1887.

RANGILBHÁI KALYÁNDÁS v. VINÁYAK VISHNU.

law of the parties as fraudulent, and by which, therefore, it would not allow the intended beneficiaries to profit at the expense of third parties. If the defendants told Ambábái that their claims were barred by limitation, it is plain that they all joined in a scheme for depriving the judgment-creditors of their due. If they did not tell her, they deceived her by their silence, when, as near relatives getting an advantage, they were bound, in dealing with an ignorant woman, to put her in possession of all the material facts(1). This, however, is a position which they do not take up, and could not be allowed to take up, so as to profit by their own avowed fraud.

For the reasons we have given we confirm the decree of the Court below, and declare the property in question subject to attachment by the plaintiff in execution of his decree against Manchhárám. Costs to be paid by the appellants. The Code of Civil Procedure provides equitably for other creditors of the deceased Manchhárám who have been diligent in pressing their claims.

Decree confirmed.

(1) See Act IX of 1872, Secs. 16, 17. Com. Dig. Tit. Chancery, (2 T. 11).

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1887. *July* 20.

MORO ABA'JI, DECEASED, BY HIS SON AND HEIR, ATMA'RA'M MORESHVAR THA'KUR, (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'RA'YAN DHONDBHAT PITRE AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Relations of inámdárs with khots—Khot—His status in the Ratnágiri District—Ownership not an essential incident of khotship—Onus—Thal.

The plaintiffs were the *inámdárs* of a certain village in the Ratnágiri District, which was granted to their ancestors by the Peshwá under a *sanad* dated 3rd September, 1778. The defendants were the *vatandár* or permanent *khots* of the same village. In a previous suit between the parties relating to the forest attached to the village, it was held, upon the construction of the Peshwá's *sanad*, that "so far as the Peshwá's Government could pass the soil of the village and its revenues by its grant, it did pass them to the plaintiffs' ancestors," and that, therefore, the plaintiffs were the owners of the forest. In the present suit, which

* Cross Special Appeals, Nos. 257 and 307 of 1875.

was brought to compel the defendants to pass a fresh *kabuláyat* every year to the plaintiffs, and to recover the revenue from them for the years 1869-1870 and 1870-1871, the defendants contended *(inter alia)* that they had proprietary rights, as inherent in their *khotship*, over the cultivated land of the village, and that the plaintiffs, as *inámdárs*, were mere aliences of the land-tax payable to Government. In support of this contention they principally relied upon the fact that they were entitled to recover, and did in fact recover, *thal*, or rent for lands reclaimed and brought under cultivation by the plaintiffs. The plaintiffs claimed, on the other hand, to be the absolute owners of the whole soil of the village, and that the defendants were estopped, by the annual *kabuláyats* they had passed through a long series of years, from setting up a proprietary title.

Held, that the mere fact of the defendants being *vatandár khots* did not make them proprietors of the cultivated land in the village; that proprietary rights were not essential to the conception of a *khotship*; that in levying *thal* on the lands tilled by the plaintiffs the defendants did not necessarily assert, they certainly did not establish, a proprietary right to the soil as against the *inámdárs*; and that the defendants held a position with rights and obligations not essentially different from those of other *khots* in the Ratnágiri District, who were farmers of the public revenue.

THESE were cross special appeals from the decision of Dr. A. D. Pollen, Acting Assistant Judge of Ratnágiri, in cross appeals Nos. 344 and 356 of 1874.

The plaintiffs are the *inámdárs* of the village at Kasarde, in the Ratnágiri District. The defendants are the *vatandár* or permanent *khots* of the same village. The village was granted by the Peshwá's Government to the plaintiffs' ancestors under a *sanad* dated 3rd September, 1778. The *sanad* purported to grant "the village of Kasarde in tarf Khárepátan, in táluka Viziádurg, including both the *swarájya* and *moglái*, (shares of revenue), together with the *habshipati, kulbáb, kulkarni*, (all taxes and assessment, &c.,) the present and future cesses, and the *inám tizái* (cess), excluding the *hakdárs, inámdárs*, and *devasthán*, (that is to say), the whole village, together with the water, grass, wood, stones, mines, and hidden treasures."

At the date of this grant, the defendants' ancestors were absent from the village. They had left the village some years before, owing probably to the political disturbances of that period. They did not return to the village and resume their position as *khots* till A.D. 1810-11. Since then they discharged the ordinary duties of *khots*, and enjoyed the ordinary rights and privileges incidental to their *khotship*.

1887.

MORO ABÁJI v. NÁRÁYAN DHONDBHAT PITRE.

In 1875 the plaintiffs sued the defendants to recover damages for cutting down certain trees in the forest attached to the village of Kasarde. In that suit the defendants contended that, as *khots*, they were proprietors of the whole village including the forest. The case came up on second appeal to the High Court, which held, upon the construction of the *sanad* of 1778, that "so far as the Peshwá's Government could pass the soil of the village of Kasarde and its revenues by its grant, it did pass them to the ancestors of the plaintiffs, the Pitres." The plaintiffs were, therefore, declared to be the owners of the forest, subject, however, to the right of the defendants and their tenants to cut and use so much jungle wood as might be necessary for their agricultural and domestic purposes, in accordance with the custom of the country[1].

In the present suit the plaintiffs alleged that the defendants had not executed to them the annual *kabuláyats*, nor paid over to them the revenues for the years 1869-70 and 1870-71. They, therefore, sought to recover the revenues for those years, and to compel the defendants to pass a *kabuláyat* every year.

The defendants contended that, as *vatandár khots*, they were proprietors of all the cultivated lands in the village; that they were not bound to pass a fresh *kabuláyat* every year; that the plaintiffs, as *inámdárs*, were only entitled to the land revenue which would be otherwise payable to Government; and that they had recovered the same for the years in question direct from the tenants.

The lower Courts awarded the plaintiffs' claim for the year 1870-71.

Against this decision both parties preferred special appeals to the High Court, which on the 30th September, 1886 held that the decision in the previous suit regarding the forest lands did not operate as *res judicata* so as to estop the defendants from establishing their rights to their cultivated lands in the village. The case was, therefore, sent back to the District Court to determine whether the defendants had any and what right over the cultivated area of the village in derogation of the comprehensive

(1) Printed Judgments for 1881, p. 146: see note, *post*, p. 688.

ownership ostensibly conferred on the plaintiffs' family by the Peshwá's *sanad* of 1778.[1]

The Assistant Judge found that the defendants, in their character as *vatandár khots*, had only hereditary rights of management and of recovering from the tenants the customary share of the produce, but had no proprietary interest whatever in any lands in the village.

To this finding the defendants took objections under section 567 of the Code of Civil Procedure (Act XIV of 1882).

Hon. Ráv Sáheb *V. N. Mandlik* for the appellants.

Mánekshá Jehangirshá for the respondents.

WEST, J.:—The contest in the present case is between the *inámdárs* of the village of Kasarde, in the Ratnágiri District, and the *khots* of the same village. The former are a family of Pitres, the latter of Thákurs, and they may be named accordingly for the sake of convenience.

In the year 1778 the Pitres of that day obtained from the Peshwá a grant of the village of Kasarde. It is expressed in the most comprehensive terms, and it conveyed to the grantee all the proprietary rights over the village that the Government could transfer to him. It has been construed in this sense in a previous suit between the parties now before us as to the forest land of the village—*Náráyan Dhondbhat Pitre* v. *Trimbak Vithal Thákur*[2]. In the judgment in that case the late Chief Justice says that, "so far as that Government could pass the soil of the village of Kasarde and its revenues by its grant, it did pass them to the Pitres, the ancestors of the plaintiffs." This would at first seem to be an adjudication as between the Pitres and the Thákurs, that the former were unqualified owners of the whole village, and so it was construed by the Assistant Judge in dealing with the first set of issues remitted for trial by this Court. But the suit decided by the judgment in question had for its physical object only the forest lands of the village. It made certain reserves as to the user of the forest in favour of the Thákurs as landholders, which

(1) See *supra*, p. 355. (2) See *infra*, p. 688, note.

1887.

MORO ABÁJI v. NÁRÁYAN DHONDBHAT PITRE.

were inconsistent with an absolute ownership on the part of the Pitres. Lastly, it was clear that, in so far as a proprietary or even *quasi*-proprietary right subsisted over any part of the village at the time of the grant, that right could not have been destroyed by the grant, nor was it meant to be touched by the judgment. The decision was *res judicata* as to the particular area to which it referred, and the Thákurs could no more as to that set up any right against the award in favour of the Pitres. But conceding all this, it was maintained the principle by which the grant had been held to pass all unoccupied and uncultivated land of the village to the donees would not apply to the lands not included in that category. That the Thákurs had had some rights as landholders, was implied in the judgment, and their title as *khots* gave them, it was urged, proprietary rights at least over the cultivated parts of the village area. It was certain that a distinction might possibly be drawn between the application of a grant to the unappropriated wastes and to the occupied lands of a village granted in general terms; and yielding to the argument on behalf of the Thákurs, we sent the case back for a precise determination of whether that family could on the basis on which they rested have legal rights, and whether in fact they had legal rights over the area of Kasarde apart from its forest lands, which constituted a deduction or derogation from the comprehensive ownership ostensibly conferred on the Pitres by their grant.

The questions proposed by this Court have been carefully investigated by the Assistant Judge, and we are now enabled to bring this protracted litigation to a close. At the time when the grant was made to the Pitres in A.D. 1778, the Thákurs were absent, and had for some years been absent from the village, owing apparently to the political disturbances of the times. If the rights annexed to a *khotship* are to be regarded as in any way dependent on the fulfilment of public duties, there was apparently a good cause of forfeiture in the case of the Thákurs. They did not resume their position in the village till about 1810, but in 1811 and afterwards they succeeded in re-establishing themselves as *khots*. In 1814 their rights in this character as against a rival family the Páthadis, were fully recognized by

the Peshwá, and they have not since been seriously disturbed. The ordinary duties of *khots* have been discharged by the family. The ordinary advantages have been enjoyed by them. The contention between them and the Pitres has arisen out of a claim asserted by the Thákurs to proprietary rights as inherent in their *khotship* over the whole soil of the village, except so far as individual rights had been acquired against them by immemorial occupation, purchase, or other means recognized by the law. They would limit the rights of the Pitres to the bare reception of the revenue or land-tax that would otherwise be paid to the Government. It is plain that the grant, which confers on the Pitres everything down to the earth and stones, was not meant to have so restricted an operation; and, as regards the forest lands, it has been decided by the previous judgment of this Court that the Thákurs' pretensions could not be supported.

As regards the cultivated lands and those which from time to time were taken into cultivation, the Thákurs, as *vatándár* or permanent *khots*, seem to have held a position with rights and obligations not essentially different from those of other *khots* in the district. They have not made out that, as *khots*, they were absolute owners or were ever recognized as absolute owners of the cultivated fields of the village. Had they come back in 1810 with pretensions such as would make the tenure of every field in the village precarious, they would no doubt have been strenuously resisted by the rayats. Had they asserted as against the Pitres the extreme claims which they have recently set up, they would not have been allowed quietly to oust the Pitres from the advantages of their ample grant. The *kabuláyats* which for a long series of years they passed to the Pitres, though they may not disprove the existence of certain proprietary rights in the *khots*, do not certainly tend in any way to establish such rights; and the grant of 1778 to the Pitres tends to show that, in the view of the Peshwá's Government, the existence of *khots* did not annul the ownership of the soil as vested in the sovereign and transferable by his grant. As the grant admittedly operated on a great part of the village, and the *kabuláyats* passed by the Thákurs were in accordance with it, though it deprived them, according to their

1887.

MORO ADÁJI v. NÁRÁYAN DHONDBHAT PITRE.

allegations, of part of their estate, it rested on them to make out that in the other parts of the village it had no such operation, owing either to a law and to pre-existing rights which so far deprived the grant of effect, or else because they had subsequently acquired rights in the cultivated lands, though not in the waste, of the village, which annulled to that extent the *primâ-facie* general ownership of the Pitres. It is plain that they were called on to establish some clear line of distinction between the two descriptions of land. If the two were classed together as to the legal rights of which they were the object, then, as they fell under an identical principle and were embraced in the same jural relation, the decision as to the forest lands would be *res judicata* as to the cultivated lands also.

We cannot think that the Thákurs have established any such distinction between the two classes of land as would support their contention in the present case. They have relied on a general proprietary title as involved in their *khotship*, which was conclusively negatived by the previous judgment of this Court. They have produced some instances of *khotships* created or enjoyed with such proprietary rights. The adjunction of these in a few special instances would by no means prove that they were generally incident to a *khotship*. In the case of "*bhadigi*," or temporary leasehold *khotship*, it seems admitted they were not so, and that is enough to show that they are not essential to the conception of *khotship*. But for the purposes of the present case a reference to the previous judgment is enough. That decides that in the case of this village, and as between the parties before us, the *khotship*, as such, did not comprise ownership.

The most important of the transactions by which it is attempted to prove an acquisition of ownership by the Thákurs, if not a recognition of an ownership previously vested in them, is the one in which they forced the Pitres to pay them a commuted *thal*, or rent, for land reclaimed and cultivated by the Pitres notwithstanding the rights of the latter as grantees. The Thákurs, however, were undoubtedly *khots*; that cannot now be questioned. In that character they being subject to settle with the Government for the whole land-tax of the village

which tax was in theory variable according to the produce of its lands, had obviously even as farmers an interest in every cultivated plot not specially exempted to the extent of the "*thal*," or contribution properly leviable upon it. This was the right by which as *khots* settling for the village revenue as an aggregate they were compensated for the obligation they thus accepted. Without this right every extension of cultivation would but tend to make them poorer. With it they would be rewarded for their augmented pains by an increase of the difference between the moderate aggregate payment to the Government under their annual *kabuláyat* and the sum of the rents levied in detail from the occupants of the soil.

The Pitres were grantees of the village, and, as owners of the forest land, they could prohibit its application to cultivation. Without this right their ownership would have been a mere name; and in all parts of India the sovereign was accustomed to make grants of waste lands as from a "*terra regis*" which were recognized by the common law as valid, even though the lands lay within the nominal confines of a half-occupied village. The constitution of such an individual right extinguished the general right to go in and occupy, subject only to payment of the rate or land-tax leviable by the Government. But if the Pitres instead of forest land-owners turned themselves into cultivators or the landlords of cultivators raising produce, they became immediately subject to the *khot's* rights to levy *thal*. The *khot* would have to pay so much the more, in theory at any rate, for every field newly brought under cultivation, and the occupant was in his turn equally bound to pay the *khot*.

The fact that the Pitres took the Government's dues arising from Kasarde from the Thákurs did not alter the legal relations subsisting between them on the point we are now considering. The Thákurs settling for the whole village had a right to make a profit within the allowed limits on every cultivated holding within it. Both parties appear to have set up claims as to land cultivated by the Pitres which could not be legally sustained. It is enough now to point out that the Thákurs in levying a "*thal*" on the land tilled by the Pitres or commuting it into a "*khand*

1887.

MORO ABÁJI v. NÁRÁYAN DHONDBHAT PITRE.

makhta" did not necessarily assert, they certainly did not establish, a proprietary right to the soil as against the Pitres. A tithe-owner did not become owner of the soil in England through the share to which he was entitled in lands newly made productive of titheable crops.

On the whole we cannot conclude that the Thákurs have shown that the questions laid down at the previous hearing of this appeal can be answered in a sense favourable to their pretensions. With the qualification indicated in our judgment of the 30th September last, we pronounce in favour of the claim of the plaintiffs to the *vasul*, or annual revenue, with all costs on the Thákurs, the defendants.

Decree confirmed.

NOTE.—The following is the judgment of Westropp, C.J., and Nánábhái Haridás, J., in *Nárávan Dhondbhat Pitre* v. *Trimbak Vithal*, (Appeals No. 271 and 332 of 1880), delivered on the 19th April 1881, referred to in the above decision (see Printed Judgments for 1881, p. 276) :—

WESTROPP, C.J. :—It is clear from the *sanad* granted by the Peshwá's Government in the *Sar* year 1179 (*Shake* 1700, A.D. September 3rd, 1778) that so far as that Government could pass the soil of the village of Kasarde and its revenues by its grant, it did pass them to the Pitres, the ancestors of the plaintiffs, the parcels granted being "the village of Mauja Kasarde in tarf Kháre pátan in táluka Vizádurg, including both the *swarajya* and the *mogláí*, (shares of revenue), together with the *habshipati*, (tax formerly levied by the Abyssinians), the *kulbáb, kulkarn*, (all taxes and assessments, &c.,) the present and future cesses, and the *inám tizái* (cess), excluding the *hakdárs, inámdárs* and *devasthán*, [that is to say] the whole village, together with the water, grass, wood (trees), stones (stone quarries), mines, and hidden treasures."

The defendants have produced here a document which their pleaders have spoken of as a *sanad*, but it contains nothing to show that the forest (or jungle) or the trees therein are vested in the defendants. It was numbered as exhibit 223 in Regular Appeal 13 of 1869 in this Court. It is not properly a *sanad*, but is a judicial settlement of a dispute as to *khoti* rights in which neither the plaintiffs nor their ancestors were parties. Exhibits 419 and 374 show that in 1860 the Collector recognized the plaintiffs' right as *inámdárs* to the jungle, and referred the defendants to a civil suit if they wished to dispute that right, and for some nine successive years afterwards the defendants, in *kabulayats* given annually to the *inámdárs* by the defendants, recognized the right of the plaintiffs. However, in 1872, the plaintiffs having cut some trees, the defendants induced the Mámlatdár on the 8th June, 1872 to make over possession of them to the defendants, who also afterwards cut down many other trees, including teak, blackwood, khair, and other trees. The plaint in the present suit was filed on the 6th January, 1875, in respect of the trees

so made over by the Mámlatdár to the defendants and of the trees cut down by the latter, and, therefore, is not barred by limitation. The attachment by Government in 1857 could not operate as an adverse possession on behalf of defendants; and, as we have seen, the title of the plaintiffs was long after that event fully admitted by the defendants, nor could their disputes with their neighbours affect the plaintiffs' rights.

The evidence, given on behalf of the plaintiffs as to the value of the trees, stands uncontradicted, and has been credited by both of the Courts below.

We concur with both of the Courts below in thinking that the plaintiffs were exclusively entitled to the soil and to the teak, sissu (blackwood), and khair trees. We think, also, that the plaintiffs were entitled to the jungle trees, subject, however, to the right of the defendants and their tenants to cut and use so much jungle wood as may be necessary for their agricultural and domestic purposes only, in accordance with the custom of the country, but not to cut or take away the same for sale or gift or other purposes. The defendants had undertaken by the *kabuláyats* not to cut jungle wood without the permission of the plaintiffs. So far from asking for such permission, as they were bound to do, they caused the Mámlatdár to make over to them jungle and other trees cut by the plaintiffs, and afterwards indiscriminately cut trees of all sorts on their own account. Hence we differ with the District Judge, who has deducted the value of the jungle trees from the damages awarded by the Subordinate Judge. Under the special circumstances just mentioned, the defendants were not entitled to any of the jungle trees taken or cut by them in violation of the *kabuláyats*, and must, therefore, pay the full amount of the damages, Rs. 913-12, awarded by the Subordinate Judge.

We vary the decree of the District Judge by awarding to the plaintiffs the sum of Rs. 913-12 as damages originally awarded by the decree of the Subordinate Judge. We concur with the Courts below in declaring the plaintiffs entitled to the soil of the forest and to the teak sissu (blackwood), and khair trees, and also we declare the plaintiffs entitled to the jungle trees of the said forest, subject, however, as regards the said jungle trees, to the right of the defendants and their tenants to cut and use so much jungle wood as may be necessary for their agricultural and domestic purposes only, in accordance with the custom of the country, but not to cut or take away the same for sale or gift or other purposes. Previously to cutting so much jungle wood as may be necessary for agricultural and domestic purposes, the defendants must ask permission to do the same from the plaintiffs, and the plaintiffs are bound and hereby directed to grant such permission to the defendants and their tenants, and so to maintain the jungle trees in the forest as to have there at least a sufficient quantity of jungle wood for the defendants and their tenants for such agricultural and domestic purposes aforesaid. The defendants must pay to the plaintiffs their costs of the suit, the costs of the appeal to the District Court, and the costs of Second Appeal No. 332 of 1880 to this Court. The parties respectively should bear their own costs of Second Appeal 271 of 1880 to this Court.