he did for the execution of that decree; and I, therefore consider the order now appealed against so far correct.

It has been urged upon the court by Mr. Shántárám Náráyan that in directing the attachment of the property by the Munsif of Bársi the District Judge was only acting ministerially. and, therefore, as it did not form part of his jurisdiction as District Judge, it was not affected by the Assistant Judge's appointment. This argument has been met by Mr. Anstey, for the opposite side, who showed that the provisions of Secs. 286 to 296 were clearly of a judicial character, and, by Sec. 294, open to an appeal.

The proper order in this case, as it appears to me, is to confirm the District Judge's decision, and to direct the papers to be returned to that officer with instruction to forward them to the Assistant with full powers at Solápur for execution.

Costs of this appeal to be borne by the appellant.

LLOYD, J.:—I concur.

Regular Appeal No. 4 *of* 1869.

Jan. 19.

RÁMCHANDRA NARSINHA MAHÁJAN .....*Appellant.*

THE COLLECTOR OF RATNÁGIRI.....*Respondent.*

Khoti *Tenure—Assessment—Liability of* Khot *of Attached Village to Assessment in respect of lands held by him—Bombay Act I. of 1865, Secs.* 3 *and* 38.

Held that a *khot* is liable to be assessed for *khoti* profits in respect of land in his private occupation during the time that the *khoti* village is under attachment by Government.

Quære—whether a *khot* in respect of such lands is a tenant within the meaning of Sec. II., cl. *(l)* of Bombay Act I. of 1865, and whether the powers in Sec. 38 of that Act apply to such lands.

THIS was an appeal from the decision of Baron De H. Larpent, District Judge of Ratnágiri, in Original Suit No. 13 of 1868.

The *khoti* village of Kozar was in 1865 attached by Government, in consequence of the refusal of the *khots* to enter into

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the usual *kabulayat*. When the village was attached, the Revenue Survey had been introduced into it. The plaintiff, Rámchandra Narsinha, was one of the *khoti* co-sharers in the village, and, as such, had lands in his private occupation during the period the village was under atttachment The lands so occupied by the plaintiff were assessed for revenue and local fund purposes during the attachment, and the amount of such assessment was levied from the plaintiff by the defendant.

To recover the *khoti* profits in respect of such land, and the assessment for local fund purposes paid by the plaintiff for the year 1866, he brought the present suit,

The defendant in his answer alleged (I.) that the plaintiff had entered into an agreement to pay *khoti* profits, and (II.) that, independent of such agreement, the plaintiff was liable to pay the amount of *khoti* profits, and of the assessment for local fund purposes by custom and law.

The agreement upon which the defendant relied was signed by the plaintiff's brother, the *kabulayatdar* of the previous year, and it was alleged that the plaintiff and his brother were members of an undivided family, and that the agreement was entered into by the plaintiff's brother as manager acting on behalf of the whole family, and as such was binding on the plaintiff.

The plaintiff denied the allegation of the family being joint and that he was bound by the agreement; and also stated that it was customary for the Government to respect and act upon during the first year of attachment any agreement entered into between the *khots* themselves.

It appeared from the evidence that the land actually occupied by the plaintiff had been assessed under the Revenue Survey Act,

The District Judge found that the agreement of the previous year, passed by one brother as *kabulayatdar* of the year, could not bind the plaintiff, as these *kabulayats* were passed by the different members of the family in turn, and *kabu-*

kayatdars did not act as managers. As to the liability, by custom, of a *khot* to pay *khoti* profits on land in his private occupation, the Judge found that in unsurveyed villages when under attachment a *khot* was liable, like any ordinary cultivator, to pay *khoti* profits on land in his private occupation. "During attachment," he said, "*khoti* rights are in abeyance, and each sharer is tenant to Government, which is in the position of the managing *khot* of the village during attachment, as he is to co-sharers when there is no attachment. Such land in private occupation is not *dhara*. Bombay I. Act of 1865, Sec. 38, made no change in the old customary liability. It only fixed the amount to be levied as *khoti* profits in excess of Government assessment proper." The Judge, accordingly, held that the plaintiff was liable by custom to pay the *khoti* profits on land in his private occupation, and the amount of the local fund due in respect of his land under Act I. of 1865. The Judge found that, although it was usual for the Government to respect *khots'* agreements during the first year of attachment, no settled agreement between the *khots* was proved.

The appeal was argued before COUCH, C.J., and MELVILL, J.

Vishvanath Narayan Mandlik, for the appellant:—Sec 38 of Act I of 1865 legalises the levy of *khoti* profits; it applies to those who are tenants as defined by the Act, and fixes the demands of the *khot* on the tenants who hold from him. The *khot's* interest is hereditary and proprietary and he does not cease to be a *khot* during a temporary attachment, or become a tenant by reason of such attachment.

[COUCH, C.J. :—The *khot*, as regards lands in his private occupation, may be tenant to himself *qua khot*, or he may be tenant of the coparcenary, or of the Government which stands in its place.]

If a *khot* can create a *dhara* in his village to last as long as the *khot* lasts, the *khot's* interest must be of a superior character to that of a *dharekari*, and the *khot* cannot be looked upon as a tenant under the Act.

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The *khot* has a right to alienate, and his occupation of his private lands may be looked upon as an alienation.

The evidence shows that sharers never pay *khoti* profits among themselves, and as this is a suit for *khoti* profits levied during the first year of attachment, when by custom the *khot*'s arrangements are continued by Government, the plaintiff has a right to recover.

Scoble (with him *Dhirajlal Mathuradas*), for the respondent:—The judgment in the case of *Tajubai* v. *The Collector of Kulaba* (*a*) shows the position of the *khot* to be that of a farmer of land revenue with certain rights and privileges. His interest as farmer is dependent for its continuance on his passing a *kabulayat* to Government. When he fails to contract, and Government steps in the *khot* falls into the position of a ryot, and he must pay the one-half or one-third of profits for the land cultivated by him. During attachment he is not a *khot*, except so far as he has a right to be restored to the management on passing a *kabulayat*. *Khoti* profits are simply remuneration allowed for the risk and trouble of collecting the revenue. They are not due to the *khot* when Government farms its own revenue. A *khot* has never been recognised as an owner of land. He is in titled only by reason of his agreement, and falling to pass that, he is liable to assessment and profits, like any ordinary ryot.

Cur. adv. vult.

19th January. COUCH, C.J.:—The question raised in this appeal is whether the plaintiff, as a *khot* of the village of Kozar, is liable to be assessed for the *khoti* profits on *khoti* land in his private occupation during the time the village is under attachment by Government. In the case of *Tajubai* v. *The Collector of Kulaba* (*supra*), it was found as one of the material facts with regard to the *khoti* tenure, that 'as the *khot* settles with Government for assessment of the 'village as a whole or for his share in it, it follows that he may let out for cultivation, or himself cultivate without making any additional payment to Government on that

(*a*) 3 Bom. H. C. Rep., A. C. J. 132.

account, any waste or uncultivated land of the village. If however, he fails to contract by *kabulayat* for the fixed assessment for any year, and the duty of realizing the revenue thus devolves on Government, he pays the half or the third (as may be customary) of the produce of land so cultivated by him as any ordinary ryot." And in the judgment of the majority of the Judges in that case it is said : "An incident which seems conclusively to show that a *khot* possesses, with reference to the lands within his *khoti*, no rights which are not dependent on the continued exercise by him of his functions as a farmer of the revenue, is the fact found by the court below, that although a *khot* while in office may dispose of available land for his own benefit, or cultivate it himself, he becomes liable in the latter case for the full amount of assessment as an ordinary cultivator whenever he ceases to discharge the duties of his office. The right to cultivate such waste or other lands as may be at the *khot's* disposal, or to give them out in cultivation under such terms as may be most to his advantage, must, consequently, be viewed as the recognised mode of his remuneration for the services rendered." This fact, which was found in the case quoted, does not appear to have been questioned in the present case ; and we concur in the view taken in the above passage of a *khot's* rights with reference to lands within his *khoti*. Nor does this view appear to be at variance with the judgment of Mr. Justice Tucker, the dissentient Judge. A *khot* cannot, by himself cultivating the land, acquire higher title to it than he has to the khotship, or a title independent of it. His occupation of the land without making any additional payment is really part of the fruits of the khotship, and is only provisional upon its continuance. Nor, when there are several sharers in the khotship, can they, by each taking a portion of land into his separate occupation, alter the nature of their right. It follows, then, that, whether the khotship be determind or only suspended by the attachment, the right to cultivate without making any additional payment to Government, which is derived from and dependent upon the khotship must also be determined or suspended. And we are unable to see any ground for the right claimed by the appellant."

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The Bombay Act I. of 1865 was relied upon for him, but that does not appear to have made any difference in his rights It may be that a *khot* is not, with reference to lands in his own occupation, a tenant within the definition (*l*) in Sec. 3 and probably the power in Sec. 38 does not extend to such land. There is no necessity that it should. The exercise of the power is not imperative, and if the rate of k*hot's* profits has not been fixed for the lands in the k*hot's* own occupation, it must be what was customary before the Survey, and may be realized under Reg. XVII. of 1827.

As to the objection that there was an agreement entered into by the k*hot*, which ought to have been respected for the first year, we agree with the court below in thinking that it was not proved that there was such an agreement. The witnesses relied on for this were Nos 38,51,52, No. 38 is the brother of the appellant, and one of the sharers in this khotship, and Nos. 51 and 52 are both k*hots*. And all they say is that sharers never pay each other the profits on land in their private occupation. This may well be without there being any agreement, the land being occupied in such proportion that the result is the same as if each paid the profit, and it was then divided between them. We, therefore, think no ground has been shown for altering the decree of the court below, and that it should be confirmed with costs.

Decree confirmed with costs.

Feb. 2.

Special Appeal No. 514 *of* 1869.

NÁNÁBHÁI VALLABDHÁS.....*Appellant.*

NÁTHÁBHÁI HARIBHÁI.....*Respondent.*

Partition—Suit not including whole of Claim of Plaintiff—Civ. Proc Code, Sec. 7.

A member of an undivided family cannot sue his co-sharers for his share in a single undivided field, portion of the family property. He must sue for a general partition of all the property liable to partition.

THIS was a special appeal from the decision of M. H. Scott, Acting Assistant Judge at Ahmedábád, in Appeal Suit No. 72 of 1869, reversing the decree of the Munsif of Neriad;