priority over Pagubai's claim for maintenance, still when Pagubai filed a suit asking for a charge on the property, the property became the subject-matter of that suit and even a party who has to satisfy a debt having a priority over the claim for maintenance had to alienate the property under the authority of the Court and on such terms as it might impose. If the party fails to obtain the authority of the Court for the purpose, then the alienation will be subject to the final decree in that suit. The decree in Pagubai's suit ultimately charged her maintenance on the property in suit, and for the recovery of that, the property was sold by auction. The plaintiff is therefore bound by that auction sale although his mortgage was prior to the institution of the maintenance suit and may have precedence over the claim in that suit. The present suit is based entirely on the strength of the sale deed. How the rights of the plaintiff under the mortgage deed can be enforced need not be discussed here; but so far as the alienation during the pendency of the suit is concerned, it must be held to be subject to the result of the maintenance suit and the reliefs prayed for by the plaintiff cannot therefore be granted. The decree of the lower Appellate Court is confirmed, and I dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

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N. J. WADIA AND SEN JJ.

Putlaji Vishram Desai and others — *Defendants* — Appellants.

v.

Damodar Vishnu Vaidya, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 285 of 1934, Decided on 15th December 1938, from decision of Dist. Judge, Ratnagiri, in Appeal No. 339 of 1931.

(a) Grant— Grant of soil in alienated village by Peshwa in 1778—Inamdar is owner of trees standing on lands already in occupation of khots, dharekaris and permanent tenants.

Grant of soil to an inamdar in an alienated village made by the Peshwa in 1778 confers 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 : *6 Bom L R 864, Rel. on; 23 Bom 518 and 18 Bom 670, Disting.* [P 408 C 1]

(b) Adverse Possession— Right to trees — Khots, dharekaris and permanent tenants in alienated village openly cutting trees on their lands for more than 35 years to knowledge of inamdar and without his permission—Inamdar's claim to trees is barred.

Where the question is of rights to trees, the same kind of evidence in proof of adverse possession as in the case of lands cannot be expected. The exercise of such rights cannot be expected to be continuous in the sense in which adverse possession of land can be said to be continuous. The rights of cutting and removal of trees will necessarily be exercised intermittently. [P 409 C 1]

Where the khots, dharekaris and permanent tenants in an alienated village, have 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, the claim of inamdars to the trees is barred by limitation: *A I R 1931 P C 162; 27 Cal 943 (P C); 35 Cal 961 and A I R 1931 P C 89, Disting.* [P 409 C 1; P 410 C 2]

Dr. B. R. Ambedkar and A. A. Adarkar— *for Appellants.*

H. C. Coyajee and Y. V. Dixit — *for Respondent (Plaintiff).*

N. J. Wadia J.—Respondent 1 is one of the inamdars of the village of Kondye in the Ratnagiri District having purchased a four-anna share in the inam from defendants 1 and 2 on 15th November 1923. He brought the suit out of which this appeal arises for a declaration that he and defendants 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 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 3 to 10, and for Rs. 65 as damages against the defendants 18 and 27 for value of certain trees sold by defendant 18 to defendant 27 and removed by the latter. The trial Judge dismissed the suit holding that the plaintiff and the other inamdar defendants 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 shares of defendants 1 and 2 having been sold to the plaintiff. The village is a khoti khichadi village and defendants 11 to 15 are the representatives of some of the khots

holding eight annas share in the village. The other eight annas share of the khoti was purchased by the plaintiff himself in the year 1897. Defendants 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 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 Peshwa 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 3 to 10 as grantees of the soil were owners of timber and fuel trees and of reeds and rushes growing by the riverside; 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 issues 1 and 2 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 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, sisav (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 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 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 (Ex. 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 dharekaries 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 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 1 Bom L R 19.[1] 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 had no intention of claiming such trees growing on the lands of any person wherever situate beyond the limits of the jungles preserved by Government.

In an earlier case, in 18 Bom 670,[2] 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 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 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 6 Bom L R 864,[3] 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 forty 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

1. Secretary of State v. Narayan Namshet Kamerkar, (1899) 23 Bom 518=1 Bom L R 19.
2. In re Antaji Keshav Tambe, (1894) 18 Bom 670.
3. Gajanan v. Nilo, (1904) 6 Bom L R 864.

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 and 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 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 S. 3, 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 6 Bom L R 864[3] 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 right follows very closely the decree made by the High Court in 6 Bom L R 864.[3]

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 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 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 thirty-five to forty 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 33 Bom L R 1273[4] 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 twelve 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

4. Bhupendra Narayan Sinha v. Rajeswar Prosad, (1931) 18 AIR PC 162=132 IC 610=58 I A 228=59 Cal 80=33 Bom L R 1273 (PC).

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, 27 Cal 943,[5] 35 Cal 961[6] and 58 I A 125,[7] 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 35 Cal 961,[6] 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 18 to defendant 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 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 8, in support of their contention, and this witness, Udhav Ballal Vaidya (Ex. 160), has fully supported the defendants' claim. He says that he himself

5. Radhamoni Debi v. Collector of Khulna, (1900) 27 Cal 943=27 I A 136=4 C W N 597=7 Sar 714 (P C).
6. Jogendra Nath Rai v. Baladeo Das, (1908) 35 Cal 961=12 C W N 127=6 C L J 735.
7. Gobinda Narayan Singh v. Sham Lal Singh, (1931) 18 A I R P C 89=131 I C 759=58 I A 125=58 Cal 1187 (P C).

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 (Ex. 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 25 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 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 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, Ex. 140, by which the plaintiff purchased the eight annas share in the khoti of the village, mentions trees, etc., standing on the lands as also 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. Para. 1 of the order made by him will run as follows: It is hereby declared that the appellant and defendants 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 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 respondent 1, the plaintiff. The cross-objections are dismissed with costs.

D.S./R.K. *Appeal allowed.*

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BEAUMONT C. J. AND KANIA J.

Chimanram Motilal and another — *Plaintiffs* — Appellants.

v.

Jayantilal Chhaganlal and another — *Defendants* — Respondents.

Appeal No. 42 of 1938, Decided on 31st March 1939.

(a) Partnership Act (1932), Ss. 4 and 6 — Sharing profits and contributing to losses are