APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

RAGHUNATHRAO (ORIGINAL PLAINTIFF), APPELLANT, *v.* VASUDEV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1899. *April* 13.

Khot—Khoti khásgi lands—Khásgi lands allotted to a khoti sharer—Sale of khoti—Occupancy rights in khoti khásgi lands.

One Naro was the owner of a 14 pies takshim (share) in a khoti village. To this takshim were allotted twenty khásgi thikáns. In 1876 Naro mortgaged his khoti takshim to the plaintiff.

In 1880 the takshim was sold in execution of a decree against Naro and purchased by Ambardekar. Ambardekar sold the takshim to the plaintiff in 1881.

In 1893 plaintiff obtained a decree against Naro establishing his right to recover thal (or customary rent) in respect of the twenty khásgi thikáns

Naro having died, plaintiff brought this suit against Naro's sons in 1895 to eject them from the khásgi thikáns.

Held, that the plaintiff was entitled to recover. The sale of the khoti takshim passed with it the khásgi lands allotted to the takshim. Both as mortgagee and purchaser of the takshim plaintiff acquired a title to the khásgi thikáns in dispute.

Held, also, that the effect of the decree which plaintiff had obtained against Naro in 1893 in the rent suit was that, in the absence of any agreement, Naro was a mere tenant-at-will of the khásgi thikáns, liable to be evicted after due notice.

Held, also, that a khoti sharer has not, with reference to a khoti khásgi thikán allotted to his share, an "occupancy right" against the body of khoti sharers, so that when he parts with his share in the khoti, his khoti khásgi lands are changed into khoti nisbat lands.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri.

Suit in ejectment. One Naro (the father of defendants Nos. 1, 2 and 3) and his brother Balaji were owners of a 14 pies takshim (or share) in the khoti village of Nive Budruk to which certain khoti khásgi lands were attached. No formal partition of the khoti had been made, but the sharers for mutual convenience had allotted to each share a part of the khásgi lands, and twenty thikáns of these lands had fallen to the share held by Naro and Balaji.

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In 1876 Naro for himself and his brother mortgaged the whole of his khoti takshim to the plaintiff.

In 1879 Naro sold four out of twenty thikáns of the khásgi land to one Vishvanath.

In 1880 the share (or takshim) of the khoti village belonging to Naro and Balaji was sold in execution of a decree obtained against them by one Krishnaji Lakshman, and purchased by Ambardekar, and in 1881 Ambardekar sold it to the plaintiff.

In 1889 plaintiff filed suits both against Naro (owner of sixteen thikáns) and against Vishvanath (owner of four) to recover thal (rent) of the twenty khásgi thikáns. The Subordinate Judge held that by reason of the Court sale of the khoti takshim Naro had lost his *status* as a khot and had been reduced to the position of an ordinary tenant-at-will in a khoti village, liable to pay thal to the plaintiff as khot according to the custom of the country.

This decision was eventually upheld in appeal by the High Court in 1893 (*Rav Raje Sir Dinkarrav* v. *Narayan*)[1].

Subsequently to this decision, Vishvanath re-sold the four thikáns of khásgi land to Naro.

Naro having died, plaintiff filed the present suit in 1895 to eject Naro's sons (defendants Nos. 1, 2 and 3) and their tenants, defendants Nos. 4 and 5) from the twenty khásgi thikáns, after giving them notice to quit.

Defendants pleaded (*inter alia*) that the plaintiff had not acquired any title to these khásgi thikáns either under his mortgage or by his purchase at the Court sale; that the khásgi thikáns were not comprised or included in the khoti takshim, and that the defendants were occupancy tenants of the thikáns, and as such were not liable to be evicted so long as they paid the fixed rent.

The Subordinate Judge held that the khásgi thikáns in dispute were part and parcel of the khoti takshim, and that consequently when the khoti takshim was sold, they passed with it; that the plaintiff had become owner of the thikáns by right of purchase; that the defendants were not occupancy tenants, and were liable

(1) (1893) P. J., p. 550.

to be ejected after notice to quit. He, therefore, awarded the plaintiff's claim.

The decision was reversed, on appeal, by the District Judge, and the suit was dismissed with costs.

The following extract from the District Judge's judgment gives his reasons :—

"(2) On the second point I hold that the plaintiff has only acquired the right of the khot, *i.e.*, the right to levy rent on the khásgi lands of defendants Nos. 1 to 3, and not the right of occupancy which has remained with them. The khoti takshim was mortgaged to the plaintiff in 1876 under Exhibit 46 ; that khoti takshim was sold through the Court in execution of the mortgage decree of one Krishnaji Lakshman on 4th June, 1880, and purchased by one Ambardekar (see sale-certificate, Exhibit 52), and conveyed by him to plaintiff on 27th April, 1881, under the sale-deed, Exhibit 51. In none of these documents is there a word about the khásgi lands ; they only deal with the khoti takshim. The Subordinate Judge considers that the khásgi lands are an inseparable appanage of the khoti, and so when the khoti is sold, the khásgi passes with it. I entirely differ from him on this point. The khásgi lands are not inseparable from the khoti ; they are very frequently dealt with separately. The khásgi lands do not generally pass when the khoti alone is transferred. During my three years' experience of this district I have seen a large number of documents dealing with khoti takshims as well as khásgi lands. and, as a rule, I have seen that whenever the khoti alone is mentioned, and the khásgi lands are not expressly mentioned, they do not pass. No doubt, instances can be quoted to the contrary, but they are rare. I would, therefore, lay the burden of proof upon the party who asserts that in any particular case khásgi lands passed without explicit mention with the khoti. To show that such has been the experience of other officers also, I may quote the report of Captain Wingate (on page 245 of the 'Ratnágiri Gazetteer'). According to him, 'in mortgage-deeds executed by the khot, the mortgage referred to the rents and profits of the village, never to the ownership of a definite plot of land, and when a khot mortgaged special pieces of land, it was as his private property, not as a part of the hereditary khotship.' This is but natural, considering that the occupancy right of khásgi lands has little in common with the rights of a khot as such, which are generally those of management and levy of rent, that khásgi lands may have been acquired quite apart from the khoti either by hereditary possession before the acquisition of the khoti or by transfer from occupancy tenants after the acquisition of the khoti."

Against this decision plaintiff preferred a second appeal to the High Court.

M. R. Bodas for appellant :—The plaintiff is entitled to the khásgi thikáns both under his mortgage and by rights of purchase.

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The mortgage-deed not only refers to the khot's right to levy rent on the khásgi lands, but also to all lands possessed by the khot at the time. The khasgi lands are part and parcel of the khoti, and as such are included both expressly and by implication in the property mortgaged to plaintiff. The sale of the khoti takshim carried with it the khásgi lands, and the purchaser at the Court sale acquired a complete title to the khásgi lands—*Govindrav* v. *Ravji*[1] After the sale, Naro ceased to be a khot, and sank to the position of an ordinary tenant-at-will of the khásgi lands. The lower Court erred in holding that Naro had occupancy rights in the khásgi lands. A khot is not, and cannot be, an occupancy tenant of such lands. The previous litigation shows that Naro was not an occupancy tenant, but a mere tenant-at-will of the lands. The matter is *res judicata*. The defendants being tenants-at-will are liable to be ejected after notice to quit.

M. V. Bhat for respondents (defendants):—The lower Court has found that Naro had no intention to part with the khásgi lands, and that this was the intention of both parties to the mortgage transaction. This is a finding of fact and cannot be disturbed in second appeal. This case falls within the principle laid down in *Mahadev* v. *Kashinath*[2]. What was mortgaged was simply the khot's right to levy rent on the khásgi lands which are the absolute and private property of the khot. It was never contemplated that the mortgage should include the khot's right over these lands. Suppose the khoti is abolished or attached under section 27 of the Khoti Act, the khot's right of occupancy in his khásgi lands will not be affected at all. In respect of the khásgi lands, the khot is himself the khatedár kul and pays rent to himself as khot. As to the nature of khoti khásgi lands, see *In re Antaji Keshav Tambe*[3] and *Secretary of State for India* v. *Sitaram*[4]. The right to hold the khásgi lands on payment of the customary rent is vested in defendants.

CANDY, J.:—The principal question in this case is whether the plaintiff, who is the purchaser of the 14 pies takshim of the defendants Nos. 1 to 3 in the khoti of the village of Nive Budruk, is entitled after due notice to eject those defendants from certain

(1) P. J., 1883, p. 59.
(2) P. J. for 1888, p. 358.
(3) (1893) 18 Bom., 670.
(4) (1899) *ante* p. 519.

fields which have been found to be "khásgi thikáns" allotted to the said takshim. There is no question as to the identity of the twenty thikáns as found by the Subordinate Judge after careful enquiry. Both the lower Courts find that, though there has been no formal partition by metes and bounds of the khoti, yet the different sharers have for mutual convenience allotted to each share certain khoti nisbat and also khoti khásgi fields, and that the twenty thikáns in question were the khásgi thikáns so allotted to the 14 pies takshim of Naro and Balaji, who are now represented by defendants Nos. 1 to 3. Defendants Nos. 7 and 8 are brothers of Naro and Balaji. Defendant No. 6 is an assignee of defendant No. 7, and defendants Nos. 4 and 5 are tenants of defendants Nos. 1 to 3. It was also found that the custom of the village is for the khoti sharers *inter se* not to pay thal for the khásgi thikáns in their respective shares. This is a custom which is very prevalent in khoti villages.

Now, postponing for the moment a question which arises regarding four of the twenty thikáns in question said to have been sold to one Vishvanath, and speaking of the twenty thikáns as the khásgi fields belonging to the 14 pies takshim of which plaintiff was mortgagee and then purchaser, the first question which arises is, did plaintiff by his position as mortgagee and purchaser of the 14 pies takshim acquire any interest in these twenty khásgi thikans? It is quite possible for a khot when executing a mortgage of his share in a "khoti" to reserve a portion and not mortgage the whole. Thus he may reserve his khásgi thikáns, and only mortgage his share in the rents received from the tenants of the khoti nisbat lands. Thus in *Mahadev* v. *Kashinath*[1] we have the illustration of a khoti takshim and a khoti khásgi thikán allotted to that takshim, separately dealt with. On the other hand, the same Judges (Sir C. Sargent, C. J., and Nanabhai Haridas, J.) held in *Govindrav* v. *Ravji*[2] that it was wrong to suppose that the purchase of a takshim would not include the khásgi lands allotted to that takshim, even though they were not expressly recited, and that the mention of the takshim as including the lands in the village would necessarily comprise the khoti khásgi lands. Thus the contrary opinion

(1) P. J. for 1888, p. 358. (2) P. J., 1888, p. 59.

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expressed by the District Judge in the present case is shown to be opposed to authority.

Further, the District Judge was under the impression that the views which he expressed were supported by the opinion of Captain Wingate, as shown in an extract from a report of that officer quoted on page 245 of the Bombay Gazetteer, Vol. X. The passage in question is stated in the Gazetteer to be taken from Bombay Government Selections CXXXIV, page 53; and if the District Judge had had the opportunity of referring to these Selections instead of quoting from the Gazetteer, he would have found that the authority he relied on did not really afford support to the view which he was expressing. Captain Wingate was seeking to establish his proposition that a khot was a mere collector of Government dues, and had no interest in the lands cultivated by the rayats. He went on to say :—

"It will be found, I believe, that the rice and garden lands of khoti villages have generally been divided into separate occupancies, which are held by the parties in possession quite independently of the khoti vatan. The holders of these occupancies either pay revenue to the khot, or, as is sometimes the case when they themselves hold a share of the khoti vatan, they pay nothing, the exemption in this case forming part of the profits of their share. But the rents in all cases and not the land form the khoti vatan. And in all the mortgage deeds executed by the khots it will be found that the mortgage refers to a share of the vatan, or the right to the rents and profits of the village generally, but never to the possession or ownership of a definite and describable portion of the village lands. Particular pieces of lands are occasionally mortgaged by a khot, but such land is invariably, if I mistake not, mortgaged as the private property of the individual, and not as a portion of the khoti vatan. The mortgagee, with a view to secure his own interests, has the mortgage-deed worded in as comprehensive and also specific terms as possible, and if the khoti vatan comprehended the ownership of land, (inclusive of a right of occupation) I have no doubt whatever that this would be particularly described."

Captain Wingate then went on to describe a mortgage-deed, which like plaintiff's mortgage-deed in the present case was as comprehensive as possible; but (said Captain Wingate):

"The nature of the vatan rights over all these items is not distinctly specified. They are to be inferred from the subsequent part of the deed, in which the mortgagor, who by the deed sinks into the position of an ordinary khoti rayat, engages to pay for the rice land he cultivates himself as may be settled by agreement between himself and the mortgagee, and for the varkas as a chautheli, *i. e.* at the rate of one-fourth of the crop."

So here the mortgagor khot Naro for himself and his brother Balaji by the mortgage-deed (46) covenanted that for their home-farm (*amhi ghari sheti karun tyachi thal*) they would pay a crop share—one-fourth—by appraisement: they became ordinary khoti rayats.

But this arrangement was soon afterwards modified. Besides the khoti khásgi fields allotted to a khoti sharer, he may cultivate some of the khoti nisbat lands. These latter fields would not by being in his occupancy be necessarily changed from khoti nisbat to khoti khásgi, for that would change the due proportion of khoti khásgi fields allotted to each share. So to prevent any misunderstanding the mortgagor khots, Naro and Balaji, passed the agreement (48), in which they recited the covenant of the mortgage-deed that they would pay crop share, one-fourth, for their home-farm lands (*khasgat amhi sheti karun*), and it was then agreed that instead of thal they should pay a lump sum of Rs. 21 annually for their khásgi fields, which were set forth in detail: if beyond these they themselves cultivated any other lands, then for such they were to pay thal. For the twenty khoti khásgi thikáns set forth they were to pay the annual makta of Rs. 21 until the mortgage should be redeemed. And from the actual cultivators of these khoti khásgi thikáns, *i. e.*, Gana, Hari and Dhondo, a separate writing was taken binding these men to pay the mortgagee Rs. 20-4-0 per annum, the balance of 12 annas being recoverable from the mortgagors.

Thus we see that the khoti sharers were not themselves actually cultivating these 20 khásgi thikáns. But it was none the less true that they constituted their "home-farm," which they might cultivate by hired labourers or by letting to yearly tenants. It is difficult to see how a khoti sharer's proprietary interest in such lands could ever be independent of his share in the khoti vatan. Such an idea would involve a contradiction in terms. A khoti khásgi field must have some connection with a khoti vatan. Of course in a mixed village, containing both dhára and khoti lands, a khoti sharer may hold certain dhára lands, and these would be quite independent of his share in the khoti vatan. If he mortgaged these, the language used by Captain Wingate would be strictly accurate. Possibly the District Judge in this case was

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misled by a confusion of thought shown by the Subordinate Judge in the Court of first instance. The Subordinate Judge said: "In a purely khoti village all land is khoti, and there are three varieties of it according to the difference of interests of the khot in the lands. The three classes are khásgi, kulargi and khot-nisbat." Now a reference to Molesworth and Candy's Dictionary shows that in a purely khoti village there cannot be such a thing as kulargi lands. A kulargi village is one held by dhárekaris in opposition to a khoti village. In a purely khoti village there can be no dhárekaris. The land is all khoti, the division being khásgi, lands held by the khots themselves (their "home-farm" as it has often been called), and the khoti nisbat lands, *viz.*, lands held by cultivators most of whom have occupancy and some also transferable rights.

The District Judge remarked that "the occupancy right of khásgi lands has little in common with the rights of a khot as such, which are generally those of management and levy of rent, and that khásgi lands may have been acquired quite apart from the khoti, either by hereditary possession before the acquisition of the khoti, or by transfer from occupancy tenants after the acquisition of the khoti." And in support of this view we were referred to certain remarks made by Mr. Justice Parsons at the close of his judgment in the *Secretary of State* v. *Narayan*[1]. Now it must be self-evident that if a "khoti khásgi" field may have been acquired quite apart from the khoti, then it cannot be a *khoti* khásgi field. If it was acquired before the acquisition of the khoti, then it would apparently be dhára. If it was acquired by transfer from the occupancy tenant thereof after the acquisition of the khoti, then it would still remain khoti nisbat (as it must have been when held by the occupancy tenant), and it would require the assent of the whole body of the khoti sharers to change it from khoti nisbat to khoti khásgi. Mr. Justice Parsons' remarks obviously apply solely to the case of one khot owning the whole interest in a khoti vatan; and we have his authority for saying that this is so. Of course, if such a khot brings waste lands of his village into cultivation he can treat them as khoti khásgi: if they lapse to him from any occupancy tenant he can equally treat

(1) P. J. for 1899, p. 12.

them as khoti khásgi. If the khotship were abolished, and the village treated by Government as an ordinary rayatwári village, the khot would hold such lands as an ordinary survey occupant. In this case the District Judge has in several places in his judgment referred to a khot's interest in his khoti khásgi fields partaking of a dual nature, *viz.*, his own occupancy right, and his right to take rent from his tenant-at-will, whom he may put into actual occupation of the land. But there is a fallacy at the foundation of this proposition. For what is an "occupancy right"? It is a right established by a tenant against his superior holder, to hold his land in perpetuity conditionally on the payment of the rent from time to time lawfully due by him to the superior holder. How can a khot establish such a right against himself? If he has such an occupancy right it must be against himself and his co-sharers in the khoti vatan. If he sells his khoti—that is the sum total of his interests in the khoti vatan—then *ex hypothesi* the purchaser acquires this occupancy right. And if, as the District Judge holds, on the occasion of such a sale this occupancy right does not pass to the purchaser, then the vendor, who is no longer a khot, is an occupancy tenant of the fields which were once khoti khásgi, but have now become khoti nisbat. This shows that there cannot be an "occupancy right" in khoti khásgi lands.

The Survey Department, even when it attempted to apply a Deccan rayatwári system to the villages of the Konkan, did not overtly assert a right to make the actual cultivator of a khoti khásgi field a survey occupant of that field. It did so with regard to all khot nisbat fields, whether the cultivator was of old standing or recent. But the "khoti khásgi thikáns" were apparently left in the uncontrolled ownership of the khot, to whose takshim they were allotted, or of the whole body of khots, if there had been no such partition or allotment. It is true that section 5 of Bombay Act I of 1880 speaks of a holder of "khoti land" (which would include khásgi) acquiring under certain conditions occupancy rights. But that comes under the heading "inferior holders" in contradistinction to the heading "khots" above section 4, and, therefore, it would only empower the Settlement Officer at the most to give an occupancy right to the actual cultivator of a

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khoti khásgi thikán against the khoti sharer, to whose share this thikán had been allotted. This, even if within the letter of the Statute, would be distinctly opposed to the intention of the makers of the Statute, and the point if ever it arises will require careful consideration.

Here the question is, whether a khoti sharer has, with reference to a khoti khásgi thikán allotted to his share, an "occupancy right" against the body of khoti sharers, so that if he parts with his share in the khoti, the khoti khásgi lands, which had been allotted to his share, at once pass from having been khoti khásgi to khoti nisbat. The obvious answer to such a question is that if the nature of the lands is thus changed, then the purchaser by his purchase does not acquire the full interests of his vendor. The vendor had the right of doing what he liked with those lands: he could cultivate them himself one year: he could let them to a tenant the next. He paid nothing to his co-sharers in respect of those lands, except the survey assessment. But the vendee's position would be quite different: and as regards the co-sharers in the vatan the proportion of khoti nisbat and khoti khásgi fields would be entirely changed. The District Judge infers that the "occupancy right," which a khot in his opinion has in his khásgi fields, could not have in the present case passed to the plaintiff as purchaser of the khoti takshim, otherwise the plaintiff, who was first mortgagee and afterwards in 1881 purchaser from the Court purchaser in 1880 of the 14 pies takshim, would at the time of the purchase have taken actual possession of the khásgi thikáns, and subsequently instead of enhancing the rent he would have given notice of ejectment. But this inference is not good. Plaintiff and his agent are not actual cultivators. There is no reason why plaintiff to this day should not be perfectly willing to let defendants Nos. 1—3 remain in possession, if they will peaceably pay the rent lawfully due by them to their khot. But that is just what they will not do, as will presently be shown: hence this suit in ejectment.

Plaintiff having become the full owner of the 14 pies takshim, and not merely the mortgagee, sued defendants Nos. 1—3. He was at first unsuccessful, but after he had given notice that the agreement for makta (48) was at an end, he succeeded in Suit No. 255

of 1889 in recovering *thal* from Naro and Balaji and in Suit No. 257 of 1889 from Vishwanath. The Subordinate Judge held that the mortgage and the agreement for makta were at an end; that Naro and Balaji had lost their status as khots and must be regarded as ordinary tenants in a khoti estate, and in the absence of a contract must pay rent (thal) according to the usage of the locality. At the end of his judgment the Subordinate Judge remarked that "the makta fixed by the Settlement Officer was fixed on the 17th November, 1888, and the present suit in so far as it seeks a modification of it is within time." On appeal to the District Court the Subordinate Judge, A. P., reversed the Subordinate Judge's decision, holding that the agreement to pay makta till the mortgage was redeemed, meant that makta should always be paid, the words 'till redemption' being simply put in as an expression of hope. It is unnecessary to further notice the judgment of the First Class Subordinate Judge, A. P. His decision was reversed by the High Court and that of the Subordinate Judge restored—*Rav Raje Sir Dinkarrav* v. *Narayan*[1] Sargent, C. J., and Candy, J., held that by the notice putting an end to the makta agreement the tenancy-at-will, under which the defendants must be deemed to have been holding after the expiration of the agreement, was thus put an end to, and they thereupon became liable to pay thal like all other cultivators of khoti lands. This decision must mean that, in the absence of any agreement, Naro and Balaji were tenants-at-will of the khoti khásgi lands, which as part of their takshim had passed to plaintiff. As such tenants-at-will they would in the absence of specific agreement pay thal like occupancy tenants (section 8 of Bombay Act I of 1880). But they would be none the less tenants-at-will. And, as shown before, it is difficult to see how inferior holders of khoti khásgi lands can be regarded as anything but tenants-at-will of those lands. For all these reasons we are of opinion that the Subordinate Judge was right in holding that plaintiff being now khot of the 14 pies takshim can after due notice eject defendants Nos. 1—3 from the khoti khásgi thikáns.

Then comes the question, how is this right affected by the fact that while plaintiff was merely the mortgagee of the 14 pies

(1) (1893) P. J., p. 550.

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takshim, and before the Court sale to Ambardekar, who sold to plaintiff, four of the khásgi thikáns were purchased by one Vishwanath, who sold them back to Naro and Balaji in 1893 [the District Judge says *rented*, but that is apparently a clerical error]. The Subordinate Judge held that Vishwanath was merely a benamidár for Naro and Balaji; but the District Judge took the contrary view, and this is a finding of fact with which we cannot interfere. The equity of redemption of this portion of the mortgaged property having been purchased by Vishwanath in 1879, plaintiff and Ambardekar, when they purchased in 1880 and 1881, became owners of the whole takshim, except these four thikáns, and the mortgage on them is still outstanding. Thus Naro and Balaji having purchased from Vishwanath stand in relation to their mortgagee in the same position as they stood before the sale to Vishwanath. Regarded in that light they might be entitled to plead that they never could be ejected as long as they paid the fair proportion of the makta, Rs. 21, due on the four fields. But when plaintiff brought the Suit No. 255 of 1889 against Naro and Balaji, in which it was eventually held that the agreement for makta was at an end and that Naro and Balaji were tenants-at-will, he at the same time brought a similar suit against Vishwanath (No. 257 of 1889), and this suit was eventually decided in the same way as the suit against Naro and Balaji. In a subsequent suit for thal of the years 1888-89 to 1890-91 (Suit No. 257 of 1892) plaintiff obtained a consent decree to the same effect as before. Further, in Suit No. 506 of 1895 plaintiff claimed thal for all the twenty thikáns for the years 1891-92 to 1893-94, and the District Judge has held in that case that for these four fields defendants Nos. 1—3 must pay thal, so the makta agreement is no longer in force as regards those four fields. Plaintiff has appealed against the District Judge's decision as regards the sixteen thikáns, but defendants have filed no cross-objections as regards the four fields. Therefore as regards them defendants Nos. 1—3 must be regarded as mere tenants-at-will, and plaintiff, who is khot, whether as mortgagee or purchaser, can eject them after due notice. Whether defendants Nos. 1—3 can now sue to redeem the four thikáns and so regain their position as khots of the four fields, is a question as to which we need not express an opinion.

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Mention was made above of the decision of the Settlement Officer in 1888 that Naro and Balaji and Vishwanath were "occupancy tenants" of the khoti khásgi thikáns, and as such liable to pay makta only. But the decision of the High Court in 1893, alluded to above, clearly reversed the decision of the Settlement Officer as to status, and the reversal of the decision as to rent followed as a matter of course (*cf.* the ruling of the Full Bench in *Antaji* v. *Antaji*[1]).

The only remaining question is as to the rights of the other defendants in these thikáns. The District Judge concurred with the Subordinate Judge in holding that these rights do not affect the plaintiff's claim; and we see no reason for differing from that view.

For the above reasons we must reverse the decision of the District Judge and restore that of the Subordinate Judge. Defendants Nos. 1 to 3 will bear plaintiff's costs throughout as well as their own. The other defendants will bear their own costs throughout.

Decree reversed.

(1) (1896) 21 Bom., 480.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899.
June 12.

SIDHESVAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Suit for sale of mortgaged property—Regulation V of 1827, *Sec.* 15, *Cl.* 3—*Special agreement—Limitation.*

Plaintiff brought this suit in 1895 on a mortgage-bond, dated 1870, to recover the balance due on the mortgage by sale of the mortgaged property, or, in the alternative, for possession of the property until payment of the balance. The mortgage contained a stipulation that, on default of payment of interest by the mortgagor, the mortgagee should take possession and hold possession in lieu of interest, and that such possession should continue until the mortgagor paid the principal and interest that remained unpaid when the mortgagee took possession.

The Judge dismissed the suit, holding that the claim for possession was time-barred, and the claim for the sale of the property could not be enforced, as the

* Appeal, No. 92 of 1898.