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[264] PRIVY COUNCIL.

PRESENT:

Sir James W. Colvile, Sir B. Peacock, Sir M. E. Smith and Sir R. P. Collier.

[In appeal from the High Court of Bombay.]

NAGARDAS SANBHAGYADAS (*Plaintiff*) *v.* THE CONSERVATOR OF FORESTS, BOMBAY, AND THE SUB-COLLECTOR OF KOLABA (*Defendants*). [19th, 20th and 21st November, 1879.]

Khoti tenure—Ownership of wood growing on village lands.

The plaintiff sought to raise the question whether, in virtue of his being *izafatdar* and *khot* of three-fourths of a village, he was or was not proprietor of three-fourths thereof, and entitled, as such proprietor, to three-fourths of the wood, including teak as well as *izaili* wood, growing on the village lands.

His rights under the *izafati* title depended on two documents: one, an imperial *sanad*, dated in A. D. 1653; the other, a Marathi document, dated in A.D. 1722. The first was construed to confer upon the grantee, as collector of the revenue, certain perquisites, and to make hereditary a right which before had been only a personal right, with reversion to the sovereign, but not to confer any proprietary right in the village lands. By the second all that was granted was a right to *babatas* or cesses, the grantee being the *desai*, or collector of the revenue on behalf of the Government.

Therefore it was held that the *izafati* title did not carry with it the proprietary right.

On the question as to the *khoti*, it was held, without the expression of any opinion, that no *khot* is or can be the proprietor of the soil; that such a right is not vested in every *khot*. This *khot* of three-fourths of a village had been authorized by the Government, to carry on the management as *khot*, of the remaining fourth, and had agreed, at the time of entering into this agreement, that he would preserve for the Government all the trees in reserves marked by survey numbers, and all the teak trees in the village. He had admitted that the Government had the power to make such reserves.

It was not shown that the Government had cut down any *izaili* wood in the village; only that it had recovered the value of some *izaili* wood cut in the reserves without their leave.

It was decided that the *khot* had not made out a title to any teak wood as against the Government, nor a claim against it in respect of the *izaili* wood.

[R., 18 B. 670; 23 B. 518; 9 Bom. L. R. 719 (723).]

APPEAL from the decision of the High Court, Bombay (11th October 1875) reversing that of the District Judge of the Konkan (15th February 1862).

Sanbhagyadas Keshavdas, father of the plaintiff, purchased in 1861 a quarter share and in 1865 a half share of the rights of the former *khots* of Pigode, a village in the Kolaba Collectorate) **[265]** over which the vendors' ancestors exercised rights at the time when the Southern Konkan was conquered from the Peshwa. To prove what were the rights transferred by the vendors, the plaintiff produced two ancient documents—the first, a firman in Persian, dated in A.D. 1653 54, purporting to be a grant from the Emperor to the *desai* of the district in which Pigode was situate, one Ismailji Abaji; the other, dated in A.D. 1722, purporting to be a grant from Trimbakji, Havildar, on the part of the Pant Sachiv, to the *desai* of that day. The material parts of these documents are set forth in their Lordships' judgment.

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The plaintiff, holding rights thus conferred, sued the Conservator of Forests and the Sub-Collector of Kolaba in the District Court, alleging that the village was his "*vatani khoti*" and "*izafat* village", in which he had a three-quarter share, the remaining fourth belonging to the Government, and he claimed to be entitled as "*vatandar khot*" to the teak trees and *izaili* wood growing on the village lands. He alleged that, in 1865-66 and in 1866-67, the Government, in the Forest Department, had cut down and sold some of both of the above, and had refused to allow to him his three-fourths' share of the proceeds.

The defendants, besides generally denying the right of the plaintiff to the wood, referred to an agreement of the year 1861 between the plaintiff and the Government, in which they alleged that he had undertaken to protect the teak trees and so much of the *izaili* wood as grew in places reserved.

The District Judge, on issues as to the right of the plaintiff as *khot*, and as *izafatdar*, and with reference to the agreement of 1861, decided that the plaintiff had become the proprietor of all the trees in the village as the result of Dunlop's proclamation of the 1st March 1824 (1), and the claim was decreed.

On appeal to the High Court this decision was reversed. But it was not denied, on the part of the Government, that the vendors to the plaintiff's father had been hereditary *khots* of the village, and that their rights had passed to the plaintiff to the extent of a three-fourths' share. On the other hand, it was admitted [266] that if the *khots* of Pigode had not been proprietors of the village lands, Dunlop's proclamation, dealing only with the rights of proprietors, neither conferred upon them, nor confirmed to them, any rights in the wood.

The High Court, holding that the right to cut down trees growing upon village lands was incident to the proprietorship of the village, decided that plaintiff had not, by grant, the proprietary right; and that the "*vatandari khots*," through whom he claimed, had not acquired by usage any title to the wood.

In giving judgment the Court said :—

"Taking, first, the higher rule of construction, that a royal grant shall not enure to any other intent than that which is precisely expressed in the grant, it is clear to us, after a close and careful examination of the documents, that there is, throughout, no one plain expression of an intention to convey the proprietorship of the land of the village.

"But we go further, and say that there is nothing whatever in the wording of the *sanads*, taken either separately or together, which, construed most strongly against the grantor, would seem to warrant the pretension that the soil was granted. How the *desai* came originally to possess 'the personal holding,' there is nothing to show. The grantor under the first *sanad* appears to have relied for his knowledge of the fact that he, the *desai*, did so possess it, as also of the nature of the holding and of the consideration for it, upon the representation of the *desai* himself and, acting upon this information, he confirmed to the *desai* that which he said he possessed. But there is nothing to show that, among the rights then recited and confirmed, the proprietorship of the land was included. It is true that the *desai* represented that 'the village of Pigode is a personal holding,' but he went on to explain what he meant by that

(1) This proclamation is set forth at p. 2 of 8 B.H.C.R.A.J.; also at p. 188 of 6 B.H.C.R.A.J.

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term. In the recital that follows, the title to the soil does not appear. Moreover, it is not necessary, for the operation of the grant, to construe it to include the proprietorship of the land itself and it is manifest from the context and the circumstances that, as that right was not included, it was the intention of the grantor to exclude it. The second grant (by the Pant Sachiv) apparently limits the right of the [267] *desai* to take for himself the cesses pertaining to the village, whether in cash or in kind.

"Taking, then, the proprietorship of the land to be in the Crown, we come to the next question, whether the descendants of the grantee, who are styled by the plaintiff *vatandari khots*, have acquired by usage a title to the timber trees. It may be a question whether, assuming that there is satisfactory proof of a user, the right to cut down and dispose of timber on Crown lands—in other words, to enjoy absolutely that which is incidental to the proprietorship of the soil—can be claimed by prescription: *Attorney-General* v. *Mathias* (1). On this point, however, we express no opinion.

"But we find, after going carefully through all the evidence recorded in the case, that there is no satisfactory proof of the custom of cutting and appropriating timber at will. On the contrary, we think that the evidence before us leads to the conclusion that the *vatandari khots* of Pigode not only are not shown to have ever claimed, as a right, to cut down and dispose of timber trees, but that they have in terms acknowledged the right to be in the Government."

Cowie, Q.C., and *J. D. Mayne*, for the appellant.

Scoble, Q.C., and *Raikes*, for the respondents.

Cowie, Q.C., and *J. D. Mayne*, on the question whether or not the plaintiff had the proprietary right in the village lands, argued that the right of the *khot*, not depending solely on the words of the *sanads*, (which only showed how the original grantee had come into enjoyment of the rights granted), and having been exercised from a period long anterior to British rule, extended beyond the mere collection of the revenue. The forest rights now claimed on behalf of the Government as a kind of seignorial right, were not asserted as appurtenant to the proprietorship of the village lands, which was not vested either in the Government or in the cultivating occupants of any class. Such rights, however, did accompany the proprietorship of the land which belonged to the *khot*. They referred to Captain [268] Wingate's report (2) and to the reasons recorded by Mr. Justice Tucker in dissenting from the majority of the Bench in *Tajubai* v. *The Sub-Collector of Kolaba* (3); also to the authorities mentioned below. The appellant's rights were not disposed of by the engagement of 1861.

Scoble, Q.C., and *Raikes* argued that the proprietary right in the village lands was neither conferred upon the plaintiff by his *izafat*, nor by his *khoti* titles, which in his plaint were kept distinct. The *khot* had only the collection of the revenue. The facts relating to his position between the Government and the tenants were stated in the judgment of the District Judge in *Tajubai* v. *The Sub-Collector of Kolaba* (3), and, notwithstanding the opinion of some settlement officers, the rights now claimed for the *khot* did not, according to the decision of the High Court in that case, belong to him. They referred to the evidence with a view

(1) 27 L. J. Ch. 761; 4 K. & J. 579.
(2) 11 Bom. Govt. Sels.
(3) 3 B.H.C.R. A.C.J. 132.

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to showing that in 1861 the right of the Government to the timber had been admitted.

Cowie, Q.C., replied, relying on the plaintiff's rights as *khot*.

Reference was made on both sides to Bombay Regulation XVII of 1827; *Tajubai* v. *The Sub-Collector of Kolaba*; *Hanmant Janardan* v. *Sullodin* (1); *Govind Purshotam* v. *The Sub-Collector and Deputy Conservator of Forests of Kolaba* (2); *Vaman Janardhan Joshi* v. *The Collector of Thana* (3); *Dadabhai Jahangir* v. *Ramji* (4); *The Kanara Land Assessment Case* (5); *Mahummad Ismael* v. *Tato Rughonath* (6); *Ruttonji* v. *The Collector of Thana* (7); *Ramchandra* v. *The Collector of Ratnagiri* (8); *The Collector of Ratnagiri* v. *Vyankatrav Narayan Surde* (9).

At the conclusion of the argument Sir BARNES PEACOCK delivered their Lordships'

JUDGMENT.

[269] 21st November.—This is a suit in which the plaintiff claims, against the Conservator of Forests in the Presidency of Bombay and the Sub-Collector of Kolaba in the Thana Zilla, a three-fourths' share of the proceeds of certain teak and *izaili* timber which he alleges was cut down by the Government in the village of Pigode. His plaint states that his share in the village of Pigode, or Pigoda, was acquired by him as the proprietor thereof, and he states that it is his *vatani* (hereditary) *khoti* and *izafati* (village). He says: "Deducting the 4-annas' share, which belongs to the Government, of the proprietorship of the said village, the remainder of the village, namely, a 12-annas' share thereof, belongs to me as proprietor. Although I have a proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as *izaili* (inferior wood), by reason of my *vatani khoti* and *izafati* thereof, the defendants in the years 1865-66 and 1866-67 cut down teakwood and *izaili* wood thereof, and sold the same by auction as well as by private sale. Having (a right to take) a share of three-fourths of the proceeds of the same, I made several applications to both the defendants, requesting to be allowed to have a three-fourths of the sale proceeds, but I obtained no redress. I sent notices also to them, but received no reply"—and so on. Then he claims three-fourths of proceeds of the timber, which he alleges was so cut down by the Government. The principal question is, was he the proprietor of the soil of three-fourths of the village, and, as such proprietor, entitled, as he alleges, to three-fourths of the jungle, including teakwood as well as *izaili*.

It will be necessary, in the first place, to consider what were his rights under the *izafati* title. That depends upon two *sanads* which were put in and relied upon, one dated in 1653 and the other in 1722. After certain recitals it proceeds: "The firman is as follows:—From the (beginning of the) months of the year one thousand (and) fifty-four;" then there is a blank, the marginal note stating "There is no grammatical connection whatever between the equivalent of this sentence and what follows in the original. It may probably be intended to mean that the various rights below named, appertaining to the village of Pigode, [270] had been enjoyed by Ismailji Abaji from the beginning of the Arabic

(1) Select Decisions, Bombay, 144.
(2) 6 B.H.C.R.A.C.J. 188.
(3) 6 B.H.C.R.A.C.J. 191.
(4) 11 B.H.C.R.A.C.J. 162.
(5) 12 B.H.C.R. Appx.
(6) 2 Borr. (2nd ed.) 195.
(7) 11 M.I.A. (P.C.) 295.
(8) 7 B.H.C.R.A.C.J. 41.
(9) 8 B.H.C.R. A.C.J. 1.

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year 1054." The firman proceeds: "At this time Ismailji Abaji, *desai* of the *tappa* (district of) Kharapat, in the jurisdiction of the above-mentioned (town), has represented to the threshold of the universe"—that is, the sovereign—"that the village of Pigunda in the above-mentioned *tappa* (district) is a personal holding (*khood-rawan*) in lieu of *izafati* (dues) in this way, namely, that the fixed revenue of the above-mentioned village, consisting of ready money and corn, goes into the possession of the revenue station (*thana*), and some of the (taxes called) *bab* and the whole of the (rights called) *kanoonat* relating to the above-mentioned village (assigned) for the maintenance of (his) children are his own reversionary rights (*doombala khood*)," —which is translated or explained in the margin to mean—"that will revert to the sovereign on ceasing to be held by the present holder."—"And the (rights to certain perquisites called) *hake-lawazimat* and (those called) *khariastatore* of the above-mentioned *tappa* (district) are a personal holding;" then the applicant goes on to show what were his personal holdings; and that the profits of the tobacoo shop were a personal holding with a reversionary right to the sovereign. Then he states: "It is hoped that by the royal grace a gracious firman may be granted (to him) for the satisfaction of his mind." The firman which was granted, is: "Let them (the above-named officers) recognize (the said rights as) reversionary (*soombala*) and continue the same;" that is to say, let them recognize all his personal rights, with reversion to the Crown, and then after him they are to continue the same rights to his children and children's children. It appears to their Lordships that the effect of this document was simply to give the grantee, as the collector of the revenue, certain perquisites arising out of the dues, and to convert that right, which was then a mere personal right, with reversion to the sovereign, into an hereditary right, which was to descend to his children and to his children's children. It appears, therefore, to their Lordships to be clear that that *sanad* gave no proprietary right in the village; it did not give an interest in the soil, and it gave no right to the timber.

The next document of 1722, in Marathi, is a short document; "To Mashaul-anam (*i.e.*, the Honourable) the Desai the [271] Adhikari and the Kulkarni of Taluka (or Taraf) Nagothna," and so on. "The villages which are with (*i. e.*, held by) you as *izafat* have been (*i.e.*, are hereby) 'settled and granted' or 'granted on certain terms being made' by Rajishri." Then come the names of three villages of which one is Pigode. "In all three villages have been (*i.e.*, are hereby) 'settled' (or granted on certain terms being made). Therefore (as to) the *babatas* (cesses or tolls) appertaining to the said villages, whether cesses in cash or in kind (grain), whatever the amount (thereof) may come to, (the same) shall be 'received by you' (or 'paid over to you')." All that was granted is that he was to be allowed the *babatas* or the cesses or tolls, he being the *desai*, or the collector of the revenue, on behalf of the Government. That document, therefore, did not convey any interest in the soil, but merely gave a certain right to certain cesses or dues as the perquisites of the grantee as the collector of the Government revenue. Therefore, as regards his *izafati* rights, they did not give him the right of proprietorship.

The next question is, was he entitled to the proprietorship of the soil of the village by reason of his *vatani* or hereditary *khoti*? With reference to that point, a report of Captain Wingate was read from a collection of papers by the Government of India, from which it appears that a *khoti* had the right of proprietorship; but that was merely the expression of the

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opinion of Captain Wingate at that time; since the date of that report, however, the point came before the High Court of Bombay, and was judicially determined. In that case (*Tajubai* v. *The Sub-Collector of Kolaba*) (1) the Government had resumed the *khoti*, had granted certain rights to the sub-tenants of the estate, and were willing to allow the plaintiff to take the *khoti* again upon certain conditions, namely, that she should be bound by the terms which the Government had entered into with the sub-tenants or holders of the land; and it was held that she was not entitled to have the *khoti* except upon those conditions. The reasons for the decision were that the *khot* was not the proprietor of the soil. The learned Judge who decided the case in the first instance went very fully into the matter, and held that the *khot* was merely an hereditary farmer of the revenue. [272] The reasons are given in the report, and it will be unnecessary to read them. It is sufficient to say that that decision was opposed to the view taken by Captain Wingate to which reference was made from the records of the Government of India. 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*.

Then the question comes, was the plaintiff in this case, by virtue of his *khoti*, entitled to the proprietorship of the soil and to the timber upon it?

It appears that an agreement was entered into by the plaintiff on the 24th December 1861, which will be found at page 395 of the Record. It is as follows: "I give in writing this *kararnama* as follows: Being invested under Government Regulation (*i.e.*, Resolution), English letter No. 1832, dated the 18th May 1860, received by me from the Government with (authority) to carry on the *vahivat* (management) from the year 1859-60 to the year 1886-87 as *khoti* of the fourth *takshm* (share) of the *mauja* (village) aforenamed"—that is, including this village,—"and being also authorized (by the Government) to collect the assessment of the Government shares (also), and having consented to do so, I give in writing the (following) body of clauses relating to the management to be carried on (by me). They are written as below: The full assessment on the village aforenamed fixed at the survey is Rs. 2,196 13a., 3p., deducting therefrom the sum of Rs. 1,648 5a. 9p. in respect of the Government shares, the assessment on the remaining fourth share has been fixed at Rs. 548 7a. 6p. The same I agree to pay by instalments as mentioned below,"—naming four instalments. Then by the 8th section, "The village aforenamed has been given (let) to me for 28 years, from the (end of the year) 1859-60. Accordingly, for 28 years from the current year 1860-61 up to the year 1886-87 I will without any hindrance continue to the cultivating tenants or their heirs (*i.e.*, I will allow the tenants to hold) such of the *koti nisbat* lands as are entered in their names in the survey papers. The amounts of assessments of those lands have been settled at the survey." [273] Then there are several other clauses, but the more important ones are the 15th and 16th. He says in the 15th clause: "Some land belonging to the aforenamed village has been divided into numbers and reserved to itself by the Government for preserving a forest thereon. I will preserve the trees thereon. I will not allow any person to cut down the same, nor will I myself cut them down. In like manner I will not allow any person to

(1) 3 B. H.C. R. A.C.J. 132.

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cultivate the same, nor will I myself cultivate the same. Should any person cultivate the same, or cut down the trees thereon, I will inform Government of the same. Should the Government order that cattle may be allowed to graze on the aforesaid land reserved for a forest, I will accordingly allow cattle to graze thereon. I will not make any objection thereto. I will also preserve the teakwood trees that may be growing in this village in places other than the survey numbers aforesaid. I will not allow any one to cut them down, nor will I cut them down. If any person does cut them, I will immediately inform the Government of the same."

Now, that is an express agreement on the part of the *khot* that he will preserve all the trees in the Government reserves, and that he will preserve the teakwood trees that may be growing in the village in places other than the survey numbers. Can the plaintiff in the face of that agreement, whatever his rights may have been as a *khot*, say, as he has said in his declaration, that he has "the proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as inferior wood."

It appears to their Lordships to be clear that, according to the 15th section of that agreement, all the timber in the reserves were to belong to the Government, and that the *khot* was not to cut down any of the teakwood, whether in the reserves or not, and that he was not to allow any other person to do so.

Then in cl. 16 he says: "The Government has given to me the ownership of a fourth part of all the trees that now are growing, and of all the new ones that may grow hereafter in the village aforenamed, excepting the trees in the aforesaid preserved forest, and those on the lands claimed by the people, [274] and those on cultivated lands, as also excepting the teakwood and blackwood trees growing on waste land." Therefore he admits that the Government, when they authorized him to carry on the management of one-fourth of the village and to collect the Government revenue thereof, had the power to reserve, and that they did reserve, all the trees in allotments reserved for a forest, and all the teakwood trees in every other part of the village.

It appears to their Lordships that there is no evidence that the Government cut down any *izaili* wood. There is an entry which shows that some persons as trespassers went on to the Government reserves and cut down some *izaili* timber. A sum is credited to the forest account in respect of the proceeds of *izaili* (inferior kind of) wood. The entry is: "Some people having cut wood from the Government forest at Mauja Pigoda without permission, and having used the same for building their own houses and cattlepens, a report was made from the peta mahalkaris outward No. 109 of the year 1864-65, whereupon an order was received from His Honour the Deputy Conservator of Forests, bearing Registered No. 361, dated the 16th of August 1865, to the effect that the value of the wood (so cut) should be recovered accordingly; (money was) recovered from the said people as per memorandum, bearing the mahalkari's signature, bearing the above date." The entry shows that the Government sued some persons as trespassers for cutting down *izaili* wood in the Government forest, and the plaintiff claims in his declaration to be entitled to that *izaili* wood, because he says he is entitled to all *izaili* wood throughout the village. There is no evidence in the case of any *izaili* wood being cut down in any other

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part of the village excepting in this portion of the village which was reserved as Government forest. The plaintiff, as it appears to their Lordships, has not made out a title to any teakwood, and he has not made out a case against the Government as to their having cut *izaili* wood in any place, not of their having recovered the value of *izaili* wood cut in any part of the village, except the Government reserves in which the plaintiff was clearly not entitled to any of the trees.

Under these circumstances their Lordships are of opinion that the decision of the High Court was right, and they will, therefore [275] humbly recommend Her Majesty that the decree of the High Court be affirmed, and that the appellants do pay the costs of this appeal.

Solicitors for appellant.—Messrs. *Hores* and *Pattison*.

Solicitor for respondents.—Mr. *H. Treasure*.

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4 B. 275=5 Ind. Jur. 145.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice (Officiating) and Mr. Justice Bayley.

IN THE MATTER OF THE NEW FLEMING SPINNING AND WEAVING COMPANY (LIMITED) IN LIQUIDATION.

THE BANK OF BOMBAY (*Appellants*), *v.* H. R. CORMACK AND OTHERS (*Official Liquidators*), *Respondents.* [5th December, 1879.]

Bill of exchange—Liability of a company to third parties on a bill drawn by directors as such—Indian Companies Act (X of 1866), s. 47—Company—Winding up.

Three of the directors of the New Fleming Spinning and Weaving Company, Limited, one of whom was also the secretary, treasurer and agent of the company, drew a bill in favour of S, in the following form:—"Sixty days after the date of this first of exchange, (second and third of the same tenor and date not being paid), pay to the order of S, the sum of Rupees two lakhs only. Value received, and place to account of G.P., K.N., N.K., Secretary, Treasurer and Agent. The New Fleming Spinning and Weaving Company, Limited, Directors." The bill was endorsed by S. to the Bank of Bombay, was duly presented for payment to the drawee, and was protested for non-payment. Subsequently to the date of the drawing of the bill, the New Fleming Spinning and Weaving Company, Limited, went into liquidation. The Bank of Bombay claimed as endorsees of the bill to prove against the company as drawers.

Held, affirming the decision of GREEN, J., that the company was not liable. In order to make a company liable on a bill or note it must appear on the face of such bill or note that it was intended to be drawn, accepted, or made on behalf of the company, and no evidence *dehors* the bill or note is admissible under s. 47 of the Indian Companies Act (X of 1866).

Dutton v. *Marsh* (1) followed.

[F., 5 B. 92.]

THIS was an appeal against an order dated the 30th August 1879 made by Green, J., whereby he disallowed the claim of the Bank of Bombay to rank as creditors of the New Fleming Spinning and Weaving Company as endorsees of a bill of exchange for Rs. 2,00,000, dated the 20th November 1878. The bill, in respect of which the claim was made against the company by the Bank of Bombay, was in the following form:—

(1) L. R. 6 Q. B. 361.