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have stopped, unless the Official Assignee had intervened. He might not have done so, and then the defendant, now plaintiff, would have escaped. I do not think he should be deprived of that chance owing to the conduct of the insolvent, while it is still open to the Official Assignee to sue him for the debt.

I decree the plaintiff's claim with costs.

Attorneys for plaintiff: Messrs. *Andrade & Cunha.*

Attorneys for defendant: Messrs. *Malvi, Mody, Ranchhoddas & Co.*

Suit decreed.

K. McI. K.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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April 1.

GANPATI GOPAL RISBUD (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT*.

Khots—Annual Kabulayats to Government—Terms must conform to custom except as modified by section 38 of Bombay Act I of 1865—Khoti lands—Origin and nature of tenure.

The plaintiff was the Khot of a village in the Kolaba District of which the Khots had from the year 1865 signed Kabulayats annually in favour of Government in a particular form. In 1915-16, Government presented for the plaintiff's signature a new form of Kabulayat introducing (*inter alia*) the following innovations :—

Clause 6 allowed the permanent tenant of Khot nisbat lands, if he had made improvements thereon, to compel the Khot either to consent to a transfer or to take up the land himself and pay for the improvements. Clause 8 required the Khot to keep the land at the disposal of a Dharekari who had deserted it.

On the Khot declining to sign the proposed form, his village was attached by Government.

* First Appeal No. 434 of 1920.

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In a suit filed by the Khot,

Held, raising the attachment and decreeing damages as from the date thereof, that the requirements of the above clauses 6 and 8 were a distinct infringement of the customary rights of the Khot, and the inclusion thereof in the Kabulayat justified the Khot's refusal to sign it.

The Khoti tenure in the Kolaba District is a customary tenure dating back to at least the 18th century, its incidents, as prescribed by custom, being nowhere defined, and in fact differing in different villages. The origin of the tenure, however, was probably the difficulty experienced by Government in collecting the revenues of the villages in the Konkan, as a result of which agreements were entered into with certain persons (Khots) for the collection of the revenue, the agreement being in each case in accordance with the customs of the country. Later, to provide for the due administration of the villages and to protect the tenants from the exactions of the Khots it was found necessary to amplify these agreements which at first had merely stated that the Khot concerned was responsible for the Government assessment. After 1865, in cases where no lease was granted under section 37 of Bombay Act I of 1865, the annual Kabulayat signed by the Khot, the provisions of which had to conform to custom except as altered by section 38 of that Act, defined exactly the demands which the Khot could make against his tenants.

A Khot's interest in his village is limited, not absolute. He possesses in some measure a proprietary right. He is an occupant with all the rights and liabilities affecting such a status. He has to secure to Government the payment of the village revenue, while the village lands which he has to manage in accordance with the restrictions mentioned in the Kabulayat fall into the following distinct classes :—

Dharekari lands, the tenants of which have heritable and transferable rights paying *Dhara* (Government assessment) alone to the Khot ;

Non-Dharekari lands, which are either

Khot Nisbat lands, i.e., lands held by permanent tenants who have heritable but not transferable rights or by non-permanent tenants, all of whom pay to the Khot not only the Government assessment but also *fayda* (fixed according to the terms of the Kabulayat), or

Khoti Khasgi lands, i.e., private lands, in the possession of the Khot of which he can make such use as he pleases.

FIRST appeal from the decision of J. A. Saldanha, Joint Judge at Thana.

Suit for declaration.

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The plaintiff was the Khot of the village of Maluka (in the Kolaba District) the Khoti whereof had been originally granted by the Peishwas. Later, Kabulayats were signed every year always in the same form in favour of Government by the Khots of the village, survey settlement being introduced.

In 1915, Government proposed that a new form of Kabulayat should be signed by the plaintiff, containing certain new clauses, the purport of which appear sufficiently set out below in the judgment of the Chief Justice.

The plaintiff refused to sign the Kabulayat in the form proposed, and Government, therefore, placed the village of Maluka under attachment.

The plaintiff thereupon filed the present suit for a declaration of his rights, an injunction and damages.

The trial Judge having dismissed the suit, the plaintiff appealed to the High Court.

K. H. Kelkar and *P. A. Bhat*, for the appellant.

H. C. Coyajee, with *S. S. Patkar*, Government Pleader, for the respondent.

The arguments were confined chiefly to the question whether, having regard to the nature of the plaintiff's interest in the land as established by custom and recognized by Government, the latter were justified in insisting on the inclusion in the Kabulayat of the clauses complained of.

MACLEOD, C. J. :—The plaintiff in this suit is the hereditary Khot of Maluka in the Taluka of Mangaon in the District of Kolaba. From the year 1865 until 1914 the Khot of this village signed in each year a Kabulayat in favour of Government in a particular form. In 1915 the Government presented a new form of Kabulayat for the Khot's signature, and on his

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refusing to sign, the village was attached thus necessitating the filing of this suit in which the plaintiff prayed as follows :—

A. (1) The plaintiff in the capacity as a Khot has a permanent right of holding the village, of making recoveries in accordance with the Mamul practice and of management. It is neither necessary nor lawful to compel him to pass a Kabulayat of any description whatever.

(2) The condition objected to in the statement hereto annexed cannot be asked for in writing in the Kabulayat.

(3) The attachment of the Khoti village effected because the plaintiff did not pass a Kabulayat in writing as asked for by the defendant for the year 1915-1916 is not legal and the Government have no right to make recoveries from any of the cultivators of Khotinisbat lands.

B. An order should be passed as mentioned in sub-clauses 1, 2 and 3 of clause A and the defendant should be restrained by a permanent injunction from acting to the contrary.

C. The plaintiff's damages of Rs. 317-2-8 for the year 1915-1916 and interest thereon at 0-12-0 per mensem till receipt should be ordered to be paid by the defendant, and all kinds of future mesne profits due should be ordered to be paid by the Government.

The defendant in his written statement denied that the plaintiff had a permanent right to hold the village. He contended that the plaintiff was a farmer of the revenue and the continuance of his holding depended upon his executing and observing such agreements as defendant might from time to time require him to accept, and upon his obeying such orders as defendant might pass with a view to the good administration of the village and in the interests of the community.

The main point of difference between the parties was that the plaintiff contended that he was not obliged to sign any form of Kabulayat at all, while the defendant contended that the plaintiff was bound to agree to any Kabulayat which the defendant might require him to sign.

The various issues raised on the pleadings appear at page 6 of the print but for the purpose of this judgment it will only be necessary to refer to issue three.

It should have been perfectly obvious to both parties that each was contending for more than he would be able to prove. The result has been that the record has been burdened with a vast number of documents which would otherwise have been irrelevant and the learned Judge, in a most exhaustive judgment felt himself compelled to relate once more the whole history and the incidents of the Khoti tenure. This case bears a curious resemblance to the Ambdosi case in which the appeal Court decision is reported in I. L. R. 36 Bombay, page 290.

The plaintiff asserted a right to revert to the Mamul Vahiwat in 1892 on the expiry of the period of the Settlement and as the learned Judges of the appeal Court remarked that question depended entirely on the construction of sections 37 and 38 of Act I of 1865 and sections 102-106 of the Bombay Land Revenue Code, and while expressing their admiration of the diligence and ability of Mr. Tipnis in his judgment of over seventy printed pages, confined themselves to considering whether the plaintiff's claim to be entitled to revert to the Mamul Vahiwat was justified on a proper construction of those sections.

In the appeal before us Mr. Kelkar has accepted the findings of fact by Mr. Saldanha and has confined his arguments to the question arising on the 3rd issue

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dealing with the main contention referred to above, which ran as follows :—

" If the plaintiff is bound to pass a Kabulayat, what should be its terms at present? What modifications, if any, should be made in the clauses of the Kabulayat set out in the Appendix to the plaint ?"

The answer given by the Judge was that the Kabulayat finally sanctioned by Government was found unobjectionable provided there were added such exact definitions of technical terms and more explicit language was used as appeared desirable in the light of the judgment of the Court. The result of the finding on that issue apart from all other questions was that the plaintiff's suit was dismissed, each party to bear his own costs.

The plaintiff has appealed and certain cross-objections are filed by the defendant. But the attitude of the plaintiff is now under the advice of his pleader far different from that which was taken in the plaint and persisted in throughout the proceedings in the lower Court. Mr. Kelkar, on behalf of his client, is agreeable to obtain a declaration that the plaintiff is a permanent hereditary farmer of the village of Maluk the hereditary right being dependent on his passing a Kabulayat every year containing conditions under orders of Government with a view to the better administration of the Khoti village.

It follows that the only question we have to determine in this appeal is whether the Kabulayat presented by the Government in the year 1915-16 was one which the Khot was bound to accept. In order to determine that question we have to remember that this Khoti tenure is a customary tenure which dates back from the time of the 18th century or earlier, and that its incidents as prescribed by custom are nowhere defined and differ in different villages. We are not aware of the origin of

the tenure but it was probably due to the difficulty experienced by the Government of the time in collecting the revenues of the villages in the Konkan. Consequently the Government entered into agreement with certain persons that they should collect the revenue, but to what terms the original farmers agreed we are not aware except that the agreement was to be according to the custom of the country. When the British Government took possession of the Konkan about the year 1818, agreements were entered into between the Government and the farmers or Khots with regard to the payment of the assessment by the Khot to the Government. At first the agreements merely stated that the Khot was responsible for the assessment since the main object of the Government was to secure for themselves the land revenue of the village. Later on in order to provide for the due administration of the village and to protect the tenants against the exactions of the Khots, it was found necessary to amplify the terms of the agreement, but the fact remained that it became an established custom for each Khot to enter into an annual agreement with Government. In 1865 Bombay Act I of 1865 was passed. That Act provided for the survey, demarcation, assessment and administration of lands held under Government in the Districts belonging to the Bombay Presidency, and thereafter this particular village was brought under the new revenue survey. Sections 37 and 38 of the Act were particularly applicable to Khoti villages. Section 37 directed that, whenever in the Ratnagiri Collectorate and certain Talukas in the Thana Collectorate the Survey Settlement was introduced into the villages or estates held by Khots, it should be competent for the Superintendent of Survey or Settlement Officer, with the sanction of the Governor in Council, to grant the Khot a lease for the full period

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for which the settlement might be guaranteed, in place of the annual agreements under which such villages had hitherto been held, and, further, the provisions of section 36 in respect to the right of permanent occupancy at the expiration of a settlement lease should hold good in regard to those villages or estates.

Section 38 said :

"It shall also be competent to such officer, with the sanction of the Governor in Council, to fix the demands of the Khot on the tenant at the time of the general survey of a district, and the terms thus fixed shall hold good for the period for which the settlement may be sanctioned.

But this limitation of demand on the tenant shall not confer on him any right of transfer by sale, mortgage or otherwise, where such did not exist before, and shall not affect the right of the Khot to the reversion of all lands resigned by his tenant during the currency of the general lease ".

No lease was granted by Government under section 37 to the Khot of Maluka, but thereafter the annual Kabulayat which was signed by the Khot defined exactly the demands which the Khot could make against his tenants. It will be sufficient for me to say that the lands in the village are either Dharekari or non-Dharekari. Dharekari lands are in the occupation of tenants having permanent heritable and transferable rights paying to the Khot the Government assessment only. Non-Dharekari lands are generally spoken of as Khoti lands which are either Khot-nisbat or Khoti-khasgi. Khot-nisbat lands may be held by permanent tenants who have hereditary but not transferable rights, or by non-permanent tenants, all of whom pay to the Khot in addition to the assessment Fayda which is fixed according to the terms of the Kabulayat. Khoti-khasgi lands are the private property of the Khot either by being entered in his name in the original survey, or by acquisition since the survey by purchase or other lawful transfer otherwise than in his capacity as Khot, or by being brought into cultivation at the Khot's own expense though entered in the original survey in the Khot-Nisbat Khata. It is important to note that with

regard to those lands which came within the description of Khot-nisbat land the right of the Khot to exact rent or Fayda in addition to the assessment was limited by the Kabulayat which was in accordance with the decision of the Government Officer fixing the demand of the Khot on his tenants under clause 38 of Act I of 1865. Therefore on the one hand the Government secured to themselves the payment of Juma by the Khot according to the amount fixed in the Kabulayat, for the Khot was liable to pay that amount whether he could collect it from his tenants or not. On the other hand the tenants were protected from the demands of the Khot by the restrictions placed upon him by the terms of his Kabulayat. Prior to 1865 these demands were fixed by custom which varied in different villages with the result that the custom being variable complaints were common amongst the tenants that exactions were levied which were not sanctioned by custom. On the other hand the Khots complained that the tenure of the Mamul Vahiwat had been unduly restricted by the operation of section 38 of Act I of 1865. But in my opinion the Kabulayat which Government asked the Khots to sign was bound to conform to custom except as altered by that section and subject to that condition the Khot would be obliged to sign the Kabulayat. If the Government presented a new form of Kabulayat which contained terms not prescribed by custom or by Statute, then the Khot might refuse to sign, and it would depend upon the decision of a higher authority whether such refusal was justified or not. Consequently the only point in this case which it is necessary for this Court to decide is whether the plaintiff Khot was justified in refusing to sign the Kabulayat of 1915-16. It appears to me very clearly that clauses 6 and 8 of the new Kabulayat do not conform to established custom, are not justified by

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section 38 of Act I of 1865, and restrict the rights of the Khot in a manner which is not permissible. I may also draw attention to clause 21 which as far as I can gather first deprives the Khot of any right to claim compensation or to make any demand in the case of Khot-nisbat lands which may be acquired under the Land Acquisition Act for public purposes, though the latter half of the clause might appear to allow him compensation in such a case if he could prove the loss of any rent or profit to which he would have been entitled by reason of a vested right but for the acquisition. In any event it would not be safe for the Khot to accept a clause drawn in such an ambiguous form. Clause 6 is extraordinarily badly worded but, apart from that, according to its terms a customary tenant of Khoti land who could not transfer without the consent of the Khot, provided he had made improvements and prepared the land at his own costs was empowered to compel the Khot either to consent to a transfer or to take up the land himself after paying the amount paid for improvements and preparation. That clause is a distinct infringement of the customary right of the Khot. It has been established by custom that a permanent tenant of Khot-nisbat land cannot transfer without the consent of the Khot. The Khot was asked to agree to a condition that once such a tenant had improved his land, he would be entitled to ask the Khot to consent to the transfer and in the case of the Khot's refusal to compel him to pay up the amount spent on the land and take up the land. We think the introduction of that clause alone justified the Khot in refusing to sign the Kabulayat.

Then under clause 8 in the case of desertion of his land by a Dharekari, the Khot was asked to agree that, however long the desertion might be, he could keep the land at his disposal and in case the Dharekari returned

restore it to him. In the case of desertions of land' by occupancy tenants the Khot was asked to agree that he should restore such land to the occupant if he returned within twelve years. The result of that clause being accepted would be that in the case of deserted lands the Khot would be unable to arrange for their proper cultivation by the tenants. He would have constant difficulties, as in the case of Dhara land the Dharekari would always be able to return at any time and demand back the land, and with regard to occupancy lands until the expiry of twelve years the occupant would still be entitled to demand back the land. That clause again in my opinion infringes the customary right of the Khot, and its inclusion in the Kabulayat justified the Khot in refusing to sign. The corresponding clause in the old Kabulayat stated that in the case of a Dharekari or a tenant of Khot-nisbat land absconding or dying without leaving an heir the Khot should make a report to the Mamlatdar and then await the passing of orders in regard to the taking of steps for the cultivation of such land and in regard to the payment of fixed assessment to Government.

Much has been said about clause 16 in the old Kabulayat which has a very curious history. It runs as follows:—Clause 16: "Litigation is at present going on in the High Court regarding Khoti rights, decision will be given there, a Vahiwat should be introduced in accordance therewith in our villages. Until then it has been agreed that the terms mentioned in the clauses 1 to 15 will be observed". The case referred to there is what was known as the Ambegaon case in which the suit was filed in 1867, was decided by the lower Court in 1869, and eventually terminated in the High Court by a compromise decree in 1883. Ever since then the clause has been continued in the annual Kabulayats signed by the Khot, neither party apparently attaching

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any importance to it. The plaintiff now claims that the Government were bound to offer him a Kabulayat in terms of the settlement arrived at in the Ambegaon case. The same question was exhaustively argued in the Ambdosi case, but as the plaintiff said he did not insist on the retention of the clause in the Kabulayat, the appeal Court directed it to be deleted. Mr. Saldanha held that the defendant was bound to apply the agreement underlying the so-called Ambegaon clause in the Kabulayats passed from 1869-70 onwards, but any claim on it was time-barred and no estoppel arose thereby. When every year the Government in effect renewed the agreement, limitation would run from the date on which the Kabulayat was signed and the demand of the plaintiff in this respect would really be a demand for specific performance. The compromise decree was to the following effect:—

"Parties to the suit agree that a decree be passed providing that the old tenants of the lands entered in the annexed statement shall have non-transferable occupancy rights as therein entered and that the rest of the statement recorded shall be binding on the parties. Each party to bear his own costs throughout."

The statement recorded was a statement showing that privileged customary tenants in the Ambegaon village were to pay, "Urdhel", i. e. half share of the produce of the rice lands and Bagayat lands, and "Tirdhel" or one-third share of the produce of Warkas lands. In the first place there was no decision of the Court determining the rights of the Khots and the Government, so in any event Government were not bound to extend the Kabulayat arranged for in that particular case to other villages. In the second place, the rights of the Khot to demand the rent from the tenant was fixed by the provisions of Act I of 1865 and it is doubtful whether in the absence of any agreement, any other terms could be arrived at between the Khot and the Government. In our opinion, therefore, the fact that

this clause remained in the Kabulayat could not bind the Government to enlarge the rights of the Khots against the tenants beyond what was fixed by the Government officer under section 38 of that Act. So there was no necessity for the continuation of this clause in the Kabulayat which the Khot had to sign. It follows then that the Government are bound to present a Kabulayat in the old form for the plaintiff's signature and on his signing it he will be entitled to recover possession of the village. It seems to us to be regrettable that in so many of these cases in which a dispute has arisen between the Khot and the Government the issues have been unnecessarily elaborated. The first declaration in the decree we shall now pass is one which could have been formulated without the need for a protracted hearing, and without having to exhibit so vast a number of documents, while the rights and liabilities of the Khot are so clearly stated in the old Kabulayat, that I cannot see myself why there was any necessity for Government to introduce a new form, since there is no indication before us to show how the conditions of the tenants could be improved by the new Kabulayat, or generally what benefits would enure to any one concerned. It was suggested that the area under cultivation in some of the villages was being reduced and cultivators might be induced to return if the terms of the Kabulayat were altered, but it is difficult to see how any of the new terms to which we think the Khot was entitled to object, can possibly benefit either Government or the Khot or the cultivators. The relationship between the Khot and the Government, to my mind, is perfectly clear. As stated in Mr Candy's report it is indubitably established that a Khot's interest in his village is limited, not absolute; he possesses in some measure a proprietary right; in fact he is an occupant with all the rights and liabilities affecting

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such a status. The Khot has to secure to Government the payment of the village revenue, while the village lands which he has to manage in accordance with the restrictions mentioned in the Kabulayat fall under three distinct classes. These are (1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot; (2) Khot-nisbat lands which are either in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and the Government assessment; and (3) Khoti-khasgi lands, private lands, in the possession of the Khot of which he can make such use as he pleases. That being the case there was no necessity whatever to elaborate any further the terms of the Kabulayat. If the Government wish to impose upon the Khot a new form of Kabulayat they must conform to the conditions which we have laid down. They must not infringe the customary rights of the Khots. The result is that the decree under appeal is reversed and it is decreed as follows :—

Declare that the plaintiffs are hereditary farmers of the revenue of their Khoti village in suit, and are entitled to hold the village as Khoti on their entering every year into the customary Kabulayat. They were not bound to execute Kabulayat A as it contains clauses which the Khot was not bound to accept. The attachment of their villages in consequence of their refusal to sign the Kabulayat in suit is illegal and they are entitled to have the attachment raised and to recover from the defendant damages from the date of the attachment to the date on which the management of the village is restored. The amount of damages should be determined by the trial Court. Beyond these two questions no other question is decided in this suit with regard to the relationship between the plaintiff-Khot and Government.

On the question of costs we have ascertained what costs were actually incurred in the Court below. Except in the two representative suits the costs were extremely small. The plaintiff having succeeded will be entitled to those costs, which bear no proportion to the length of time during which the case lasted or the number of documents exhibited.

With regard to the costs of the appeal undoubtedly costs have been increased by translations of unnecessary documents. We, therefore, exclude from the costs of the appeal the costs of translations. Each party to pay the costs of his own translations. Apart from that the plaintiff will be entitled to the costs of the appeal.

Cross-objections are dismissed with costs.

I should like to add that we are very much indebted to Mr. Kelkar for having argued the case for the plaintiff in the way he has done in spite of the case as originally set up by the plaintiff. We are also indebted to Mr. Coyajee for the way in which he argued the case for Government.

SHAH, J. :—I concur.

Decree reversed.

R. R.

PRIVY COUNCIL.

VAJESINGJI JORAVARSINGJI AND OTHERS (PLAINTIFFS), APPELLANTS *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.

J. C.* 1924. June 26.

[On appeal from the High Court at Bombay.]

Act of State—Cession—Titles to land in ceded territory—Absence of recognition—Effect of proclamation—Patta—Pleading.

After a sovereign state has acquired territory, either by conquest, or by cession under treaty, or by the occupation of such as has theretofore been

* *Present.*—Lord Dunedin, Lord Carson and Mr. Ameer Ali.