the appellant to rigorous imprisonment. Be it as it may, as the High Court had no power to impose a sentence of rigorous imprisonment we change the sentence from rigorous imprisonment to simple imprisonment for a period of one month in each case. With this modification the appeals are dismissed.

Appeals dismissed.

SHRIMATI SHANTABAI

v.

STATE OF BOMBAY & OTHERS

1958

March 24.

(S. R. DAS C. J., VENKATARAMA AIYAR, S. K. DAS, A. K. SARKAR and VIVIAN BOSE JJ.)

Fundamental Rights, Enforcement of—Unregistered document conferring right to cut and appropriate wood from forest land—Proprietary interest vested in State by subsequent enactment—Claim founded on rights accruing from such document, if maintainable—Constitution of India, Arts. 19(1)(f), 19(1)(g)—Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. 1 of 1951).

By an unregistered document the husband of the petitioner granted her the right to take and appropriate all kinds of wood from certain forests in his Zamindary. With the passing of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, all proprietary rights in land vested in the State under s. 3 of that Act and the petitioner could no longer cut any wood. She applied to the Deputy Commissioner and obtained from him an order under s. 6(2) of the Act permitting her to work the forest and started cutting the trees. The Divisional Forest Officer took action against her and passed an order directing that her name might be cancelled and the cut materials forfeited. She moved the State Government against this order but to no effect. Thereafter she applied to this Court under Art. 32 of the Constitution and contended that the order of Forest Officer infringed her fundamental rights under Arts. 19(1)(f) and 19(1)(g) :

Held (per curiam), that the order in question did not infringe the fundamental rights of the petitioner under Arts. 19(1)(f) and 19(1)(g) and the petition must be dismissed.

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Ananda Behera v. *The State of Orissa*, [1955] 2 S.C.R. 919, followed.

Chhotabai Jethabai Patel and Co. v. *The State of Madhya Pradesh*, [1953] S.C.R. 476, not followed.

Held (per Das C. J., Venkatarama Aiyar, S. K. Das and A. K. Sarkar, JJ.), that it was not necessary to examine the document minutely and finally determine its real character for the purpose of deciding the matter in controversy, for whatever construction might be put on it, the petition must fail. If the document purported to transfer any proprietary interest in land, it would be ineffective both for non-registration under the Registration Act and under s. 3 of the Madhya Pradesh Abolition of Proprietary Rights Act which vested such interest in the State. If it was a profits-a-prendre that was sought to be transferred by it, then again the document would be compulsorily registrable as a profits-a-prendre was by its nature immoveable property. If it was a contract that gave rise to a purely personal right, assuming that a contract was property within the meaning of Art. 19(1)(f) and 31(1) of the Constitution, the petitioner could not complain as the State had not acquired or taken possession of the contract which remained her property and she was free to dispose of it in any way she liked. The State not being a party to that contract would not be bound by it, and even if for some reason or other it could be, the remedy of the petitioner lay by way of a suit for enforcement of the contract and compensation for any possible breach of it and no question of infringement of any fundamental right could arise.

Per Bose J. The document conferred a right on the petitioner to enter on the lands in order to cut down and carry away, not merely the standing timber, but also other trees that were not in a fit state to be felled at once. The grant was, therefore, not merely in respect of moveable property but immoveable property as well. Being valued at Rs. 26,000, the document was compulsorily registrable under the Registration Act otherwise no title or interest could pass; and in absence of such registration the petitioner had no fundamental rights that could be enforced, as held by this court in *Ananda Behera's case*.

Although *standing timber* is not immoveable property under the Transfer of Property Act or the Registration Act, *trees attached to the earth* which are immoveable property under s. 3(26) of the General Clauses Act, as also s. 2(6) of the Registration Act, must be so under the Transfer of Property Act as well.

ORIGINAL JURISDICTION: Petition No. 104 of 1957.

Petition under Article 32 of the Constitution for the enforcement of fundamental rights.

R. V. S. Mani, for the petitioner.

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H. N. Sanyal, Additional Solicitor-General of India, R. Ganapathy Iyer and *R. H. Dhebar*, for respondents Nos. 1-3.

N. N. Keshwani, for *I. N. Shroff*, for respondent No. 4.

1958. March 24. The Judgment of Das C. J. Venkatarama Aiyar, S. K. Das and Sarkar JJ. was delivered by Das C. J. Bose J. delivered a separate Judgment.

Das C. J.

DAS C. J.— We have had the advantage of perusing the judgment prepared by our learned Brother Bose J. which he will presently read. While we agree with him that this application must be dismissed, we would prefer to base our decision on reasons slightly different from those adopted by our learned Brother. The relevant facts will be found fully set out by him in his judgment.

The petitioner has come up before us on an application under Art. 32 of the Constitution praying for setting aside the order made by the respondent No. 3 on March 19, 1956, directing the petitioner to stop the cutting of forest wood and for a writ, order or direction to the respondents not to interfere in any manner whatever with the rights of the petitioner to enter the forests, appoint her agents, obtain renewal passes, manufacture charcoal and to exercise other rights mentioned in the petition.

Since the application is under Art. 32 of the Constitution, the petitioner must make out that there has been an infringement of some fundamental right claimed by her. The petitioner's grievance is that the offending order has infringed her fundamental right under Art. 19(1)(f) and 19(1)(g). She claims to have derived the fundamental rights, which are alleged to have been infringed, from a document dated April 26, 1948, whereby her husband Shri Balirambhau Doye, the proprietor of certain forests in eight several Tehsils, granted to her the right to take and appropriate all kinds of wood—building wood, fuel wood and bamboos, etc.—from the said forests for a period from the

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date of the document up to December 26, 1960. The terms of the document have been sufficiently set out in the judgment to be presently delivered by Bose J. and need not be set out here. The petitioner has paid Rs. 26,000 as consideration for the rights granted to her. The genuineness of this document and the good faith of the parties thereto have not been questioned. The document, however, has not been registered under the Indian Registration Act.

The nature of the rights claimed by the petitioner has to be ascertained on a proper interpretation of the aforesaid document. We do not consider it necessary to examine or analyse the document minutely or to finally determine what we may regard as the true meaning and effect thereof, for, as will be presently seen, whatever construction be put on this document, the petitioner cannot complain of the breach of any of her fundamental rights.

If the document is construed as conveying to her any part or share in the proprietary right of the grantor, then, not being registered under the Indian Registration Act, the document does not affect the immoveable property or give her any right to any share or interest in the immoveable property. Assuming that she had acquired a share or interest in the proprietary right in spite of the document not having been registered, even then that right has vested in the State under s. 3 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, and she may in that case only claim compensation if any is payable to her under the Act. If the document is construed as purely a license granted to her to enter upon the land, then that license must be taken to have become extinguished as soon as the grantor's proprietary rights in the land vested in the State under s. 3 of the Act. If the document is construed as a license coupled with a grant, then the right acquired by her would be either in the nature of some profits-a-prendre which, being an interest in land, is immoveable property or a purely personal right under a contract. If the document is construed as having given her a profits-a-prendre which is an interest in land, then also

the document will not affect the immoveable property and will not operate to transmit to the petitioner any such profits-a-prendre which is in the nature of immoveable property, as the document has not been registered under the Indian Registration Act, as has been held in *Ananda Behera* v. *The State of Orissa* (1). If it is a purely personal right, then such right will have no higher efficacy than a right acquired under a contract. If, therefore, the document is construed as a matter of contract, then assuming but without deciding that a contract is a property within Arts. 19(1)(f) or 31(1) of the Constitution, she cannot complain, for the State has not acquired or taken possession of her contract in any way. The State is not a party to the contract and claims no benefit under it. The petitioner is still the owner and is still in possession of that contract, regarded as her property, and she can hold it or dispose of it as she likes and if she can find a purchaser. The petitioner is free to sue the grantor upon that contract and recover damages by way of compensation. The State is not a party to the contract and is not bound by the contract and accordingly acknowledges no liability under the contract which being purely personal does not run with the land. If the petitioner maintains that, by some process not quite apparent, the State is also bound by that contract, even then she, as the owner of that contract, can only seek to enforce the contract in the ordinary way and sue the State if she be so advised, as to which we say nothing, and claim whatever damages or compensation she may be entitled to for the alleged breach of it. This aspect of the matter does not appear to have been brought to the notice of this Court when it decided the case of *Chhotabai Jethabai Patel and Co.* v. *The State of Madhya Pradesh* (2) and had it been so done, we have no doubt that case would not have been decided in the way it was done.

For the reasons stated above, whatever rights, if any, may have accrued to the petitioner under that document on any of the several interpretations noted above, she cannot complain of the infringement by the

(1) [1955] 2 S.C.R. 919. (2) [1953] S.C.R. 476.

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State of any fundamental right for the enforcement of which alone a petition under Art. 32 is maintainable. We, therefore, agree that this petition should be dismissed with costs.

BOSE J.—This is a writ petition under Art. 32 of the Constitution in which the petitioner claims that her fundamental right to cut and collect timber in the forests in question has been infringed.

The petitioner's husband, Balirambhau Doye, was the Zamindar of Pandharpur. On April 26, 1948, he executed an unregistered document, that called itself a lease, in favour of his wife, the petitioner. The deed gives her the right to enter upon certain areas in the zamindari in order to cut and take out bamboos, fuel wood and teak. Certain restrictions are put on the cutting, and the felling of certain trees is prohibited. But in the main, that is the substance of the right. The term of the deed is from April 26, 1948 to December 26, 1960, and the consideration is Rs. 26,000.

The petitioner says that she worked the forests till 1950. In that year the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, which came into force on January 26, 1951, was enacted.

Under s. 3 of that Act, all proprietary rights in the land vest in the State on and from the date fixed in a notification issued under sub-s. (1). The date fixed for the vesting in this area was March 31, 1951. After that, the petitioner was stopped from cutting any more trees. She therefore applied to the Deputy Commissioner, Bhandara, under s. 6(2) of the Act for validating the lease. The Deputy Commissioner held, on August 16, 1955, that the section did not apply because it only applied to transfers made after March 16, 1950, whereas the petitioner's transfer was made on April 26, 1948. But, despite that, he went on to hold that the Act did not apply to transfers made before March 16, 1950, and so leases before that could not be questioned. He also held that the lease was genuine and ordered that the petitioner be allowed to work the forests subject to the conditions set out in

her lease and to the rules framed under s. 218(A) of the C. P. Land Revenue Act.

It seems that the petitioner claimed compensation from Government for being ousted from the forests from 1951 to 1955 but gave up the claim on the understanding that she would be allowed to work the forests for the remaining period of the term in accordance with the Deputy Commissioner's order dated August 16, 1955.

She thereupon went to the Divisional Forest Officer at Bhandara and asked for permission to work the forests in accordance with the above order. She applied twice and, as all the comfort she got was a letter saying that her claim was being examined, she seems to have taken the law into her own hands, entered the forests and started cutting the trees; or so the Divisional ForestOfficer says.

The Divisional Forest Officer thereupon took action against her for unlawful cutting and directed that her name be cancelled and that the cut materials be forfeited. This was on March 19, 1956. Because of this, the petitioner went up to the Government of Madhya Pradesh and made an application dated September 27, 1956, asking that the Divisional Forest Officer be directed to give the petitioner immediate possession and not to interfere with her rights. Then, as nothing tangible happened, she made a petition to this Court under Art. 32 of the Constitution on August 26, 1957.

The foundation of the petitioner's rights is the deed of April 26, 1948. The exact nature of this document was much canvassed before us in the arguments by both sides. It was said at various times by one side or the other to be a contract conferring contractual rights, a transfer, a licence coupled with a grant, that it related to moveable property and that, contra, it related to immoveable property. It will be necessary, therefore, to ascertain its true nature before I proceed further.

As I have said, the document calls itself a "lease deed", but that is not conclusive because the true nature of a document cannot be disguised by labelling it something else.

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Clause (1) of the deed runs—

"We executed this lease deed...and which by this deed have been leased out to you in consideration of Rs. 26,000 for taking out timber, fuel and bamboos etc."

At the end of clause (2), there is the following paragraph:

"You No. 1 are the principal lessee, while Nos. 2 and 3 are the sub-lessees."

Clause (3) contains a reservation in favour of the proprietor. A certain portion of the cutting was reserved for the proprietor and the petitioner was only given rights in the remainder. The relevant passage runs:

"Pasas 16, 17, 18 are already leased out to you in your lease. The cutting of its wood be made by the estate itself. *Thereafter*, whatever stock shall remain standing, it shall be part of your lease. Of this stock, so cut, you shall have no claim whatsoever."

Clause (5) runs—

"Besides the above pasas the whole forest is leased out to you. *Only the lease of the forest woods is given to you.*"

Clause (7) states—

"The proprietorship of the estate and yourself are (in a way) co-related and you are *managing* the same and therefore in the lease itself and concerning it, you should conduct yourself *only as a lease holder explicitly*.....Only in the absence of the Malik, you should look after the estate as a Malik and only to that extent you should hold charge as such and conduct yourself as such with respect to sub-lessees."

The rest of this clause is—

"Without the signatures of the Malik, nothing would be held valid and acceptable, including even your own pasas transactions.....The lease under reference shall not be alterable or alienable by anybody."

The only other clause to which reference need be made is clause (8). It runs—

"You should not be permitted to recut the wood in the area which was once subject to the operation of cutting, otherwise the area concerned will revert to the estate. The cutting of the forests should be right at the land surface and there should not be left any deep furrows or holes."

I will examine the seventh clause first. The question is whether it confers any proprietary rights or interest on the petitioner. I do not think it does. It is clumsily worded but I think that the real meaning is this. The petitioner is the proprietor's wife and it seems that she was accustomed to do certain acts of management in his absence. The purpose of clause (7) is to ensure that when she acts in that capacity she is not to have the right to make any alteration in the deed. There are no words of transfer or conveyance and I do not think any part of the proprietary rights, or any interest in them, are conveyed by this clause. It does not even confer rights of management. It only recites the existing state of affairs and either curtails or clarifies powers as manager that are assumed to exist when the proprietor is away.

Although the document repeatedly calls itself a lease, it confers no rights of enjoyment in the land. Clause (5) makes that clear, because it says—

"Only the lease of the forest *woods* is given to you".

In my opinion, the document only confers a right to enter on the lands in order to cut down certain kinds of trees and carry away the wood. To that extent the matter is covered by the decision in *Chhotabhai Jethabhai Patel & Co.* v. *The State of Madhya Pradesh* (1), and by the later decision in *Ananda Behera* v. *The State of Orissa* (2), where it was held that a transaction of this kind amounts to a licence to enter on the land coupled with a grant to cut certain trees on it and carry away the wood. In England it is a *profit a prendre* because it is a grant of the produce of the soil "like grass, or turves or *trees*". See 12 Halsbury's Laws of England (Simonds Edition) page 522, Note (m).

(1) [1953] S.C.R. 476, 483. (2) [1955] 2 S.C.R. 919, 922, 923.

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It is not a "transfer of a right to enjoy the immoveable property" itself (s. 105 of the Transfer of Property Act), but a grant of a right to enter upon the land and *take away* a part of the produce of the soil from it. In a lease, one enjoys the property but has no right to take it away. In a *profit a prendre* one has a licence to enter on the land, not for the purpose of enjoying it, but for removing something from it, namely, a part of the produce of the soil.

Much of the discussion before us centred round the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act of 1950. But I need not consider that because this, being a writ petition under Art. 32, the petitioner must establish a fundamental right. For the reasons given in *Ananda Behera's case* (1), I would hold that she has none. This runs counter to *Chhotebhai Jethabhai Patel's case* (2), but, as that was a decision of three Judges and the other five, I feel that we are bound to follow the later case, that is to say, *Ananda Behera's case* (1), especially as I think it lays down the law aright.

The learned counsel for the petitioner contended that his client's rights flowed out of a contract and so, relying on *Chhotebhai Jethabhai Patel's case* (2), he contended that he was entitled to a writ. As a matter of fact, the rights in the earlier case were held to flow from a licence and not from a contract simpliciter (see page 483) but it is true that the learned Judges held that a writ petition lay.

In so far as the petitioner rests her claim in contract simpliciter, I think she has no case because of the reasons given in *Ananda Behera's case* (1):

"If the petitioners' rights are no more than the right to obtain future goods under the Sale of Goods Act, then that is a purely personal right arising out of a contract to which the State of Orissa is not a party and in any event a refusal to perform the contract that gives rise to that right may amount to a breach of contract but cannot be regarded as a breach of any fundamental right."

To bring the claim under Art. 19(1)(f) or Art. 31(1)

(1) [1955] 2 S.C.R. 919. (2) [1955] S.C.R. 476.

something more must be disclosed, namely, a right to property of which one is the owner or in which one has an interest apart from a purely contractual right. Therefore, the claim founded in contract simpliciter disappears. But, in so far as it is founded either on the licence, or on the grant, the question turns on whether this is a grant of moveable or immovable property. Following the decision in *Ananda Behera's case* (1), I would hold that a right to enter on land for the purpose of cutting and carrying away timber standing on it is a benefit that arises out of land. There is no difference there between the English and the Indian law. The English law will be found in 12 Halsbury's Laws of England (Simonds Edition) pages 620 and 621. But that still leaves the question whether this is moveable or immoveable property.

Under s. 3 (26) of the General Clauses Act, it would be regarded as "immovable property" because it is a benefit that arises out of the land and also because trees are attached to the earth. On the other hand, the Transfer of Property Act says in s. 3 that standing timber is not immoveable property for the purposes of that Act and so does s. 2 (6) of the Registration Act. The question is which of these two definitions is to prevail.

Now it will be observed that "trees" are regarded as immoveable property because they are attached to or rooted in the earth. Section 2(6) of the Registration Act expressly says so and, though the Transfer of Property Act does not define immoveable property beyond saying that it does not include "standing timber, growing crops or grass", trees attached to earth (except standing timber) are immovable property, even under the Transfer of Property Act, because of s. 3 (26) of the General Clauses Act. In the absence of a special definition, the general definition must prevail. Therefore, trees (except standing timber) are immoveable property.

Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of "immoveable property" and

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"attached to the earth"; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of "standing *timber*" and not of "timber *trees*".

Timber is well enough known to be—

"wood suitable for building houses, bridges, ships etc., whether on the tree or cut and seasoned." (Webster's Collegiate Dictionary).

Therefore, "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 still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live; and that physical fact of life cannot be altered by giving it another name and calling it "standing timber". But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the rule, as I hold it to be, the law is grounded, not so much on logical abstractions as on sound and practical commonsense. It grew empirically from instance to instance and decision to decision until a recognisable and workable pattern emerged; and here, this is the shape it has taken.

The distinction, set out above, has been made in a series of Indian cases that are collected in Mulla's Transfer of Property Act, 4th edition, at pages 16 and 21. At page 16, the learned author says—

"Standing *timber* are trees fit for use for building or repairing houses. This is an exception to the general rule that *growing trees* are immoveable property."

At page 21 he says—

"Trees and shrubs may be sold apart from the land, to be cut and removed as wood, and in that case they are moveable property. But if the transfer

includes the right to fell the trees for a term of years, so that the transferee derives a benefit from further growth, the transfer is treated as one of immoveable property."

The learned author also refers to the English law and says at page 21—

"In English law an unconditional sale of growing trees to be cut by the purchaser, has been held to be a sale of an interest in land; but not so if it is stipulated that they are to be removed as soon as possible."

In my opinion, the distinction is sound. 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 reasonably 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.

Now how does the document in question regard this? In the first place, the duration of the grant is twelve years. It is evident that trees that will be fit for cutting twelve years hence will not be fit for felling now. Therefore, it is not a mere sale of the trees as wood. It is more. It is not just a right to cut a tree but also to derive a profit from the soil itself, in the shape of the nourishment in the soil that goes into the tree and makes it grow till it is of a size and age fit for felling as timber; and, if already of that size, in order to enable it to continue to live till the petitioner chooses to fell it.

This aspect is emphasised in clause (5) of the deed where the cutting of teak trees under 1½ feet is prohibited. But, as soon as they reach that girth within the twelve years, they can be felled. And clause (4) speaks of a first cutting and a second cutting and a

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third cutting. As regards trees that could be cut at once, there is no obligation to do so. They can be left standing till such time as the petitioner chooses to fell them. That means that they are not to be converted into timber at a reasonably early date and that the intention is that they should continue to live and derive nourishment and benefit from the soil; in other words, they are to be regarded as *trees* and not as *timber* that is standing and is about to be cut and used for the purposes for which timber is meant. It follows that the grant is not only of standing timber but also of trees that are *not* in a fit state to be felled at once but which are to be felled gradually as they attain the required girth in the course of the twelve years; and further, of trees that the petitioner is not required to fell and convert into timber at once even though they are of the required age and growth. Such trees cannot be regarded as timber that happens to be standing because timber, as such, does not draw nourishment from the soil. If, therefore, they can be left for an appreciable length of time, they must be regarded as trees and not as timber. The difference lies there.

The result is that, though such trees as can be regarded as standing timber at the date of the document, *both* because of their size and girth and *also* because of the intention to fell at an early date, would be moveable property for the purposes of the Transfer of Property and Registration Acts, the remaining trees that are also covered by the grant will be immoveable property and as the total value is Rs. 26,000, the deed requires registration. Being unregistered, it passes no title or interest and, therefore, as in *Ananda Behera's case* (1) the petitioner has no fundamental right which she can enforce.

My lord the Chief Justice and my learned brothers prefer to leave the question whether the deed here is a lease or a licence coupled with a grant, open because, on either view the petitioner must fail. But we are all agreed that the petition be dismissed with costs.

Petition dismissed.

(1) [1955] 2 S.C.R. 919.