of the Dunlop's Proclamation. Although it might not be proper to refer to the preamble in regard to the object of the proclamation, it may be said that this will rather serve than defeat the object in view.

8. It is urged on the alternative ground that apart from the Dunlop's Proclamation, the kabulayat contains an express grant of trees to the khot in 1863 or 1865 by Government. The plain answer to that claim is that if the Dunlop's Proclamation is an irrevocable grant of royalty trees, such as teak, blackwood, and sandalwood trees, the subsequent grant by Government would violate the terms of the proclamation and therefore would be ineffective. In *Secretary of State for India v. Sitaram Shivram* ILR (1899) 23 Bom. 518 : 1 Bom. L.R. 19 the khots in the village had cut down a large number of teak trees growing on the khoti khasgi land. Thereupon the Secretary of State sued them to

recover their value, alleging that they were the property of Government. The khots then relied upon the Dunlop's Proclamation, and it was held that the proclamation was not a mere promise, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing, or might thereafter grow, and that the gift could not be revoked, and that by reason of the proclamation Government has no right to the teak trees growing on the land in question. It must follow that the claim based upon a subsequent grant, assuming, that clause 18 of the kabulayat, which expressly states that "the ownership of the: remaining trees has been given to you," intended to confer the right to the trees, must be ineffective unless it were proved that the defendants came on the land subsequent to Act I of 1865. But no such issue was claimed in the trial Court, and we are, not prepared to allow the plaintiff in these Letters Patent Appeals to raise a fresh ground of attack against the defendants. Therefore these appeals fail and must be dismissed with costs.