

or five months from the date of the first *talak*, and within the period of *iddat* or three months reckoned from the second *talak*.

In these circumstances we hold that as the death was within the year, the widow was not deprived of the right to inherit.

We accordingly confirm the decree of the lower Court and dismiss the appeal.

Decree confirmed.

R. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Beaman.*

RAMCHANDRA BĀLLAL GOGTE (ORIGINAL DEFENDANT 2), APPELLANT,
v. DATTATRAYA VISHNU PRABHU AND OTHERS (ORIGINAL PLAINTIFFS
AND DEFENDANT 1), RESPONDENTS.*

1907.

February 15.

*Khoti Settlement Act (Bom. Act I of 1880), sub-section 5 of section 3,
sections 9 and 10⁽¹⁾—Privileged occupant—Dharekari, quasi-Dharekari,
Occupancy tenant—Transfer of land to another on sale—Not a resignation
so as to be at the disposal of the Khot.*

* Second Appeal No. 70 of 1905.

(1) Sub-section 5 of section 3 and sections 9 and 10 of the Khoti Settlement Act (Bom. Act I of 1880):—

3. In this Act, unless there be something repugnant in the subject or context,

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|-----|---|---|---|---|---|
| (1) | * | * | * | * | * |
| (2) | * | * | * | * | * |
| (3) | * | * | * | * | * |
| (4) | * | * | * | * | * |

(5) "privileged occupant" means:

- (a) a dharekari, or
- (b) a quasi-dharekari, or
- (c) an occupancy tenant.

9. The rights of Khots, dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy tenants' rights shall be heritable, but shall not be otherwise transferable, unless in any case the tenant proves that such right of transfer has been exercised in

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By transferring his land on sale, an occupant does not resign it within the meaning of section 10 of the Khoti Settlement Act (Bom. Act I of 1880) so as to place the land at the disposal of the Khot.

SECOND appeal from the decision of D. G. Gharpure, Joint First Class Subordinate Judge of Ratnagiri, with appellate powers, confirming the decree of N. B. Mujumdar, Subordinate Judge of Devrukh.

Plaintiffs sued for the recovery of possession and Rs. 15 for rent of certain lands situate at the village of Kinjavde which they alleged was a Khoti village and of which they and defendants 5—17 were Khots. The cause of action was stated to be a forfeiture caused by defendant 1's selling the lands to defendant 2, which she (defendant 1) had no right to do. Defendants 3 and 4 were joined because they were in possession. Defendants 5—17 were plaintiffs' co-sharers. They were made defendants because they refused to join as plaintiffs.

Defendants 1 and 2 denied that the village was Khoti and that plaintiffs and defendants 5—17 were Khots. Defendant 1 further alleged her absolute title to the lands with a right to alienate subject only to the payment of a fixed rent to the temple of Sthaneshvar which held the village as Inam.

Defendants 3—17 did not appear.

The Subordinate Judge found that the village of Kinjavde in which the lands in dispute were situate was a Khoti village

respect of the land in his occupancy, independently of the consent of the Khot, at some time within the period of thirty years next previous to the commencement of the revenue year 1865-66, or unless, in the case of an occupancy right conferred by the Khot under section 11, the Khot grants such right of transfer of the same.

10. If a privileged occupant resign the land or any portion of the land in his holding, or if any such occupant's land lapse for failure of heirs, or other persons entitled thereto, or is forfeited on the occupant's failing to pay the rent due in respect thereof, the land so resigned, lapsed, or forfeited, shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.

But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.

governed by the Khoti Settlement Act (Bom. Act I of 1880), that plaintiffs and defendants 5—17 were Khots, that defendant 1 was occupancy tenant of the holding, that the holding was not alienable by defendant 1 to defendant 2, that out of the five lands in suit, two which were sold by defendant 1 to defendant 2 were forfeited and not the rest and that plaintiffs were entitled to recover possession of the two lands and also Rs. 12 on account of the rent of all the lands for one year. He, therefore, passed a decree accordingly.

On appeal by defendants 1 and 2 the Judge confirmed the decree. The following is an extract from his judgment:—

It was urged that there was no provision for forfeiture in the Khoti Act in the case of a sale and that the ruling in *Nagardas v. Ganu* (P. J. 1891, p. 167) did not apply to this district. In my opinion the word 'resign' in section 10 is broad enough to include transfer. Transfer means and implies resignation or relinquishment in another's favour. Otherwise, what would be the penalty for over-riding the provisions of section 9? A tenant may safely disobey them without any real remedy to the Khot for a mere declaration by a Civil Court of the invalidity of a transfer would not compel the tenant to take possession from and hold it against the transferee. The legislation cannot be supposed to leave a breach of its rules without a penalty. This consideration confirms the interpretation I have put upon the word 'resign.' If so, the sale by defendant 1 to defendant 2 falls under section 10 and works a forfeiture. But the section does not by its very words work such forfeiture of the entire holding of a tenant but only of the land transferred.

Defendant 2 preferred a second appeal.

K. N. Koyaji for the appellant (defendant 2):—Under the Khoti Settlement Act, the transfer of his rights by an occupancy tenant does not cause forfeiture. The word "resign" in section 10 of the Act does not include transfer. We submit that the term "resign" in section 10 means an abandonment without assigning the land to anybody or relinquishment in favour of the Khot himself. If the term included alienation in favour of others, then *dharekaris* and *quasi-dharekaris* would forfeit their lands to the Khot by alienating them, but section 9 has expressly declared the rights of *dharekaris* and *quasi-dharekaris* to be transferable. This would be an absurd result. There would thus be an irreconcilable conflict between sections 9 and 10.

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M. V. Bhat for the respondents (original plaintiffs):—Section 9, para. 2 of the Khoti Settlement Act was enacted for the purpose of safe-guarding the rights of the Khot against an occupancy tenant who is a tenant of the Khot. If such a tenant does not prove the acquisition of a right of transfer according to the conditions laid down in that para., then the transfer effected by him is null and void so far as the Khot is concerned. Such transfer can be validated only by the consent of the Khot. As the sale by defendant 1, who is Khot's occupancy tenant, was accompanied by transfer of possession to the vendee, defendant 2, it determined his occupancy rights in the land and gave to the Khot the right to eject him: *Nagardas v. Ganu*,⁽¹⁾ *Dattatraya v. Nilu*.⁽²⁾

JENKINS, C. J.:—This is a suit for possession, plaintiff being some of the whole body of Khots interested.

The ground on which possession is sought is that by purporting to transfer by way of sale her occupancy rights, the defendant No. 1 resigned the land within the meaning of section 10 of Bombay Act I of 1880 with the result that the land is at the disposal of the Khot as Khoti land free of all encumbrances.

It is conceded before us that unless this transfer can be treated as a resignation of the land, the plaintiff's case must fail.

In our opinion when one transfers land to another on a sale-deed, he cannot according to the ordinary usage of language be said to have *resigned* the land.

But the matter is made clear by the provisions of section 10.

It is thereby enacted that "if a privileged occupant resign land, the land so resigned shall be at the disposal of the Khot."

But a privileged occupant includes a *dharekari* and *quasi-dharekari* and an occupancy tenant (sub-section 5 of section 3 of the Act).

Under section 9 the rights of *dharekaris* and *quasi-dharekaris* are expressly made transferable, so that if we were to accept the argument which the respondent is compelled to place before us,

(1) (1891) P. J. p. 107.

(2) (1898) P. J. p. 378.

we should have the result that while section 9 would enable a *dharekari* and *quasi-dharekari* to transfer, he would on exercising the right of transfer so conferred on him, place his land at the disposal of the Khot by virtue of section 10.

This obviously cannot have been intended; and so we are of opinion that by transferring his land on sale an occupant does not resign his land within the meaning of section 10.

As this admittedly disposes of the case adversely to the plaintiff, we must reverse the decree of the lower appellate Court and dismiss the suit with costs throughout.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

ASHIDBAL, WIDOW OF OOSMAN AHMED BUKHAI, PLAINTIFF, v.
ABDULLA HAJI MAHOMED AND OTHERS, DEFENDANTS.*

Mahomedan Law—Relinquishment of share—Voluntary settlement—Document whereby heirs give up their rights in the property in favour of one heir—Deed supported by valuable consideration—Onus of proof—Power of revocation in a voluntary deed—Indian Trusts Act (II of 1882), section 53—Trustee—Transactions entered into by trustee for his own benefit—“Unless otherwise provided”—Indian Trusts Act (II of 1882), section 36—Equity in favour of a person paying off a subsisting charge on property—Appointment of cestui que trust as trustee—Partition suit—Dismissal of suit—Defendants cannot claim partition of their shares in that suit.

O., a Mahomedan, died leaving him surviving his widow A. and a daughter Z. Z. died leaving her surviving two sons, two daughters and her husband. After her death, her mother A. and her husband A. H. M. arrived at a settlement and executed a document whereby they relinquished their share in the property of O. in favour of the minor sons of Z. A. then brought a suit to set aside the document alleging that it was a voluntary settlement :

Held, that the document was not a voluntary settlement but was a transaction supported by valuable consideration, inasmuch as the relinquishment by one was consideration for the relinquishment by the other.

Mahammadunissa Begum v. J. C. Bachelor⁽¹⁾ followed.

* O. C. J. Suit No. 432 of 1905.

(1) (1905) 29 Bom. 428; 7 Bom. L.R. 477.

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1906.

July 13.

August 9.

September 13.