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then under consideration, it has no effect, so far as I can see, upon the question whether the present Darkhast is time-barred or not. For the purpose of determining that question, it is clear that all the previous applications have to be considered. They were steps-in-aid of execution. The Darkhast of 12th June 1907 was held by the Court then to have been made in time: and after that adjudication it is not open to the Court now to consider the question whether it was in time or not.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir. Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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VALLABHDAS NARAYANJI AND AMRITLAL AMERCHAND (ORIGINAL CLAIMANTS), APPELLANTS *v.* THE SPECIAL LAND ACQUISITION OFFICER FOR RAILWAYS AND ANOTHER (ORIGINAL OPPONENT AND COUNTER CLAIMANT), RESPONDENTS*.

Land Acquisition—Khoti village—Warkas and Bhati lands—Villager—Claimants; enclosing Bhati lands and treating them as if they belonged to them—Interest acquired in the lands—Compensation—Apportionment—Proportion of one to the Khot and two to the Occupants.

Two villages of Kanjur and Vikhroli were granted to the Khot of Powai under a perpetual lease, dated July 7th 1835. Certain Bhati lands (waste lands producing grass) in those villages were acquired by Government for Railway purposes under Land Acquisition Act, 1894. The Khot claimed the whole of the compensation but the villagers claimed that they had acquired a substantial interest in the Bhati lands by long and continued user thereof adversely to the Khot. The evidence showed that the Bhati lands had been enclosed; that they had been sold by registered sale deeds; that they had passed from hand to hand under these sale deeds and that the Khot was perfectly aware that the villagers were thus dealing with them.

* First Appeal No. 125 of 1917.

(with First Appeals Nos. 117 to 123 of 1917, Nos. 126 to 128 of 1917, Nos. 20 to 106 of 1920 and Nos. 372, 373 of 1920).

Held, that the villagers had acquired by their action an interest in the Bhati lands and were therefore entitled to compensation.

Vasudev Bhaskar Pendse v. *The Collector of Thana* (1); and *Harischandra* v. *Sorabji* (2); discussed and distinguished.

Apportionment of compensation in respect of the Bhati lands in proportion of one to the Khot and two to the occupants approved:

PER SHAH, J.:—"If the occupants of the particular plots acquired can show that they have been in enjoyment of the respective plots for over twelve years and have enjoyed these lands in their own right, there is no reason why they should not acquire the interest which they claim to have in those lands. The acquisition of rights by prescription is open in law to these villagers against the Khot, whatever his rights under the lease may be."

FIRST appeal against the decision of J. A. Saldanha Assistant Judge of Thana.

Proceedings under the Land Acquisition Act.

By a deed, dated July 7, 1835, the villages of Kanjur and Vikhroli in Thana District were conveyed to the Khot of Powai, on a perpetual lease at a permanent rent by the Honourable East India Company. The material terms of the lease were as follows:—

2nd. For the cultivation of the whole of the waste land situated in the above villages and generally for their improvements you are to enjoy it free of assessment for the abovementioned period of forty years at the expiration of which all the arable waste will be fully assessed at the usual rates and the amount of such assessments will be levied from you annually by Government in addition to the sum fixed in the preceding paragraph. You are to cultivate one-fourth of the present waste land within ten years from the date of this lease.

3rd. All the rights possessed by Government on the produce of the waste of the abovementioned villages including the waste land and trees, excepting such as may be specially excepted in this lease, are vested in you. These you are to enjoy free of assessment for the abovementioned period of forty years at the expiration of which an assessment will be fixed and levied as stated in the preceding paragraph.

(1) (1879) P. J. 274. (2) (1897) P. J. 9 and 444.

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9th. The rights of the present proprietors of land and those of others possessing or authorized to possess rights and privileges of any description whatever, are to remain unaffected by this lease. It is clearly to be understood that this lease confers no right which Government does not now possess, and such portion only of the rights of Government as may be herein specially granted.

In 1910 certain lands in the said villages were notified for acquisition for the purpose of quadrupling the G. I. P. Railway line between Kalyan and Bombay. The lands were in the occupation of the villagers who claimed the compensation from the Land Acquisition Officer. The Khot on the other hand, claiming proprietory interest in the lands acquired, applied that compensation should be paid to him. The Land Acquisition Officer awarded compensation to the villagers.

References were made to the Court under section 18 of the Land Acquisition Act, 1894, by the Khot. On his behalf it was contended that the land revenue settlement established by the Government of Bombay in Salsette as recorded in Bombay Regulation I of 1808 extended only to paddy holdings so far as the villagers of Vikhroli and Kanjur were concerned, and that the rest of the lands in the villages belonged to the State, in other words, that the rice lands or *suti* lands were the only *occupancies* recognized by law; that the rest of the lands were *unoccupied* lands vested not in the villagers, but in the Government; that by the lease of 1834-1835 all the rights of Government in the unoccupied lands in the villages of Vikhroli and Kanjur became vested in the Khot of Powai, with the right of collecting revenue in the occupied lands; that the proprietorship of the soil of the villages belonging to Government (apart from the occupancy right of the villagers) became vested also in the Khot, and that therefore he could claim right to all trees in the villages even those of *suti* fields.

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The Assistant Judge who heard the references held that there was nothing in the Regulation I of 1808 to show that Government considered all *warkas* lands to be State property, nor could "all the osik" in the contemplation of the parties to the *kowl* have included all the waste lands of the villages. He further held that, even assuming that Government leased to the Khot all the waste lands in the villages, *bhati* lands held by the ryots were not included in them for the following reasons:—

"Bhati lands cannot be regarded as really *osik* or waste lands. They require some sort of protection and care if not culture which cost some trouble and labour if not much money.

There cannot be doubt that in the Vikhroli and Kanjur as in many other villages in Salsette there were *bhati* lands in actual private occupation of the ryots.

If Government had owned and enjoyed the produce of these *bhati* lands, it would have been embodied in the accounts of the revenue given in the lease and along with the receipts from hay of waste fields. The omission of this leads to the conclusion that the *bhati* lands had been all in the enjoyment of the villagers. They were assessable, but were not assessed by Government out of sympathy for the wretched condition of the ryots; a concession which was probably made to them as in the Malad and other villages mentioned in section 55 of the Regulation I of 1808.

Such rights of the proprietors of land and those of others possessing or authorised to possess rights and privileges of *any description* were expressly guaranteed by clause 9 of the *kowl*. The lease conferred no right which Government had not possessed and such portion only of their rights were specially mentioned. That these rights extended very likely to *bhati* holdings whether adjuncts to their fields or not and to trees even outside their holdings appears clear from the lease as also from the evidence which will be discussed hereafter.

It is true that it has been held in several decisions especially *Vasudev B. Pendse* v. *Collector of Thana* (1879) P. J. 274; *Harischandra* v. *Sorabji* (1897) P. J. 9; Reference 2 of 1892 (Exhibit 224), First Appeal No. 330 of 1909 (Exhibit 243); Reference 24 of 1913 (Exhibit 230); Reference 50 of 1913 (Exhibit 234); that *warkas* lands primarily belong to Government, but it is clear that they refer to *warkas* which are attached or pertaining to

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fields for the purpose of taking *rab* from them for the use of the rice fields and for occasionally growing inferior grains—a use which could be only permissive. But where the *warkas* lands are *bhati* in which grass is grown and used for commercial purposes an actual legal interest is created and established in the holder of the land, and if the holding is openly enjoyed by the holder as private property with right to sell the grass and pocket the income for over the statutory limitation period, there would be created in the holder an independent and exclusive legal estate, in respect of which Government or the Khot in their behalf could only have a right to levy assessment from the holder. This is the conclusion arrived at by the Honourable Judges of the High Court in Cross-Appeals Nos. 149 of 1903 and 11 of 1904 (vide the learned judgment of the Hon'ble Mr. Justice Heaton printed on pp. 20-23 of my Brochure).

It will be seen from the judgment in *Harischandra* v. *Sorabji* (1897) P. J. 444 that the *sutidars* had in their possession and enjoyment much land in excess of what could correspond to the demp Jara fixed for their holding, and the claim of the Khot to assess such surplus or for compensation in respect of it was negatived. The surplus could not have comprised only rice fields, and must have included lot of *bhati* lands which were never assessed and which though assessable could not be assessed except under a formal revenue settlement introduced under the Bombay Land Revenue Code.

The learned Assistant Judge, therefore, awarded compensation to the villagers and on the question of the apportionment he directed that one-third compensation be awarded to the Khot and two-thirds to the villagers on the following grounds :—

"There can be no doubt, therefore that the Khot has got what may be called the assessable interest in the lands in dispute. The interest can be fairly held to be equivalent to one-third of the produce of the land on the basis of the principle on which assessment is levied on rice lands of the Sutidars under Bombay Regulation I of 1808. This appears to me to be an equitable settlement of the dispute between the Khot and the ryots and might form, I hope, the basis of a future amicable settlement in respect of all the rest of the lands in dispute outside the recent acquisitions by Government for the purpose of a fair revenue settlement, if the parties cannot agree to the rates under the revenue settlement. After all the ryots cannot claim anything more than occupancy right in their *bhati* holdings like that of their *suti* lands and, if, therefore, their title is that of a limited character, they cannot claim the whole of the compensation, as long as they pay no assessment to the Khot in respect of them."

The claimants appealed to the High Court.

R. W. Desai and *J. G. Rele*, for the appellant:—The Assistant Judge had apportioned compensation between the ryots and the Khots in the proportion of two-thirds and one-third on the ground that the lands are Bhati or grass lands and fall in the category of lands which were dealt with in the case of the Malad lands decided by this Court in First Appeals Nos. 149 of 1903 and 11 of 1904. That case depended upon the special conditions of the villagers of Malad which will be found embodied in section 55, clause (4), sub-clause (2) of Bombay Regulation I of 1808. Those conditions do not apply to the villagers in the present case and the Assistant Judge ought not to have imported those conditions into the present case. The two grants are quite distinct and there is nothing in common between them.

The law about the tenure of lands in Salsette at the date of these grants will be found in the Bombay Regulation I of 1808 and also Regulation XVII of 1827. We are not concerned in the present case with the latter regulation. But Regulation I of 1808 capitulates the Revenue Settlement which was introduced into this Taluka shortly after its acquisition by the East India Company in 1774. According to this Settlement the holders of cultivated lands were assured the perpetual possession of the lands they cultivated, and they were also assured that the grain commutation of their rental would also remain fixed for ever. But with regard to the waste lands in the villages, which produced grass or other articles of inferior produce, it was never intended that any such title should be conveyed to or vested in the ryots and therefore these waste lands always remained the property of the East India Company. *Warkas* lands

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are waste lands. It has already been held so in the leading case on the subject known as *Pendse's case* (*Vasudev Bhaskar Pendse* v. *The Collector of Thana*)[1]. No doubt that case was from another, and not the Salsette Taluka, of the Thana District, but that makes no difference. In the next case to which reference should be made the village was a village in Salsette, viz., the Powai Estate which comprised a group of several villages granted by the East India Company to Framji Cowasji who afterwards acquired the villages now in dispute. But even in that case the same principle was laid down by two successive Benches of this Court: see *Harischandra* v. *Sorabji*[2] (Jardine and Ranade JJ., and Farran C. J. and Candy J.). Those decisions have laid down the law as to the proprietorship of *warkas* lands vesting in the Crown, and through it in the Crown grantees like the appellants in this case. That law has been followed as applying to all *warkas* lands not only in Salsette, but also in the rest of the Presidency. A number of cases have been decided on that footing by the District Court of Thana, the judgments in some of which are filed in the Record. No doubt they did not come up to this Court in appeal but that was because the parties and their pleaders knew well that that was the law. The Assistant Judge tries to get out of those decisions by attempting to distinguish the *warkas* lands in the villages in question here on the ground that they are Bhati lands. But there is no such tenure as Bhati tenure anywhere recognised. It is not to be found in the Bombay Regulation I of 1808, except in the isolated instance of the village of Malad, nor has it been subsequently recognised in any Act or Regulation bearing on the land revenue system of this Presidency: see Bombay Act I of 1865 or the Bombay Land Revenue Code of 1879.

(1) (1879) P. J. 274.

(2) (1897) P. J. 9 and 444.

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Under the grant of 1835 all the waste lands in the villages of Vikhroli and Kanjur were expressly conveyed to the grantee and therefore he is alone entitled to the whole of the compensation. All that the villagers in this case have proved is that they have been in possession of specified pieces of these *warkas* land and that they had invariably taken the produce of the fruit or other trees growing on them and the grass produced thereon. The bulk of the evidence consists of the use of such grass from these lands, and the villagers say they have been selling it in the Bombay market. But it is submitted such possession and use is not an indication of anything more than a general license by the State, continued by the grantee, to the proprietors of the rice lands to make use of the attached *warkas* lands. Exactly the same argument had been used in *Pendse's case*(1) but the learned Judges disposed of it as follows :—

"It is possible, and for the sake of argument we may concede, that the plaintiff had had the use of the '*warkas*' land mentioned in the plaint for the same length of time during which he has held his rice lands. But it must be considered as being now settled law that all waste land belongs to the State, and '*warkas*' lands must be regarded as to all intents and purposes waste lands.

* * * *

He (plaintiff) argues that the lands have always been marked off by distinct boundaries from the *warkas* of his neighbours, that the Government Officers must have been aware of these boundaries; and that they never interfered with his exclusive enjoyment of the land. He also shows that he has from time to time cultivated portions of the '*warkas*' land. But this is really no argument in favour of a recognition by Government of his proprietory title, or of the acquisition of any such title....The Government would also readily acquiesce in the demarcation by the cultivators *inter se* of the respective portions of waste lands used by them, so as to prevent quarrels and breaches of the peace. But there is nothing in this which can be construed into a grant or recognition of any proprietory title adverse to the title of the State as owner of all waste lands."

(1) (1879) P. J. 274 at p. 276.

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The above remarks absolutely answer the argument advanced by the Assistant Judge to decide the case in favour of the villagers. It is quite unnecessary to examine the evidence of the separate possession of each piece of land by the individual tenant. Assuming that the whole evidence is good, the case does not stand higher than the facts in *Pendse's case*[1]. It is too late now to disturb that judgment which has been followed in several cases some of which are mentioned by the Assistant Judge.

W. B. Pradhan, for the respondent:—The decision in *Pendse's case*[1] has no application to the present case. In the present case there is evidence to show that the villagers have not only been in possession and enjoyment of these *warkas* lands for a very long time, but they have also openly sold and mortgaged these lands as their absolute property to the knowledge of the Khot. This open course of dealing is a peculiar feature of this case which was not present in *Pendse's case*[1]. In the case of *Harischandra* v. *Sorabji*[2] the Court was very careful to point out that in the absence of any evidence they declined to assume that the Sutidars as such had become the owners of the soil in the *warkas* land. The reference in that case to the decision in *Pendse's case*[1] cannot in the present case help the Khot inasmuch as there is overwhelming evidence to show that the Sutidars have acquired a right to the soil of these *warkas* lands.

Bahadurji, Acting Advocate General with *S. S. Patkar*, Government Pleader, for the Crown, was called upon to address on the question of compensation.

MACLEOD, C. J.:—This is an appeal from the decision of the Assistant Judge of Thana in Reference No. 5 of 1915. In 1910 a strip of land on the east side of the

(1) (1879) P. J. 274.

(2) (1897) P. J. 9.

G. I. P. Railway between Kurla and Thana was notified for acquisition in order that the line might be widened. This reference refers to a portion of that strip situated in the Vikhroli village, and the lands in other companion References are all similar lands either in this village or in the village of Kanjur through which the line passes.

The first question that arises on this appeal is whether the amount awarded by the Judge is insufficient and should be increased. [After having dealt with the evidence on this question the judgment proceeded :—]

With regard to the apportionment of the compensation in those cases in which the claimants had proved that they were in occupation of Bhati lands, in the proportion of one to the Khot and two to the occupant, the Khot claims to be entitled to the whole of the compensation, whether he was in occupation of the lands or not. This is a question which seems to have arisen, and must always necessarily be arising, in Salsette, in cases of compulsory acquisitions, because there have been a number of instances in Salsette where what may be called Khoti grants have been made in old times by Government to various individuals in order to encourage better cultivation in the villages granted, and it has come to be understood that with regard to Bhati lands the compensation money should be awarded in the proportion of one to the Khot and two to the occupants. It has been thought on principles of equity that the compensation money should be apportioned in this way, although the occupants may have proved that they had the right to occupy the grass lands and retain the whole of the produce without paying any assessment to the Khot. That being the case, I see no reason why any alteration

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should be made in the apportionment of compensation in those References in which it has been proved that the lands in Reference were Bhati lands, in the occupation of particular individuals who claimed the rights of occupancy.

An enormous amount of learning seems to have been devoted to this case on the part of the legal advisers on both sides, as I see that this question how the compensation should be apportioned was argued for twenty days before the Assistant Judge, and I do not know which to admire most, the patience of the Judge or the ingenuity of the learned counsel. But it seems to me that a great deal of the time taken up might have been saved if the parties had really considered what was the real issue. Most of the arguments on the issues which were raised by the Assistant Judge appear to me to have been purely academical. There was no necessity to construe Bombay Regulation I of 1808, nor was there any necessity to consider clause by clause the lease to the Khot of the villages of Vikhroli and Kanjur. Whatever rights the Khots acquired under the lease between themselves and Government in 1837 to the waste lands in these villages, even assuming for the purposes of this case that they became absolute proprietors of the soil, that would not prevent other persons acquiring rights against the Khot either permanent or otherwise under the general law.

I may take the opportunity here of pointing out how a great deal of confusion has arisen in these cases and other similar cases which have come before the Courts by the use of the word "warkas." Evidently the word "warkas" was originally applied to that land in the neighbourhood of rice lands from which the villagers procured from times immemorial rough grass and branches for the purposes of Rab burning on the

rice fields, and it is admitted that although the villagers or Sutidars in occupation of a particular area of rice land have a right to collect Rab materials from the adjacent waste lands, they have no proprietory interest on account of that in the soil, so that in the case of those lands it might well be, if they were compulsorily acquired, the villagers or Sutidars would have no right to any part of the compensation. The case of *Vasudev Bhaskar Pendse* v. *The Collector of Thana* (1) has been referred to as showing that the villagers have no rights whatever in any waste lands, for whatever purpose they are used. But what was decided in that case appears at p. 286 :—" The general conclusions at which we have arrived are these, viz., that the holders of rice fields in the Konkan, whatever may be their tenure of such fields, are not proprietors of the soil in the 'warkas' lands held by them ; and that they are not entitled either by custom, or prescription, or, (so far as appears in the present case), by any grant or recognition on the part of the Government to cut down teak, or other specially reserved trees growing on 'warkas' lands of which they are the occupants. The plaintiff therefore cannot have a decree declaring him entitled to cut down such trees." So that the distinction between *warkas* land, which could be considered as appertaining to the cultivation of rice fields, and waste lands producing grass, which are better styled Bhati lands, was not dealt with in the judgment. So it seems to me that that is a very good reason why the decision in *Harischandra* v. *Sorabji* (2) is not an authority in the case now before us. The learned Judges considered that the question before them was concluded by the decision in *Pendse's case* (1). They say : " Warkas lands are waste lands, and are therefore included in the grant made by the State of waste lands to the original grantee. The right to take

(1) (1879) P. J 274. (2) (1897) P. J. 9.

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Rab from these lands for manuring rice lands confers no title to the soil or the trees growing in it, which remain the property of the grantee." Therefore in that case the Court was not considering Bhati lands but *warkas* lands proper.

This question arose in First Appeal No. 149 of 1903 and No. 11 of 1904 with regard to Bhati lands in Malad, and although the Khoti grant in that case may not have been worded in the same way as the Khoti grant in this case, the decision that Bhati lands are distinct from *warkas* lands which are appurtenant to rice holdings is directly in point.

It comes to this, therefore, that as these Bhati lands were included in the village of Vikhroli, it may be said they were included in the lease which Government granted to the Khot in 1837, and it might also safely be assumed that for centuries the villagers in Salsette have been accustomed to cut grass on the waste lands, if it was required for feeding their animals or for sale, and it nowhere appears, at any rate in this village, that the Khot has ever interfered with those rights of cutting grass. That of course by itself would not be sufficient to create anything in the nature of occupancy rights. But we find in these cases the evidence shows that a great deal more was done than merely entering on the land when the grass was ready to cut and removing the grass. These grass lands have been enclosed. They have been sold by registered sale deeds. They have passed from hand to hand under these sale deeds, and the Khot was perfectly aware that the villagers were enclosing these grass lands and were treating them as if they belonged to them. In that state of affairs it is impossible to say that the villagers could not acquire by such action proprietory rights in the lands so enclosed and dealt with. There is no suggestion in this case that these lands had not

been so dealt with for a period of twelve years and upwards. It would follow, therefore, unless the Khot chooses to contest the question in a regular suit by endeavouring to regain possession of grass lands of this nature, that the villager-claimants in these References have acquired an interest in the land in reference.

It is not necessary for the purposes of this Reference to define exactly what that right is. But it is certainly clear that they have been in possession of these lands, and have taken the profits of these lands, and have paid no assessment for them, and so they might certainly have made a perfectly good case for receiving the whole of the compensation. But it seems to have been recognised in other similar cases not only on the east side of the island but also on the west side, that some residuary interest remained in the Khot which entitled him to share in the compensation, and as this question was not fought out before the Assistant Judge, and considering all the circumstances and the previous recognition of this method of apportionment, I do not think there is any reason why it should be disturbed. It evidently was in the past recognized as a compromise between the conflicting interest of the Khot and the villager-occupants who had been accustomed to take grass for their own purposes from the grass lands without paying anything by way of assessment to the Khot. Therefore, I think, that is the ground on which all these References ought to be decided, and we make it clear that there was no necessity for the findings on various issues which were raised in the lower Court, in particular issues Nos. 1, 2, 3, 4 and 5.

[After referring to other appeals his Lordship concluded :—]

All appeals filed by Mr. Desai are dismissed with costs. Separate sets of costs in cases in which

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Mr. Pradhan appears. The Government Pleader to get costs on the amount of the claim in each appeal. Mr. Pradhan to get costs on two-thirds of the claim allowed by the District Judge in each case.

SHAH, J. :—I agree that all these appeals should be dismissed. I desire to state briefly the grounds upon which the two questions, first, as to the market value of the various plots acquired, and second, as to the apportionment of the compensation, should be answered in the manner in which they have been answered by the trial Court in this case.

[After dealing with the question of market value of lands the judgment proceeded :—]

The main question in these appeals round which the arguments have ranged is the question of apportionment. The Khot claims the whole of the compensation in respect of these Bhati lands. On the other hand the villagers claim to have a substantial interest in these Bhati lands on account of the long and continued user thereof adversely to the Khot, and claim to be entitled to the compensation in respect of those lands. It is not necessary for the purpose of deciding this question of apportionment to consider the points relating to the construction of Regulation I of 1808, nor is it necessary to deal with the general question as to whether under the lease the Khot did or did not acquire any right to the Bhati lands or other waste lands. Whatever his rights under the lease may be, it is quite clear that, if the occupants of the particular plots acquired can show that they have been in enjoyment of the respective plots for over twelve years, and have enjoyed those lands in their own right, there is no reason why they should not acquire the interest

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which they claim to have in those lands. The acquisition of rights by prescription is open in law to these villagers against the Khot, whatever his rights under the lease may be. The Government do not claim any interest in the land such as might go to reduce the market value of the land acquired under the Land Acquisition Act. The lower Court has considered the question of the enjoyment of each particular plot by a particular individual very carefully, and has dealt with that part of the case fully in the judgment. In the course of the argument, no attempt has been made on behalf of the Khot except in relation to a few plots to show that the conclusion of the lower Court on evidence with regard to the possession and enjoyment of each particular plot by each particular holder is open to any objection. These conclusions, therefore, must be accepted to be right with regard to the enjoyment and possession by particular villagers of the particular plots in question. If we accept those findings, it is clear that the villagers, who are shown to have enjoyed and held these lands for a number of years to the knowledge of the Khot, and without any assertion on the part of the Khot against their enjoyment, are entitled to a substantial share in the compensation. On that ground it is clear that the claim of the Khot to the whole of the compensation cannot be allowed. If once the conclusion is reached that the Khot is not entitled to the whole of the compensation in respect of each plot acquired, then as regards the apportionment between the Khot and the villager there is not any serious difference between the parties. In previous cases the occupant and the Khot have been held entitled to share the compensation in the proportion of 2 to 1. It is in the same proportion that the lower Court has directed the apportionment of compensation in these cases; and in spite of the desire

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of the occupants expressed through their pleader in the course of argument, for the first time, that they should get the whole amount, there is no reason whatever to think that that is not a fair and equitable apportionment under the circumstances. The fact that they have filed no cross-objections, and have raised no objection in the lower Court to allow the compensation to be divided in that proportion goes a great way to show that they have all along understood their rights to be as determined by the lower Court. That proportion has been accepted in some of the earlier decisions of this Court with regard to the Bhati lands, and that proportion, I think, may properly be accepted in these cases.

I desire to add a word with reference to the decision in *Harischandra* v. *Sorabji*[1] which has been relied upon by Mr. Desai as showing that all these Bhati lands are on the same footing as the *warkas* land, and that no length of enjoyment of such lands would give any right of ownership over the same to the holder. I do not think that that decision has any such effect. That case was decided really on the evidence in that case; and it is pointed out that in the absence of any evidence the learned Judges declined to assume that the Sutidars as such had become the owners of the soil in the *warkas* land. They referred to the case of *Vasudev Bhaskar Pendse* v. *The Collector of Thana*[2] in the judgment. It is clear to my mind that neither that case nor *Pendse's case*[2] helps the Khot in the present case, because the lands with which we are concerned are not exactly of the class of *warkas* lands with which the Judges were concerned in that particular case; nor can I accept those cases as laying down the general proposition, which it is contended they do, that in no case can *warkas* land be acquired by the holder by

(1) (1897) P. J. 9. (2) (1879) P. J. 274.

adverse possession against the Khot. But in the present case we are not concerned with the effect of these decisions on what may be described as proper *warkas* land. These Bhati lands stand on the same footing for the purpose of acquisition of rights by prescription as ordinary lands; and I see no reason why these villagers who have been enjoying the produce of these grass-growing lands, should not have the benefit, which the law gives to such occupation and enjoyment, as against the Khot. As regards the few lands, as to which Mr. Desai contended that the acquisition of rights by adverse possession was not established, I am of opinion that he has failed to show that the conclusion reached by the lower Court is wrong.

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Appeals dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

JINA JIJIBHAI BARIA (ORIGINAL DEFENDANT), APPLICANT *v.* MATHUR JIBHAI BARIA (ORIGINAL PLAINTIFF), OPPONENT*.

1921

July 1.

Bombay Mamlatdars' Courts Act (Bombay Act II of 1906), section 5. Explanation†— *Mamlatdar—Possessory suit—Joint possession cannot be ordered—Jurisdiction.*

Under the Bombay Mamlatdars' Courts Act, 1906, the Mamlatdar has no jurisdiction to award joint possession, in a possessory suit against a co-owner.

THIS was an application under the Extraordinary Jurisdiction of the High Court, from an order passed by H. L. Talati, Mamlatdar of Borsad.

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* Civil Extraordinary Application No. 88 of 1921.

† The explanation runs as follows:—

"The exercise by a joint owner of any right which he has over the joint property is not a dispossession, or disturbance of possession, of the other joint owner or owners within the meaning of this section."