

# GUJARAT HIGH COURT

State of Gujarat

Vs.

Ibrahim Akabarali

First Appeal No. 459 of 1964 with Civil Apple. No. 3420 of 1970, (for addl evidence) with Second Appeal Nos. 541 and 696 of 1968, First Appeal No. 459 of 1964 is against order of N.J. Patel Jt. Civil J. (Sr. Divn.), Baroda in S.C.S. No. 44 of 1962 and Second Appeal No. 696 of 1968 is against order of B.J. Jadeja, Extra Asst. J., Baroda in R. C. A. No. 68 of 1965.

(S.H. Sheth and T.U. Mehta, JJ.)

21.10.1972

## JUDGMENT

### **S.H. SHETH, J.**

1. These appeals arise under the following circumstances. The plaintiff in First Appeal No. 459 of 1964 is a forest contractor (hereinafter referred to as the Contractor). One Arvindkumar Ambalal Purohit was the Dumaldar of Kosum and Chimli villages in the former Chhota-Udepur State. He will be referred to hereinafter in thus judgement as "the Jagirdar". He held those villages as his proprietary Jagir. On 10th June, 1948 Chhota-Udepur State merged with the Province of Bombay. After merger the Government of Bombay recognized the Jagirdar's rights to his Jagir. On 11th June, 1954 the Jagirdar agreed to sell all the trees of Kosum and Chimli villages to the Contractor On 1st August, 1954 the Bombay Merged Territories and Areas (Jagirs Abolition) Act 1953 (hereinafter referred to as 'the Jagir Abolition Act' for the sake of brevity) came into force as a result of which the Jagirdar's Jagir was abolished, On 28th August, 1961 the Jagirdar's executed in favour of the contractor a document by which he ratified the earlier agreement of 11th June, 1954. It is the contractor's contention that upon the abolition of the Jagirdar's Jagir the latter became the occupant of all lands in his possession in his former Jagir villages and that he continued to be the owner of all the trees in those villages Tenants in possession of the Jagirdar's lands became occupants of those lands. The contractor further contended that his right to cut the trees and to remove the cut wood under the agreement of 11th June, 1954 was recognized by the Jagir Abolition Officer appointed under the Jagir Abolition Act.

2. On 3rd March 1955 the Government of Bombay issued Notification No. E.L.D. 2555/134/3 E

under Section 4 of the Indian Forest Act, 1927 (hereinafter referred to as 'the Forest Act' for the sake of brevity) constituting Serial Nos. 14, 194, 210 and 225 of Kosum village and Serial No. 110 of Chimli village along with various other lands as reserved forests. It is this notification which is challenged by the contractor on the ground that the aforesaid survey numbers of Kosum and Chimli villages have been the private forests of the Jagirdar and that the said notification (hereinafter referred to as 'the impugned notification') is ultra vires Sections 3 and 4 of the Forest Act.

3. Under the Saurashtra Felling of Trees Act the contractor applied to the Mamlatdar for a permit to cut all trees except teak, sandalwood and black wood trees. The Mamlatdar in his turn referred the matter to the Forest authorities. Meanwhile the contractor started cutting trees in respect of which the Mamlatdar had already granted him permission. However the contractor was sometime thereafter stopped by the Forest authorities from cutting any trees. It is further alleged by the contractor in his plaint that the Divisional Forest Officer had invited tenders to sell the material cut by him even though the State Government had not been in possession thereof. The contractor, therefore, filed Special Suit No. 44 of 1962 in the Court of the Civil Judge, Senior Division, at Barpda against the State of Gujarat and Divisional Forest Officer, Chhota-Udepur for a declaration that he is the owner of all the trees including teak, blackwood and sandalwood trees standing in the Jagirdar's former Jagir villages - Kosum and Chimli - and also of the cut material, fire-wood, timber, charcoal and other 'things left there and for a consequential injunction restraining the defendants from interfering with his rights and his possession of the trees and for a further mandatory injunction directing the defendants to issue authorization passes and transport permits to him for removing the cut material.

4. The defendants to this suit resisted the suit on several grounds. They contended that the Civil Court had no jurisdiction to inquire into the dispute between the parties after notification under Section 4 of the Forest Act was issued because a special tribunal appointed under Section 4(1)(c) of the Forest Act has jurisdiction in the matter. The next contention which was raised was that the forest in question were reserved forests under the former Chhota-Udepur State and that, therefore, Chhota Udepur State had rights in those forests and that those rights had devolved upon the defendant - State of Gujarat - the successor State. They challenged the order of the Jagir Abolition Officer made in the matter of compensation to be granted to the Jagirdar for the abolition of his Jagir under the Jagir Abolition Act. The agreement dated 11th June, 1954 executed by the Jagirdar in favour of the contractor was also challenged on the ground that at the time when it was executed by the Jagirdar his entire estate was under the management of the Court of Wards.

5. The learned Trial Judge raised the necessary issues and tried the suit He recorded findings in favour of the contractor and granted him the decree.

6. It is that decree which is challenged by the defendants in this First Appeal.

7. Second Appeals Nos. 541 and 698 of 1968 arise under the following circumstances. The Jagirdar filed in the Court of the Civil Judge, Senior Division, at Baroda Regular Civil Suit No. 867 of 1962 against the State of Gujarat for a declaration that he is the absolute owner of lands and trees, mentioned in Schedule A to the plaint and situate in his former Jagir villages - Kosum and Chimli - and also for a declaration that the impugned notification is illegal and ultra vires Sections 3 and 4 of the Forest Act and, therefore, not binding on him. He also prayed for a permanent injunction restraining the defendants-State from interfering with his possession of the lands in question or in the alternative, for possession of those lands if he was found to have been dispossessed of them. In this suit therefore, the Jagirdar has challenged the same notification which has been challenged by the contractor in the suit out of which First Appeal No. 1964 arises.

8. The learned Trial Judge passed in favour of the Jagirdar decree and declared him the owner of the lands in question and held that the impugned notification was inoperative in so far as those lands were concerned. As a consequence of this decree he granted to the Jagirdar the consequential relief and issued an injunction restraining the defendant-State from proceeding against the said lands in exercise of its powers under Section 4 of the Forest Act.

9. Having been aggrieved by this decree the State of Gujarat filed Regular Civil Appeal No. 68 of 1985 in the Court of the District Judge at Baroda. The learned Extra Assistant Judge, who heard the appeal, partly allowed it and modified the decree of the Trial Court. He passed the following modified decree.

"The plaintiff has become the occupant of the suit land on the introduction of the Jagirs Abolition Act. However, he is not the owner of the trees standing on the said lands Notification No. FLD 2555/137/12E dated 3rd March 1955 is therefore, not illegal. The decree passed by the trial court declaring the plaintiff to be the owner of the tree and also declaring the notification quoted above as illegal is set aside. The decree granting injunction restraining the defendant from proceeding against the lands mentioned in notification No. FLD 2555/137/12E dated 3rd March 1955 in exercise of its power under Section 4 of the Indian Forest Act is also set aside."

Having been aggrieved by this appellate decree both the parties have filed appeals in this Court Second Appeal No. 541 of 1968 has been filed by the Jagirdar in so far as it adversely affects him. Second Appeal No. 696 of 1968 has been filed by the State of Gujarat in so far as it adversely affects it.

10. It is therefore, clear that in all these appeals there are common questions of facts and law which are involved. They relate substantially to the Same controversy.

11. ....

12. Mr. Nanavaty who appears for the State of Gujarat in First Appeal No. 459 of 1964 and in Second Appeal No. 696 of 1968 has raised before us the following contentions.

1. The impugned agreement was executed by the Jagirdar at a time when he was a minor and his estate was under the management of the Court, of Wards. The approval of the Court of Wards to the transaction evidenced by the impugned agreement was not taken. It is therefore void.

2. The impugned agreement is compulsorily registrable and yet it is not registered. It is therefore, inadmissible in evidence. The effect of non-registration is that there is no transfer of trees by the Jagirdar to the contractor.

3. The forest in question have vested in the State of Gujarat under Section 8 of the Jagir Abolition Act. Section 5(1)(b) has no application. Therefore, the impugned notification issued under Section 4 of the Forest Act is valid. Within the meaning of Section 8 of the Jagir Abolition Act the forests in question are uncultivated lands.

4. Assuming that Section 5 of the Jagir Abolition Act governs the lands in question, trees have not vested in the Jagirdar.

5. The lands in question were reserved forests under Chhota Udepur State. They vested in the State of Gujarat - the successor State - as reserved forests. Therefore, the Jagirdar had no right to them and the impugned notification is valid.

6. If it is held that all lands in question were not reserved forests under the Chhota-Udepur State at least Serial No. 225 of village Kosum was a reserved forest under that State. It, therefore, vested in Chhota Udepur State and thereafter in the State of Gujarat - the successor State. In any case, therefore, the impugned notification in so far as it pertains to Serial No. 225 of village Kosum is valid.

7. Even if it is held that Serial No 225 of village Kosum did not vest in the State of Gujarat, the State of Gujarat in any case had proprietary right in it within the meaning of Section 3 of the Forest Act on account of the reservation made by Chhota-Udepur State in respect thereof. Therefore, the impugned notification in so far as it pertains to it is valid.

13. In reply Mr. Oza, appearing for the Jagirdar, has contended as follows, in Second Appeals Nos. 541 of 1968 and 696 of 1968.

1. Having held that the Jagirdar had become the occupant of the lands in question the lower Appellate Court ought to have held that he had become the owner of the trees situate in those lands.

2. Whether any survey and settlement of the lands in question had taken place after the merger of Chhota-Udepur State is a question of fact and it cannot be allowed to be raised for the first time in appeal.

3. Compulsory registrability of the impugned agreement and want of its registration

cannot be allowed to be raised for the first time in appeal. The contention was not pleaded in the Court below nor was an issue raised thereon.

4. Village Chimli was given to the Jagirdar in Krishnaarpan, i.e. it was granted to him in perpetuity. Kosum was given to him in Dharmada, that is to say it was granted to him in perpetuity. Therefore, no question of trees having at any time vested in the State of Gujarat arises.

The first and the second contentions arise exclusively in First Appeal No. 459 of 1964. The remaining contentious arise in the First Appeal as well as in the Second Appeal. Since common questions of fact and law arise in these cases it will be more convenient to decide all of them by a common Judgment.

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22. We now turn to the second contention raised by Mr. Nanavaty. The question which he has raised relates to compulsory registrability or otherwise of the agreement, Ex. 103. In order to examine the soundness of the contention raised by Mr. Nanavaty it is necessary to examine the nature of the transaction. In paragraph 1 it is stated that the villages Kosum and Chimli had been granted fry Chhota-Udepur State to the father of the Jagirdar who was a Raj Purohit. They were granted as a gift and he had become the full proprietor thereof. After his death the Jagirdar had become the full proprietor and he was the full proprietor on the date execution of that document. It is further stated in that document that Kapilaben, his mother had been made a party to the transaction in order to avoid any future disputes from her side. Paragraph 2 which is material states as under. The right to cut all sorts of trees such as teak wood, black wood, Mahuda and Panchrav situate in all the lands of Kosum and Chimli was transferred to the contractor. It is stated as a matter of elucidation that the reference to all lands of Kosum and Chimli in that paragraph included all surveyed and unsurveyed lands and cultivated and uncultivated lands including the rivers, the Nalas and the hills. It then proceeds to state in details the survey numbers of those villages in respect of which the agreement Ex. 103, was entered into by the Jagirdar. Paragraph 3 states that the right to cut trees in the aforesaid terms was transferred to the contractor for a cash consideration of Rs. 35001/- and that a sum of Rs. 10001/- was received by the Jagirdar as deposit or earnest money. It was provides that the balance was to be paid by the contractor to the Jagirdar on the former obtaining authorization passes from the Forest Officer, Paragraph 4 of Ex. 103 is a material paragraph. It states as under.

The right to cut teak Sisam, Mahuda and Panchrav trees situate in the aforesaid two villages and to obtain there from, building material, fire wood and charcoal was transferred to the contractor and the possession of the trees had been handed over to him.

Paragraph 5 states as under. The period for taking away building material, fire wood and charcoal from teak, black wood, Majude and Panchrav trees was fixed at three years from the date of the issue of authorization passes by the Forest Officer. Paragraph 6 provides for extension of time in case the Forest Officers suspend the authorization passes after having granted them. Paragraph 7

provides that if it was necessary to get the said agreement registered the Jagirdar would get it done. These are the principal matters provided in that document. The reference to teak, blackwood, Mahuda and Panchrav trees, in our opinion Panchrav means miscellaneous. The teak, blackwood and Mahuda trees have been specifically referred to. The remaining trees have been described by the expression 'Panchrav' which means miscellaneous. The document of retification, Ex. 104, does not provide for anything different.

23. The question is whether the document Ex. 103 was a compulsorily registrable document. Section 17 of the Registration Act provides for compulsory registration of certain documents. Amongst them are non-testamentary instruments which purport or operate to create, declare, assign limit or extinguish, whether in present or in future, any right title or interest, whether vested or contingent of the value of one hundred rupees and upwards to or in immovable property. The value of the right which has been assigned by Ex. 103 is admittedly of the value of more than rupees one hundred the consideration for the transaction being Rs. 350001/-.

24. The question which has been canvassed before us is whether there has been the assignment of any right to or in immovable property. The expression "immovable property" has been defined by Sub-Section (6) of Section 2 of the Registration Act 1908 in the following terms.

"immoveable property" includes land building, hereditary allowances rights to ways lights ferrises fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops nor grass."

Sub-Section (9) of Section 2 defines "movable property" in the following terms.

"movable property" including standing timber, growing crops and grass, fruit upon and juice in trees and property of every other description, except immoveable property."

Within the meaning of the expression "things attached to the earth" used in Sub-Section (6) of Section 2 trees would ordinarily be immovable property unless it is shown that they are standing timber." The question of considering two other exceptions "growing crops" and "grass" does not arise in the instant case. 'Standing timber' has not been expressly excluded from immovable property but has been expressly included in movable property. The question which has been argued by Mr. Nanavaty before us is that the trees transferred under the agreement, Ex. 103. could not be called "standing timber" and that, therefore, the exception to immovable property carved out by Sub-Section (6) of Section 2 would not be attracted to the instant case.

25. A similar question came up for consideration of the Supreme Court in *Smt. Shantabai v. State of Bombay*<sup>1</sup>, In that case the Petitioner's husband was the Zamindar of Pandharpur. He had executed an unregistered document which was called a lease in favour of his wife. The deed gave her right to enter upon certain areas in her husband's or transferor's Zamindari in order to cut and take away bamboos, fuel wood and teak. Certain restrictions were placed on the cutting, and the

felling if certain tress was prohibited. The term of the tease was fixed at 12 years and the consideration, was Rs. 26,000/- The petitioner worked the forests until 1950. In that year the Madhya Pradesh Abolition of Proprietary Eights (Estates Mahals Alienated Lands) Act. 1950 came into force. Whether, such a deed which transferred rights in trees was compulsorily or not was the question which the Supreme Court. That question has been dealt with by Justice Vivian Bose in his separate concurring judgment. The question has not been dealt with in the judgment of four other learned Judges. After having examined the nature of the transaction it has been held that by the said deed the petitioner's husband had granted to the petitioner a license to enter upon the land with a right to cut tree and carry away the wood. The nature of the transaction in that case was similar to the nature of the transaction in the instant case. After having examined different provisions of the Registration Act, the General Clauses Act and the Transfer of Property Act, certain, tests have been laid down in order to whether the trees in respect, of right was transferred by the husband to his wife in that case constituted "standing timber" within the meaning of Section 2(6) of the Registration Act. The Question which was posed for their consideration rented to the difference between "standing timber" and a tree. In that connection it has been observed that "standing timber" does not necessarily mean timber trees. The definition of "timber" given in Webster's Collegiate Dictionary has been accepted. It is in the following terms.

"wood suitable for building houses, bridges, ships etc. whether on the tree or cut and seasoned."

Having examined the different provisions and the meaning of the expression "timber" the following test has been laid down in order to determine whether a particular tree is a

<sup>1</sup> AIR 1958 SC 532

"standing timber."

"standing timber" must be a tree that is in a state fit for these purposes and further a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber for all practical purposes even though it is standing if not, it is still a tree because unlike timber, it will continue to draw sustenance from the soil."

In other words "standing timber" means wood suitable for building houses, bridge, ships etc, whether on the tree or cut and seasoned and includes a tree which is meant to be converted into timber so shortly that it for all practical purposes can be regarded as timber even though it may be standing. If it is not to be converted so shortly into timber then it continues to draw sustenance from the soil. Dealing with the aspect of nourishment which a tree draws from the soil it has been observed that such a tree, if it is to be felled very shortly draws so negligible an amount of nourishment from the soil that it can be ignored for all practical purposes. Though theoretically there is no distinction between one class of trees and another, if the drawing of nourishment from the soil is the basis of the rule the law is grounded, not so much on logical abstractions as on

sound and practical commonsense. The rule grew empirically from instance to instance and decision to decision until a recognizable and workable pattern emerged. The final answer to the question has been recorded in the following terms.

"Before a tree can be regarded as "standing timber" it must be in such a state that if cut it could be used as timber and when in that state it must be cut reasonable early. The rule is probably grounded on generations of experience in forestry and commerce and this part of the law may have grown out of that. It is easy to see that the tree might otherwise deteriorate and that its continuance in a forest after it has passed its prime might hamper the growth of younger wood and spoil the forest and eventually the timber market. But however that may be the legal basis for the rule is that trees that are not cut continue to draw nourishment from the soil and that the benefit of this goes to the grantee."

Relying upon this principle we find that the test which has been applied for answering the question is one of intention. If a tree is to be converted shortly into timber, then it can be regarded as "standing timber". In that case, the trees which were transferred by the transferor to his wife were not regarded as "standing timber" for the following reasons. Cutting of the trees was to be done for a period of 12 years. Not only, the right to cut the trees fit for timber was transferred but also the right to cut the trees not fit for cutting then but which would become fit during the 12 years of the agreement was also transferred. The period of 12 years is a fairly long period. If a tree is not fit for being cut at a particular time, it may become fit in course of 12 years after receiving nourishment from the soil. The period of 12 years during which the right to cut trees continues to be in force is such a long period that the trees not only would receive an appreciable quantity of nourishment from the soil but also the trees not fit for being cut at the date of transfer would become fit for the purpose in course of 12 years on account of the development of their girth for which the nourishment from the soil accounts. The second reason which weighed with the Supreme Court for holding that the trees the right in which was transferred by the transferor to his wife were not 'standing timber' was that the cutting of trees under the age of 1½ years was prohibited but that the cutting was permitted as soon as they reached a particular girth. The trees in respect of which the right to cut was transferred could be cut once, twice or thrice, that is to say. If a tree was once cut and if it grew again in course of 12 years, it could be cut again also. The fresh girth of a tree after it was once cut shall entirely be the result of nourishment received by it from the soil. Therefore, what was transferred in that case was benefit from the soil. The third reason which weighed with the Supreme Court in that case was that the trees were not to be cut or felled at once but as and when they acquired a certain girth on account of nourishment from soil. On account of these reasons the Supreme Court held in that case that what was transferred was not 'standing timber' but benefit arising from the soil.

26. The second case upon which reliance has been placed is the Full Bench decision of the Allahabad High Court in *Bajjnath v. Ramadhar*<sup>2</sup>, In that case one Shanker Bux Singh who was the owner of certain plots of land transferred Sisham (black wood) and nim trees which grew on

his plots of land to Baijnath. Only the trees were sold and not the land on which they stood. They were sold for a sum of Rs. 100/- The terms of the transaction did not provide whether trees were to be cut or were to, be allowed to remain standing on the land or whether any right was granted to Baijnath to tend them. Baijnath was not required to remove them within a certain time. The District Board, claiming to be the owner of the trees, sold one of the Sisam trees to the respondents in that case and they cut it away. The appellant Baijnath thereupon instituted the suit claiming damages from the respondents. It gave rise to that decision. Dealing with the question this is what the learned Chief Justice Desai, delivering the majority opinion of the Full Bench, has stated.

timber trees. Sisham and nim trees are essentially timber trees; they are grown not for the sake of fruits, but for the sake of their wood which is used as timber. A fruit-bearing tree is meant to remain standing, because it is only when it is standing that it can bear fruits. A timber tree, on the other hand, is meant to be cut down; it is only after it is cut down that its trunk etc. can be used as timber. A standing tree can never be used for timber and a felled tree can never be used for producing fruits. What is meant by standing timber in Section 2(6) is 'a standing timber tree'. It is only when a tree is standing that the question would arise whether it is movable or immovable property; no such question would ever arise in respect of a tree that has been cut down or fallen down. The words following 'but not' in the definition of immovable property take out of the definition what otherwise would have been within it only standing trees would be within the meaning of the definition, because they are things attached to the earth. Trees that have been felled or cut down are no longer things attached to the earth and, therefore, would not be within the meaning of immovable property "Trees are generally divisible into two classes (1) fruit bearing trees and (2) even without the clause "but not standing timber growing crops or grass".

A tree within the definition of "immovable property" must be a standing tree. But every standing tree is not immovable property because the legislature has expressly excepted from the definition standing timber trees, growing crops and grass. They have been accepted from the definition because though they are standing for the time being, they are meant not to remain standing. They can be brought to use only after they have been cut.

<sup>2</sup> AIR 1963 All 214 (FB)

They are meant to be cut sooner or later. They have been taken out of the definition of immovable property on account of their nature and character. Therefore, it is reasonable to consider the nature of a thing when a question of this type arises. Referring to a timber tree he has further stated that a timber tree must be felled or cut down before it can be used as timber and it is wrong to say that while it is standing it is not a timber tree. A standing timber tree must be not only a timber tree but also standing. Therefore, it is illogical to say that a timber tree is not a timber tree, because it is standing. Next, a timber tree does not cease to be a timber tree, because its owner has not the present intention of cutting or felling it, whether a tree is a timber tree or not

does not depend upon whether its owner has the present intention to cut it or not. Therefore, in his opinion a timber tree does not come into existence only when an intention to cut it sooner or later is formed but even prior to the formation of such an intention, it is a timber tree. A timber tree must be cut down in order that it fulfills its object. Therefore, it cannot be justifiably said that a timber tree is only that tree in respect of which there exists an intention of cutting it down. Dealing with the distinguishing features, in this context of timber trees and fruit trees he has stated that a tree which is not a fruit tree must be a timber tree. A tree cannot be called a fruit tree so long as there is no intention to cut it down and it cannot become a timber tree as soon as such an intention is formed. In his opinion, therefore, whether a tree is a timber tree or not depends upon its nature and the use to which it is generally put and not upon whether there is a present intention in the mind of its owner to cut it sooner or later. He has therefore, evolved an objective test to determine whether a particular tree is a standing timber or not. He has rejected the subjective test of intention to cut a tree. Dwelling on the subject further, he has stated that there are certain trees the utility of which lies only in their wood. Applying the objective test, they, in his opinion, are timber trees irrespective of whether they are to be cut shortly or within a reasonable time or at a later date. There are certain trees which are fruit bearing trees. To such trees, according to him, the intention test can be applied. Mango trees, as for example, would not be standing timber trees as long as the owner thereof was interested in taking fruits. They would become standing timber trees when the intention to cut them was developed by their owner. Bracketing the nature of the trees and intention to cut them together, it has been stated in that decision that intention to cut a tree is itself derived from the nature of the trees. If the utility of the tree lies only in its wood there is always an intention to cut it. In other words the subjective act of the formation of intention to cut a tree flows only from the nature of the tree. If it is a fruit bearing tree, the intention to cut it will develop as soon as the utility of the fruits it bears, comes to an end or when it ceases to bear fruits. In other words, it appears to us that in the opinion of the learned Chief Justice, it is the transformation in the nature of trees that leads to the development of intention to cut them in a large number of cases. He then proceeds to point out the drawbacks in the intention theory. A deed of transfer of ownership over a tree is not required by any law to contain an expression of intention of the transferee about its future use. Whether a document requires to be registered or not must be determined solely on the basis of its contents. If the contents of document are accepted, nothing else should enter into consideration for deciding whether it should be compulsorily registered or not. Intention may vary from time to time, but it would be difficult to say that whether a tree is a movable property or immovable property can vary from time to time. Next, no period has been prescribed by any authority within which a tree must be intended to be cut down in order that it falls within the meaning of a timber tree. If an intention to cut it down at any time in future is enough, it is as good as not decisive because a timber tree is not ripe at all times to be cut down. If it is intended to be cut down, say after five years, it cannot be said that in the course of five years during which it is not to be cut down it is immovable property and that after five years it becomes movable property. The learned Chief Justice in that Full Bench decision has in our opinion, analyzed the position very meticulously and precisely. Mr. Justice Beg who was a member of the Full Bench agreed to the final

conclusion but gave his own reasons for doing so. According to him, the intention of the parties is to be determined by the circumstances of each case and the nature of the transaction is the determining factor. If all those factors indicated that the parties intended to Deal with the trees as timber then it could be called standing timber.

27. In the Registration Act of 1866, a similar expression was used, it came up for consideration before a Division of the High Court of Bombay in *Krishnarao v. Babaji*<sup>3</sup>, It Was a case of a mango tree which is primarily a fruit tree. It has been observed in that decision that by the term "timber" is meant properly, such trees only as are fit to be used in building and repairing houses A mango trees which is primarily a fruit tree does not always fall within that expression whether it falls within the expression "timber" is to be determined according to the custom of a locality.

28. In *Vora Ibrahim Akbarali v. State of Gujarat*<sup>4</sup>, a similar question arose. In that the decision of the Supreme Court Shantabai's case, AIR 1958 Supreme Court 532 (supra) and the Full Bench decision of Allahabad High Court in Bajinath's case AIR 1963 Allahabad 214 (FB) (supra) have been considered. A number of other decisions have also been considered in that case. In that case the plaintiff had from one Ranjitsinhji certain other miscellaneous tree standing on the land belonging to the vendor. He contended that by virtue of the document sale his favour, he had acquired a right to cut, fell and transport the trees and to convert them into charcoal. Forest Department however refused to issue transport passes to him in order to enable to remove the produce of the trees. He therefore challenged that action of the State in the suit by seeking a declaration of his title to the trees and prayed for an injunction to restrain the State and its officers from interfering with hit felling and cutting operations and with his operation of removing charcoal and other product from the area where the trees purchased by him stood. The question whether the document by which right to cut remove trees was transferred to the purchaser was compulsorily registrable arose in that case. In that case, the right to cut and remove trees was transferred for a period of three years. The trees in respect of which the right to cut them and remove their wood was granted were Mahura and Atakati trees and Mahura and Panchrav trees. It was not disputed in that case that Atakati and Panchrav trees mean miscellaneous trees. Referring to the expression "standing timber" used in Sub-Sections (6) and (9) of Section 2 of the Registration Act. It has been observed that in order to fall within the exception it is necessary to show that what is excepted from immovable property is firstly 'timber and that such timber is standing has been construed so as to mean wood fit for use for such purposes as the construction of buildings. After having considered case law on the subject including the aforesaid decisions of the Supreme Court and the Allahabad High Court the following test has been laid down by this High Court.

"It would thus appear from the above observations that in order to constitute timber" the first ingredient that should be fulfilled would be that it must be timber

<sup>3</sup>(1900) ILR 24 Bom 31

<sup>4</sup>(1968) 9 Guj LR 939

i.e. wood suitable for building houses, bridges, ships etc. and secondly the tree must be in a state

fit for these purposes and should be meant to be converted into timber so shortly that it could already be looked upon as timber for all practical purposes even though standing." The aforesaid test was then applied to the facts of that case. While applying the test one of the arguments which was raised was that under the terms of the contract in that case the trees could be cut only for a period of three years. The nourishment which a tree would receive from the soil during the period of three years would be, it was argued in that case very negligible. That aspect of the case was not considered by the Division Bench in that case. This is what has been stated on that point.

"Moreover, trees which would not be fit at the date of the contract might become fit to be used as timber within the period during which the plaintiff was allowed to cut the trees. But even if we do not consider this last factor in view of the fact that the period is only 3 years, there is no doubt about the fact that other trees and non-timber trees are also permitted to be cut under the contract."

The revision Bench applied the Intention test and observed that if trees were not intended to be cut within a reasonable time, then they would continue to receive nourishment from the soil and what would be saplings and young trees at the date of the contract would in course of time on account of such nourishment be fit for use as timber. It was in that connection that emphasis was laid on the period of three years and it was contended that the period of three years was sufficiently long to enable a or fit young tree to be grown into one fit for use as timber. That aspect was not made use of by the Division Bench for determining the question of early intention to cut the trees. Construing that document in light of the facts and circumstances of that case it was held that under the document not only the right to cut and remove timber trees was transferred but that the right to cut and remove other trees such as fruit-bearing and fire wood trees was also transferred. It was, therefore, held in that case that what was transferred to the purchaser was interest in soil or benefit arising from soil and that therefore, the document was compulsorily registrable. In this instant case, what has been transferred is the right to cut teak, black-wood Mahura and miscellaneous trees for period of three years. In our opinion, the period, of three years for which the right to cut the aforesaid trees has been granted is not long enough to enable us to come to the conclusion that the trees in question would receive so much of nourishment from soil as would render sapling and young trees fit for being cut at any time during that period. The question of a transfer of benefit arising from the nourishment supplied by the soil does not, therefore, arise in the instant case.

29. Mr. Nanavaty has however, argued that there are certain trees which cannot fall under the category of standing timber at all. Four kinds of trees have been mentioned in the document, Ex. 103. Teak and black-wood trees can by no stretch of imagination be said to be other than standing timber. We then come to Mahura and miscellaneous trees. Whether a Mahura tree is fit for yielding timber or only fire-wood is a question of fact in regard to which no evidence has been led. So far as miscellaneous trees described in the document. EX. 103 as Panchrav trees are concerned it has been contended by Mr. Nanavaty that they include fruit trees as well as trees

which would yield only fire-wood from which charcoal can be prepared. What Mr. Nanavaty contends before us may or may not be true. We do not have any evidence to show what were the other trees standing on the lands in question. We are unable to accede to the contention raised by the expression "miscellaneous trees" is wide enough to cover all trees. It may be so. We are, however, not so much concerned with this general amplitude as with its contents in relation to the lands in question. The defendants who have raised this plea before us did not raise any pleading in the written statement on the point. Obviously, therefore, the learned Trial Judge did not raise any issue on the question. Even the general contention that Ex. 103 was inadmissible in evidence for want of Registration has not been raised by the defendants in their Written Statement. Under the aforesaid circumstances, the plaintiff could not lead any evidence to show what trees, so far as land in question were concerned were included in the expression "miscellaneous trees". If the "defendants had raised this contention in the Written Statement even a general contention-relating to the effect of non-registration of the document, Ex. 103, it would have probably been justifiably said that the plaintiff had notice or what the State was and that he should have led the point. Having thus prevented the plaintiff from leading evidence on the question and having themselves failed to lead any evidence on that question, so far as the defendants are concerned, we are of the opinion that the defendants cannot be allowed to raise that point for the first time in this First Appeal. The contention has not been raised even in the memorandum of appeal filed in this Court.

30. Having been faced with this question Mr. Nanavaty has asked us to remand the case to the Trial Court for a fresh trial on the point. We are unable to grant that request of his Remand of the suit is not intended to enable a party to fill in the lacunae in his case. The very basis for this aspect of the case has not been laid by the defendants in their Written Statement. If there were averments to this effect in the Statement filed by the defendants, we would have probably raised an issue and sent it down for trial. Not only there are no pleading on the point but no prayer has also been made to us for allowing an amendment to the Written Statement Under the aforesaid circumstance we reject fine request made by Mr. Nanavaty that the suit should be remanded to the Trial Court for the Purpose. We do not propose to remand the suit in order to enable the state to play its innings all over again and afresh.

31. The aforesaid reasons, therefore, lead us to the following conclusions. The period of three years during which the right to cut and remove trees has been granted by the Jagirdar to the contractor by Ex. 103 is not long enough as to have any bearing on the question of nourishment which a sapling or young tree may receive from the soil. Teak and black-wood trees are by all standards timber trees. There is no evidence to show whether a Mahura tree is a timber tree or any other kind of tree. There is no evidence to show whether miscellaneous trees. In relation to the lands in question, include any trees than timber trees. Failure on the part of the State of Gujarat to make necessary averments on facts in relation to Mahura and miscellaneous trees cannot be allowed to visit upon the contractor. The document Ex. 103, states that the contractor was granted the right to cut teak, black-wood, Mahura and miscellaneous trees and to remove

building material. Kathi (fire-wood) and charcoal to be prepared out of it. The reference to fire-wood and charcoal is not in our opinion, a reference to trees yielding only fire-wood. The reference is to trees yielding timber. While taking timber out of timber trees some useless wood is bound to fall out. While shaping them into different patterns for making them useful for building purposes rough pieces of wood will certainly be yielded. In our opinion it is this by product of timber which is referred to in the document. Ex. 103 as Kathi Such a by product has no value except for the purpose of using it as fire-wood or fuel directly or for the purpose of converting it into coal which in its turn will be used as fuel. In absence of any pleadings on the point and in absence of any evidence on the point and in light of what has been stated in the document, Ex. 103, we are of the opinion that teak, black-wood and such Mahura and miscellaneous trees were sold by the Jagirdar to the contractor which would yield building material or timber incidentally if such timber yields some fire-wood or charcoal prepared out of fire-wood, it cannot be said that the tree which has yielded timber and fire-wood as its byproduct is not a timber tree but, a non-timber tree or fire-wood tree. In absence of any pleadings and evidence on the point we are unable to come to the conclusion that the miscellaneous trees included fruit-bearing trees. What was, therefore, sold by the Jagirdar to the contractor were timber trees to be cut and removed within a reasonable period of three years. The period of three years in our opinion, constitutes a foreseeable future with reasonable certainty What was therefore, transferred by the Jagirdar to the contractor by the document Ex. 103, was in our opinion, 'standing timber' within the meaning of Sub-Sections (6) and (9) of Section 2 of the Registration Act. It was, therefore movable property. The document, therefore was not compulsorily registrable under Section 17 of the Registration Act. The second contention raised by Mr. Nanavaty in that behalf therefore fails and is rejected.

32. We now turn to the third contention raised by Mr. Nanavaty. According to him, the lands in question were uncultivated lands within the meaning of Section 8 of the Jagir Abolition Act and, therefore, they have vested in the State. Therefore argues Mr. Nanavati, neither the Jagirdar nor the contractor has any right in or over them. This takes us to the examination of a few sections of the Jagir Abolition Act Section 3 of the Jagir Abolition Act provides as follows :

"Notwithstanding anything contained in any usage, grant sanad, order, agreement or any law for the time being in force on and from the appointed date. -

(i) all jagirs shall be deemed to have been abolished;

(ii) save as expressly provided by or under the provisions of this Act, the right of a jagirdar to recover rent reassessment of land or to levy or recover any kind of tax, cess, fee charge or any hak and the right of reversion or lapse, if any vested in a jagirdar, and all other rights of a jagirdar or of any person legally subsisting on the said date in respect of a jagir village as incidents of jagir shall be deemed to have been extinguished."

By virtue of the provisions of Section 3 the Jagirdar's Jagir of Kosum and Chimli villages was abolished with effect from 1st August 1954 when the Jagir Abolition Act came into force. He

therefore did not have any rights in his Jagir except those which were granted to him by the said Act. Having abolished the Jagir what the Jagirdar inter alia got in return is laid down by Section 5 the relevant provisions of which are as under.

"(1) In a proprietary Jagir village -

(a) in the case of Gharkhed land held by the Jagirdar, such Jagirdar.

(b) in the case of land other than Gharkhed land, which is in the actual possession of the jagirdar or in the possession of a person other than a permanent holder holding through or from the Jagirdar such Jagirdar.

(c) .....

(d) .....

shall be primarily liable to the State Government for the payment of land revenue due in respect of such land and shall be entitled to all the rights and shall be liable to all the obligations in respect of such land as an occupant under the Code or any other law for the time being in force."

The remaining part of Section 5 is not relevant for the purpose. It is therefore clear that so far as Gharkhed lands were concerned or broadly speaking, so far as the lands in his possession were concerned the Jagirdar became the occupant of those lands within the meaning of the Bombay Land Revenue Code. There is no dispute about the fact that the Jagirdar or the contractor through him was in actual possession of the lands in question. On 1st August, 1954 the Jagirdar would, therefore, ordinarily become the occupant of the lands. Mr. Nanavaty has, however, relied upon Section 8 which carves out an exception to Section 5 Section 8 provides thus.

"All public roads, lanes and paths, the bridges, ditches, dikes and fences on or beside the same, the bed of the sea and of harbours, creeks below high water mark, and of rivers, streams, nalas, lakes, wells and tanks, and all canals and water courses, and all standing and flowing water all unbuilt village site lands, all waste lands and all uncultivated lands (excluding lands used for building or other non-agricultural purposes) which are situate within the limits of any jagir village, shall except in so far as any rights of any person other than the jagirdar may be established in or over the same and except as may otherwise be provided by any law for the time being in force, vest in and shall be deemed to be, with all rights in or over the same or appertaining thereto, the property of the State Government and all rights held by a Jagirdar in such property shall be deemed to have been extinguished and it shall be lawful for the Collector, subject to the general or special orders of the State Government to dispose them of as he deems fit, subject always to the rights of way and other rights of the public or of individuals legally subsisting. Explanation - For the purposes of this section, land shall be deemed to be uncultivated if it has not been cultivated for a continuous period of three years immediately before the appointed date."

33. The question which has been canvassed before us lies in a narrow compass. According to Mr. Nanavaty, the lands in question which are forest lands were uncultivated lands within the meaning of Section 8, Therefore, on the appointed date they vested in the State. According to Mr. Oza, who appears for the Jagirdar, they were not uncultivated lands and therefore the Jagirdar became their occupant within the meaning of Section 5. Mr. Nanavaty has placed reliance only upon the expression "all uncultivated lands" and no other expression in support of his contention. The question, therefore, which we have to determine is this : Are forest lands uncultivated lands ? Ex facie, a forest land may appear to be an uncultivated land because agricultural operations can hardly be carried on in a land which is Studded with trees. That is the simple formula which Mr. Nanavaty has canvassed for our acceptance. When we read the expression "'all uncultivated lands" in light of the Explanation to Section 8 we find that what ex facie appears to be appealing is not what it really means. When provisions of Section 8 are read in light of the Explanation what the legislature has intended to mean is that all lands which have remained uncultivated for a period of three years prior to the appointed date must vest in the State Cultivation of a land, in our opinion, presupposes cultivability of the land. If a land is not cultivable, no question of its cultivation or otherwise arises. In other words, cultivation presupposes cultivability. If a land is not cultivable, what is to be cultivated or not to be cultivated ? To say that uncultivable land has been or can be cultivated is an absurd proposition. Similarly, to say that an uncultivable land has not been cultivated is an obvious tautology.

34. In Special Civil Application No. 570 of 1963 and other companion matters decided on 5th November 1968 by Mr. Justice J.B. Mehta a similar question arose under the Bombay Talukdari Tenure Abolition Act, 1949 and Bombay Personal Inams Abolition Act, 1952. The language of Section 6 of the Bombay Talukdari Tenure Abolition Act. and of Section 7 of Bombay Personal Inams Abolition Act, 1952 is pari materia with the language of Section 8 of the Jagir Abolition Act. The expression which has been used in the aforesaid sections of those two Acts is the same as the expression used in Section 8 of the Jagir Abolition Act It has also been used in all the three Acts in the same context whether hilly tracks which were uncultivable and on which only grass grew naturally were covered by the expression "all waste lands and all uncultivated lands" used in Sections 6 and 7 respectively of the Bombay Talukdari Tenure Abolition Act and Bombay Personal Inams Abolition Act was the question which arose for decision. If such hilly tracks fell within the ambit of "all waste lands and all uncultivated lands", they would vest in the State under the aforesaid Sections 6 and 7 respectively of the Bombay Talukdari Tenure Abolition Act and Bombay Personal Inams Abolition Act. On the other hand, if they were not governed by the said expression, then under the provisions of the aforesaid two Acts which are identical with the provisions of Section 5 of the Jagir Abolition Act, they would vest in the Talukdar or Inamdar, as the case may be. Having considered the question Mr. Justice J.B. Mehta has Observed in his judgement that the hilly tracks are incapable of any cultivation by ploughing for raising crops. They are according to him not capable of cultivation by their very nature and as, in that case, they were never placed under cultivation right from the beginning, they did not fall within the ambit of the aforesaid expression. Sections 6 and 7 respectively of the Bombay Talukdari Tenure

Abolition. Act and Bombay Personal Inams Abolition Act, have also an Explanation appended to them which is identical in explanation to Section 8 of the Abolition Act Referring to the Explanation appended to those two sections he has observed that it contemplates only those lands which could be cultivated but which were left fallow or uncultivated for a continuous period of three years. In his opinion, therefore, the expression "all waste lands and all uncultivated lands" did not cover grays lands on hilly tracks which by their very nature are incapable of cultivation but which are not so useless as to be incapable of any use. The principle enunciated by Justice J.B. Mehta, in our opinion, is a correct principle. We agree with him in his interpretation of the aforesaid expression used in the aforesaid two Acts.

35. Thereafter, in Second Appeal No. 1973 of 1964 decided by Mr. Justice J.B. Mehta on 12th January 1971 (Guj.) a similar question arose under Section 8 of the Jagir Abolition Act. It was a case of forest lands. One of the questions which was raised before him was whether the forest lands were uncultivated lands and whether they on that account, vested in the State under Section 8 of the said Act dealing with the question he was observed in that judgment that the forest land is by its very nature unfit for cultivation, and no crops can be raised in it. According to him therefore, forest lands did not fall within the ambit of the expression "all uncultivated lands". He has indeed followed, while so deciding, his own earlier judgement in Special Civil Application No. 570 of 1963 (Guj) and others to which we have already referred in answer to this, contention Mr. Nanavaty has argued that the expression "uncultivated" means 'cultivable but not cultivated' as well as uncultivable but not cultivated.' We are unable to accept the second part of his submission. The expression "uncultivated" certainly means 'cultivable but not cultivated.' But what is uncultivable cannot fall under the category of 'uncultivated'. In the context in which the said expression has been used in Section 8 of the Jagir Abolition Act it appears to us that a land uncultivated for a period of three years prior to the appointed date stands in contrast with uncultivable land. We, therefore, reject the second part of the submission made by Mr. Nanavaty because in our opinion, he has canvassed it in terms wider than the provisions of Section 8 of the Jagir Abolition Act warrant.

36. The next argument which Mr. Nanavaty has raised is that the decision of Mr. Justice J.B. Mehta in Special Civil Application No. 570 of 1963 (Guj) other companion matters is obiter dictum and also erroneous. According to him, the question which was raised before Mr. Justice J.B. Mehta was whether hilly tracks where grass naturally grew were waste lands. The question according to him, whether they were uncultivated lands was not raised in that case. He has also tried to point out to us that that decision is full of discussion which pertains to the expression "waste lands". In, our opinion, the decision of Mr. Justice J.B. Mehta is not an obiter dictum because if hilly tracks were 'uncultivated lands' they would have vested in the State. The contention which was raised on behalf of the State in that case was that hilly tracks vested in it under Sections 6 and 7 of the Bombay, Talukdari Tenure Abolition Act and Bombay Personal Inams Abolition Act because they were waste lands or uncultivated lands. The question whether that decision is an obiter dictum or not is not of great significance because even otherwise it has

only persuasive value for us, it is not binding upon this Bench. So far as his interpretation of the aforesaid expression is concerned, it is in our opinion, correct. We are of the opinion that it is neither an obiter nor an erroneous decision.

37. Mr. Oza, appearing for the Jagirdar, has in his turn, spread the canvas of his argument much wider than it should have been. According to him the expression "all waste lands and all uncultivated lands" indicates one class of lands which are both waste and uncultivated. We are unable to accede to this argument raised by Mr. Oza. The expression "all waste lands has been joined by conjunctive and with the expression "all uncultivated lands". They, therefore indicate two distinct types of lands. If the Legislature had intended that the aforesaid expression should indicate one class of lands the expression rather would have been "all waste and uncultivated lands" as against the expression "all waste lands and all uncultivated lands" which has been used in Section 8. The Legislature could not in our opinion, have used the expression "all waste and uncultivated lands" because it is in our opinion, a contradiction in one sense and a tautology in another sense. A waste land can be an uncultivated land in the sense that there is no cultivation there. But a waste land is something different from uncultivated land. It is uncultivable or unfit for cultivation. An uncultivated land in its turn cannot necessarily be a waste land. If it is cultivable, it cannot be waste though it may have been left uncultivated. The construction which Mr. Oza has tried to place upon the expression "all waste lands and all uncultivated lands" used in Section 8 does not appeal to us and we reject it. On the bare construction of Section 8 of the Jagir Abolition Act we are of the opinion that the forest lands, which by their very nature are uncultivable and in respect of which no question of their having been cultivated or otherwise can arise do not fall under the expression "all uncultivated lands". We are therefore, of the opinion that by virtue of the provisions of Section 8 of the Jagir Abolition Act the lands in question did not vest in the State.

38-39. x x x x x

40. The Jagirdar has led evidence to show that he used to purchase seeds and throw them or spread them in the forest, lands in question and that thereby he used to grow grass there. The learned appellate judge has dealt with this evidence. He appears to have accepted that part of the evidence led by the Jagirdar. Even then accepting that finding of his at its face value we are unable to come to the conclusion that the forest lands were cultivated by the Jagirdar, Spreading or throwing of seeds and growing grass cannot amount to cultivation. Cultivation means breaking of the soil or ploughing and tilling of the land and sowing seeds by human efforts and watering and tending the growth when the seeds sown sprout and plants appear above the surface of the soil. In assigning this meaning to the expression "cultivation" we are fortified by different meanings given to the expression "cultivate" in Webster's Dictionary. The third contention raised by Mr. Nanavaty, in light of the reasons which we have stated in this judgement, that the lands in question vested in the State under Section 8 of the Jagir Abolition Act fails and is rejected. In our opinion, they vested in the Jagirdar under Section 5 of the Jagir Abolition Act. Indeed, the

Jagirdar got such rights as he had in those lands under the Chhotaudepur State. The Jagir Abolition Act does not extend those rights nor is it the case of the Jagirdar that the provisions of the Jagir Abolition Act have extended them.

41-49. x x x x x

This evidence clearly shows that as early as in 1953 record of rights for Chimli Kosum villages were prepared and promulgated. If record of rights were prepared and promulgated in 1953-1955 it presupposes that survey and settlement of the lands must have been carried out Unless lands were surveyed and the land revenue payable in respect thereof was settled the question of promulgating the record of rights would not arise. In other words promulgation of record of rights presupposes the survey of lands and settlement of land revenue. The facts which the survey of land produces and the settlement of land revenue enforces are the very facts which are to be promulgated or made known to the people. That in our opinion, is the promulgation of the record of rights. Rights of the holders of lands are recorded in the record of rights and announced to the people by their promulgation. Mr. Nanavaty has, however, contended that Section 40 of the Bombay Land Revenue Code contemplates a fresh and original survey and settlement. It appears to us that there was no fresh survey and settlement in respect of the lands of Chimli and Kosum villages by the State of Bombay after the merger of Chhotaudepur State with the Province of Bombay. But if the State of Bombay recognized, accepted and acted upon the survey and settlement carried out by the Chhotaudepur State and promulgated their record of rights on that basis, it cannot be said that there was no survey and settlement of the lands as contemplated by the Bombay Land Revenue Code.

50. There are certain sections of the "Bombay Land Revenue Code to which our 'attention' has been invited". Section 112 is one of them. It provides as under.

"Existing survey settlement of land revenue made, approved and confirmed under the authority of the State Government shall be, and are (hereby declared to be, in force subject to the provisions of this Act."

The survey settlement which Section 112 contemplates are those which are made, approved and confirmed under the authority of the State Government. The survey settlements carried out by the Chhotaudepur State and recognized, accepted and acted upon by the State of Bombay cannot be said to have been made by the State Government, though they can be said to have been approved and confirmed by the State Government Section 112 of which Mr. Oza has invited our attention, therefore, does not help him.

51. The next section to which he has invited our attention is Section 117-R which provides as under :

"All settlements of land revenue heretofore made and introduced and in force at the date

of the commencement of the Bombay Land Revenue Code (Amendment) Act, 1939 shall be deemed to have been made and introduced in accordance with the provisions of this chapter and shall notwithstanding anything contained in Section 117-E, be deemed to continue to remain in force until the introduction of a revision settlement."

This section also does not help Mr. Oza because the expression "... Made and introduced and in force at the date of the commencement of the Bombay Land Revenue Code (Amendment Act 1939 ..." points to the settlement of land revenue done in British India prior to 1930.

52. The next section to which he has invited our attention is Section 216 Sub-Section (2) whereof is important for the purpose of the present case. It Provides as under.

"All survey settlements heretofore introduced in alienated villages shall be valid as if they had been introduced in accordance with the provisions of the section."

This section refers to the introduction of survey settlements in alienated villages. The relevant provisions of the Bombay Land Revenue Code relating to survey settlements have reference to unalienated villages. In order, therefore, to provide for the introduction of survey settlements in alienated villages, Sub-Section (2) of Section 216 was enacted, Chimli and Kosum were alienated villages in Chhotaudepur State and if Chhotaudepur State had introduced survey settlements in those alienated villages we see no reason to take the view that they would not be valid under the provisions of "the Bombay Land Revenue Code by virtue of Sub-Section (2) of Section 216. Kosum and Chimli were alienated villages in Chhotaudepur State and they were alienated villages in the State of Bombay until 1st August, 1954. On the abolition of Jagirs under the Jagir Abolition Act with effect from the said date they became unalienated villages. Therefore, we are not inclined to take a narrow view of the matter so as to lay down that alienated villages contemplated by Sub-Section (2) of Section 216 were alienated villages merely, of British India and not alienated villages which in course of time came to be a Part of the State of Bombay prior to the promulgation of record of rights in respect of them. Rights of holders of lands in alienated villages have been dealt with by Section 217 of the Bombay Land Revenue Code in the following terms' :

"When a survey settlement has been introduced under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation holders of land in unalienated villages have, or are affected by under the provisions of this Act and all the provisions of this Act relating to holders of land in unalienated villages shall be applicable, so far as may be to them."

53. Mr. Nanavaty in reply has contended that survey settlement contemplated by the Bombay

Land Revenue Code must be one under the Code must be one under the Code itself and he has relied in that behalf upon the definition of "survey settlement" given in Sub-Section (3) of Section 3 of the Bombay Land Revenue Code. The definition is in the following terms :

"Survey settlement" includes a settlement made under the provisions of Chapter VIII-A."

The definition of "survey settlement" is an inclusive definition. It does not define the expression "survey settlement" as meaning one and one only carried out under the provisions of the Bombay Land Revenue Code. This inclusive definition of the expression "survey settlement" fortifies us in placing upon the language of Sub-Section (2) of Section 216 of the construction which we have placed. In our opinion, therefore, if a survey settlement was carried out by some other authority not under the provisions of the Bombay Land Revenue Code and if it was accepted and acted upon by the State Government, it became one under the Bombay Land Revenue Code itself.

54-56. X X X X X X

57. Mr. Nanavaty has invited attention to an unreported decision of Division Bench of this High Court as Special Civil Application No. 1007 of 1965 and others, decided by Chief Justice Miabhoy and Mr. Justice J.B. Mehta on 4th/5th May 1967 (reported in ILR (1968) Guj 839). In that decision the entire scheme relating to survey and settlement as laid down by the Bombay Land Revenue Code has been considered by this Court. Having considered the scheme the following opinion has been recorded in that behalf.

"Therefore, in the substantive part of Section 7 a survey settlement which is contemplated is not any other kind of survey settlement under the Code, but one under Chapters VIII and VIII-A of the Code alone and until such scientific survey settlement is made ad hoc payment of assessment is to continue at the former rate."

That decision is distinguishable on more than one ground. In that case, no question arose as to the effect which is produced if the State Government recognizes, accepts and acts upon a survey settlement carried out by some other State or some other authority. Secondly, we have no evidence before us to show that the State Government in the instant case has accepted that survey settlement only for the purpose of ad hoc payment. If there was such evidence, the principle laid down in that unreported decision by this Court would have probably applied.

58-61. X X X X X X

62. Mr. Oza has invited our attention to an unreported decision of Mr. Justice Vakil in Special Civil Application No. 638 of 1961 decided by him on 16-12-1963 (Guj.). It was also a case of two Jagir villages of Chhotaudepur-Gundi and Kheda. On consideration of the provisions of, the

Chhotaudepur Forest Rules it has been held by Mr. Justice Vakil that they were not applicable to Jagirs, which were granted by Chhotaudepur State to Jagirdars prior to the enforcement of the said Rules. Chhotaudepur Forest Rules came into operation with effect from 1st August 1934. It is an admitted fact that Kosum and Chimli were granted to the father of the Jagirdar long before Chhotaudepur Forest Rules came into force. If we accept the principle laid down by Mr. Justice Vakil it would mean that Chhotaudepur Forest Rules did not govern the Jagir villages of Kosum and Chimli. On a correct reading of Chhotaudepur Forest Rules we are of the opinion that the view expressed by Mr. Justice Vakil, with respect to him is not correct. Schedule 'A' to Chhotaudepur Forest Rules in terms mentions S. No. 225 of Kosum village as a reserved forest governed by Chhotaudepur Forest Rules. If Chhotaudepur Forest Rules did not apply to Kosum and Chimli villages S. No. 225 of Kosum village would not have been mentioned in Schedule 'A'. Schedules 'E' and 'F' show that the rules were made applicable to Dumala Jagir villages. It does not state that they were made applicable to such Dumala or Jagir villages which were granted by Chhotaudepur State after the said Rules came into force. We are, therefore, of the opinion that Chhotaudepur Forest Rules governed all forests situated in all Jagirs irrespective of whether they were granted to the Jagirdars prior to the coming into force of those Rules or subsequent thereto.

63. There is one more fact of which note must be taken. There is no provision in these Rules which shows that the applicability of the said Rules was limited only to Jagirs granted after they came into force. The second principle which Mr. Justice Vakil has laid down is that rights which accrued to Chhotaudepur State under Chhotaudepur Forest Rules were not saved to the State of Bombay by the Application of Laws Order. Section 5 of the Application of Laws Order provided that the repeal by that Order of any law in force in the erstwhile State did not affect any right, title or privilege enjoyed by the former State-Obviously, therefore, they accrued to the successor State. One of the reasons appealed to Mr. Justice Vakil in taking that view was that the lands in Chhotaudepur State were alienated lands and that under the Forest Act no reservation could be made in respect of such lands. It is true that the lands in question Chhotaudepur State were alienated lands and yet in respect of those lands Chhotaudepur State had certain rights under Chhotaudepur Forest Rules. When Chhotaudepur State merged with the State of Bombay those lands continued to be alienated lands until Jagirs were abolished with effect from 1st August, 1954 whereafter they became unalienated lands. Therefore, the fact that the lands in question in Chhotaudepur State were alienated lands and that the provisions of the Forest Act could not be made applicable to alienated lands in British India prior to independence of India and thereafter does not in our opinion, make any difference whatsoever. One more factor which appealed to Mr. Justice Vakil was that even if Chhotaudepur Forest Rules applied to alienated lands in Chhotaudepur State, they cannot help the State Government on account of their repeal. That is not, in our opinion, the correct way of looking at the question. If Chhotaudepur Rules applied to alienated villages in Chhotaudepur State and if therefore, some rights accrued to Chhotaudepur State, did they devolve upon the State Government or not after its merger with the Province of Bombay. That, in our opinion, is the correct way of looking at the question. We have no doubt in,

our mind that they accrued to the State of Bombay as well in terms they are saved by the Application of Laws Order. The second principle laid down by Mr. Justice Vakil, therefore, in our opinion, is not a correct principle. We are therefore, unable to make any use of that decision for the purpose of this case.

64-70. X X X X X X

Judgement accordingly.