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to the lower appellate Court. I would only add my personal opinion that, in considering what is the limit of enhancement permissible to the landlord under section 83 of the Bombay Land Revenue Code, the Court is entitled to take into consideration not only the general usage of the District, but also what has been the particular usage in regard to the lands in suit. If, for instance, it is proved that the permanent tenant has only paid a very little more than the assessment of the land for a very large number of years, then, although there may be a general custom allowing an Inamdar to enhance up to the limit of half the gross produce of the land, I should be inclined to say that that usage did not apply to the particular lands in suit. These, however, are questions which the lower Court will have to consider, and on which it is not necessary to come to any definite conclusion at present.

*Decree reversed.*

J. G. R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.*

VISHNU BHIKAJI ADHIKARI AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS v. BABLA LAKHA JATHAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS\*.

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 October 7.

AND VICE VERSA.

*Khoti Settlement Act (Bom. Act I of 1880), sections 8, 10†—Khot—Privileged occupant—Resignation of occupancy in favour of Khot—Adverse possession of land against the occupant—Effect of adverse possession against*

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\* Cross Appeals Nos. 992 of 1917 and No. 55 of 1918.

† These sections run as follows :—

8. Tenants other than occupancy tenants shall continue to hold their lands subject to such terms and conditions as may have been, or may hereafter be, agreed upon between the Khot and themselves, and in the absence of any such

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*the Khot—Ejectment by Khot—Notice—Land Revenue Code (Bom. Act V of 1879), section 84 ‡.*

VISHNU  
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An occupancy tenant of Khoti land having died in 1898, the defendant who was his remote relative took possession of the land and held it adversely. A first cousin of the deceased relinquished the holding in favour of the plaintiff-Khot in 1914. The plaintiff having sued to recover possession of the land:—

*Held*, that the defendant's adverse possession against the heir of the occupancy tenant only extinguished the latter's right to the actual possession of the land and did not operate to annihilate the occupancy tenant's right which he could transfer to the plaintiff-Khot.

*Held*, further, that the defendant, on account of the resignation of the rightful occupancy tenant, could claim to be a tenant under section 8 of the Khoti Settlement Act, 1880; and in the absence of any specific agreement between himself and the Khot he should be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed; and that he was accordingly entitled to the notice prescribed in the case of yearly tenants under section 84 of the Land Revenue Code, 1879.

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specific agreement shall be held to be yearly tenants liable to pay rent to the Khot at the same rates as are paid by occupancy tenants in the village in which the lands held by them are situate: Provided that the rates shall not exceed the maxima prescribed in section 33, clause (c).

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 his forfeiture is certified by the Collector.

‡ The section runs as follows:—

84. An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the thirty-first March.

An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenant or by the tenant to the landlord, at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E or to the like effect.

CROSS-appeals from the decision of C. E. Palmer, District Judge of Ratnagiri, modifying the decree passed by N. K. Mastakar, Subordinate Judge at Deogad.

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VISHNU  
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v.  
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Suit to recover possession of Khoti land.

The plaintiff was the Khot of the land. One Sada was the occupancy tenant of the land. On the tenant's death in 1898, the land was taken possession of by the defendant, who was the mother's brother's son of Sada. On Sada's death, the land was entered in the name of Babu who was the first cousin of Sada. But the defendant remained in possession. In 1914 Babu executed a Rajinama and relinquished the holding to the plaintiff.

In 1915 the plaintiff sued to recover possession of the land from the defendant.

The Subordinate Judge decreed the suit. •

This decree was on appeal modified by the District Judge who held that the plaintiff had become owner of the land, but that he could not eject the defendant in the absence of a proper notice to quit.

Both parties preferred cross-appeals to the High Court.

*P. B. Shingne*, for the plaintiff.

*A. G. Desai*, for the defendant.

FAWCETT, J.:—The plaintiffs are Khots of a village in the Ratnagiri District. They sued to recover possession of certain land which was in the possession of the defendant No. 1, who is the appellant in Appeal No. 55 of 1918. The plaintiffs' case was that one Babu Daji was the occupancy tenant of the land, and that he had relinquished the same in the plaintiffs' favour in 1913. They claimed, therefore, to be entitled to the land in suit. The defendant No. 1, Lakha, alleged that he was the occupancy tenant as heir of one Sada Narshet, who

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died in the year 1898, and that as he had been in possession for over twelve years any right of Babu Daji had been extinguished.

The trial Court held that Babu Daji, and not defendant No. 1, was the rightful occupancy tenant as heir of Sada Narshet. It also held the Rajinama to the plaintiffs proved, and accordingly passed a decree in favour of the plaintiffs for possession and mesne profits.

In appeal by the defendant No. 1 to the District Court, it was held that defendant No. 1 was not Sada's heir, and that although defendant No. 1 had been in possession for over twelve years, still that did not give him the occupancy right. On the other hand, his possession since 1898 as a tenant prevented his being treated as a trespasser, and as such required to give up his land without any notice. Such notice admittedly not having been given, the plaintiffs were not entitled to a decree for possession. It accordingly modified the lower Court's decree, holding that the plaintiffs were entitled only to a declaration of their ownership of the property in suit.

Both parties have appealed from this decision. Taking the defendant's appeal first, the only substantial point put before us by his pleader is that there is nothing in the Khoti Settlement Act to prevent adverse possession operating, and that on the finding of the lower appellate Court the plaintiffs' right to recover possession of the land should be held to be extinguished. The real point, however, is whether the defendant No. 1's possession was adverse as against the Khoti as well as against the rightful occupancy tenant. It might, no doubt, be urged that as the plaintiffs claimed by virtue of the relinquishment in their favour by Babu, and the latter's title had been extinguished by

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adverse possession, the possession of defendant No. 1 operated also against the plaintiffs who claimed through Babu. An instance in which such a contention succeeded is the case of *Gobinda Nath Shaha Chowdhry v. Surja Kanta Lahiri*<sup>(1)</sup>. But that case has been dissented from in *Thamman Pande v. The Maharaja of Vizianagram*<sup>(2)</sup>, in which it was held that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. This follows the ordinary definition of 'adverse possession', namely, "possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession". In the present case, the defendant No. 1 in his written statement says that since 1898 he has been paying dues to the Khot while in possession of this land, and the case is, therefore, similar to one where the possession is acquired during the continuance of a lease. So long as the Khot received proper dues from the defendant No. 1 he was not prejudiced, and there is no reason for saying that the defendant No. 1's possession was adverse to him; in other words he had not a right to the immediate possession of land which was in the possession of a tenant paying the proper dues. This is in accordance with a ruling of this Court in *Yesa bin Rama v. Sakharam Gopal*<sup>(3)</sup>, where the whole question of the result of an alienation by an occupancy tenant in a Khoti village is carefully considered. That decision was given before the amendment of section 10 of the Khoti Settlement Act, 1880, by Bombay Act No. VIII of 1912, and in view of the terms of section 10, as it

(1) (1899) 26 Cal. 460.

(2) (1907) 29 All. 593.

(3) (1905) 30 Bom. 290.

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then stood, it was held that an occupancy tenant, whose tenancy is not determined, did not forfeit his tenancy by parting temporarily with the possession of his land to another without resigning the land to the Khot, and so long as his tenancy was not determined, the land was not at the disposal of the Khot. Section 10, as now amended, provides that if an occupancy tenant resigns the land or any portion of the land in his holding or does any act purporting to transfer such land or any portion thereof or any interest therein without the consent of the Khot (except in certain cases), such land 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. This amendment, however, does not affect the present case, the twelve years' adverse possession of defendant No. 1 being complete before the amendment was enacted. The case, therefore, falls within the ruling in *Yesa bin Rama v. Sakharam Gopal*<sup>(1)</sup>. In that case it was further held that, though an occupancy tenant cannot transfer his occupancy right without the consent of the Khot, yet there was nothing to prevent him from disposing, at his will, of any rights which he possesses other than such occupancy right. Thus he can, as long as his own tenancy is undetermined, grant to another the right which is in him, but he cannot give a right which would survive his own interest, so as to force upon the Khot a tenant claiming in his own right a permanent occupancy as against the Khot, surviving after the rights of the transferor had determined. Accordingly it was held that the transferee cannot claim for himself any permanent tenure on a fixed statutory rent, and although the plaintiff Khot was not allowed to recover possession of the land transferred, yet he was granted

<sup>(1)</sup> (1905) 30 Bom. 290.

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a declaration that no occupancy tenant's rights in the land had been transferred by the occupancy tenant to his transferee. It follows from this that the defendant No. 1's adverse possession against Babu only operates to extinguish Babu's right to the actual possession of the land, and does not operate to annihilate his occupancy tenant's right which he could, therefore, transfer to the Khot. As pointed out in the trial Court's judgment, the defendant No. 1 does not allege that his possession was prior to the commencement of the revenue year 1845-46 so as to entitle him to a right of occupancy tenant under section 5 of the Khoti Settlement Act, 1880, and that right could not be transferred to him by Babu under the decision just referred to. It cannot accordingly have been acquired by adverse possession, for that would give greater right to possession by wrong or usurpation than to possession under a transfer from the rightful occupancy tenant, and as already remarked the possession was not adverse against the plaintiffs. I think, therefore, that the lower Court was correct in saying that defendant No. 1's adverse possession for over twelve years does not give him the occupancy right.

We were referred by the appellants' pleader to the judgment of this Court in S. A. No. 922 of 1914, in which the plaintiff had been held to have been in possession of the land in suit for over twelve years before the Khot obtained a relinquishment from a registered occupancy tenant, and it was decided that the title acquired by prescription under the Indian Limitation Act by the plaintiff had not been displaced by the recent possession of the Khot, which was much less than twelve years before the suit. The plaintiff was accordingly held entitled to a decree for possession. That decision does not, however, really affect the view taken above. The plaintiff in that case had been forcibly

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dispossessed by the Khot, and the relinquishment in his favour was before the amending Act of 1912. The lower appellate Court in its judgment says that "the Khot had then either to allow the transferee to continue in possession or if he wanted to evict him, he was bound to give him a notice according to the Bombay Land Revenue Code. But he was not to take the law in his hands by getting a Sodpatra for himself from one who had no subsisting right. Therefore the plaintiff can maintain the suit to recover his lost land." That recognises the right of the Khot to serve a notice upon the plaintiff under the Bombay Land Revenue Code, and then obtain possession in due course of law, and as he had not given such notice, the plaintiff was entitled to recover possession. Had he given such notice the decision might have been different.

The plaintiffs' Appeal No. 992 of 1917 objects to the decision of the District Judge that the defendant No. 1 was entitled to the three months' notice prescribed by section 84 of the Bombay Land Revenue Code. This, however, is clearly correct and in accordance with the view taken in *Yesa bin Rama v. Saleharam Gopal*<sup>(1)</sup>. In that case it was held that the Khot could not claim to treat the person in possession under a right derived from the occupancy-tenant either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture. Here, however, there has been a resignation by the rightful occupancy-tenant, and the most that defendant No. 1 can claim is to be a tenant under section 8 of the Khoti Settlement Act. Under the provisions of that section, in the absence of any specific agreement between himself and the Khot, he must be held to be a yearly tenant liable to pay rent to the Khot at the rates prescribed and

(1) (1905) 30 Bom. 290.



accordingly, he is entitled to the notice prescribed in the case of yearly tenants under section 84 of the Bombay Land Revenue Code. The result is that both appeals should, in my opinion, be dismissed with costs.

MACLEOD, C. J. :—I agree.

*Appeals dismissed.*

R. R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.*

SHIVUBAI KUM RAJARAM SHETE (ORIGINAL PLAINTIFF No. 2), APPELLANT  
v. SHIDDHESHWAR MARTAND HEGADE AND OTHERS (ORIGINAL  
DEFENDANTS AND PLAINTIFF No. 1), RESPONDENTS\*.

*Civil Procedure Code (Act V of 1908), Order I, Rule 10 (2), Order XXXIV,  
Rule 1—Mortgage—Suit for redemption—Suit by some of the heirs of mort-  
gagor—Application to add remaining heirs as defendants, after cause of  
action had become time-barred—Indian Limitation Act (IX of 1908),  
section 22.*

Some of the heirs of a mortgagor sued to redeem the mortgage a few days before the expiry of the period of limitation. To meet an objection raised for non-joinder of parties, the plaintiffs subsequently applied to make the remaining heirs party-defendants to the suit. The lower Courts declined to make them parties on the ground that the claim as regards them was barred by section 22 of the Indian Limitation Act, 1908. The plaintiffs having appealed :—

*Held*, that the plaintiffs' right to redeem which they had when they filed the suit was not lost by their omission to make the remaining heirs parties. They were only necessary parties to save multiplicity of suits and to prevent the mortgagee being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption.

*Held*, also, that it was within the discretion of the Court under Order I, Rule 10, sub-rule (2), of the Civil Procedure Code, to make the remaining heirs co-defendants, and then to consider what would be the legal result of such addition.

\* Second Appeal No. 160 of 1919.

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