Special Appeal No. 669 *of* 1863.

TA'JUBA'I kom DA'U'DKHA'N JANGALKHA'N...*Appellant.*
The SUB-COLLECTOR OF KULA'BA'.....*Respondent.*

Khotí tenure—Shilotrí hak—mortgage—Revenue Survey—resumption —Reg. XVII. of 1827.

In a suit brought by a khot, in 1862, to recover an hereditary share in a khotí village, which had been mortgaged by her husband in 1845, and taken directly under Government management by the Sub-Collector of Kulába, on failure by the mortgagee to pass the customary agreement (*kabuláyat*) for the security of the revenue for the year 1851-52, the court of first instance decreed the restoration of the khotí estate, on payment by the plaintiff of any loss which may have been sustained by Government during its interim management; but the District Judge, in appeal, modified that decree by annexing a condition, that the plaintiff was to observe the engagements which had been entered into between Government and the sub-tenants of the estate, through the Revenue Survey—which had been introduced during the direct management of the village by Government—whether as regards the rates of assessment, or the rights of tenancy :—

Held by *Arnould* and *Newton, JJ.*, (*Tucker, J., dissentiente*), that the plaintiff had no right to object to the conditions, subject to which the District Judge had allowed her claim to resume the khotship.

1866. August 1. S. A. No. 669 of 1863.

THIS was a special appeal from the decision of C. Gonne, Joint Judge of the Konkaṇ District, in Appeal Suit No. 668 of 1862, modifying the decree of H. Birdwood, Assistant Judge of the Konkaṇ at Tháná, in Original Suit No. 1 of 1862.

The following judgment, in which the facts are fully stated, was recorded by the District Judge :—

"The plaintiff in the original suit, a khot, sued the Sub-Collector of Kulába to compel the restoration by him of the management of her half of a khotí village, and of one and a half khárs, of which the management had, for the ten previous years, been assumed by the Sub-Collector on behalf of Government. This had not happened in consequence of the immediate fault of the real khot, but of the fault of one Gangárám Márvádí, to whom the khotí rights had been mortgaged, and who had failed in 1851-52 to pass the customary annual kabuláyat to the Sub-Collector. In 1860-61 the plaintiff had redeemed the mortgage, and had applied for the

1866.
August 1.
S. A. No. 669
of 1863.

restoration of her khotí and shilotrí rights, offering at the same time to make good any loss the Government might have been put to, during their direct management; but the application had been refused.

"The Sub-Collector, in answer, denied the right of the khot to reënter on the management of the village and the khár. The khot's right, he contended, rested on the annual kabuláyat passed to the Collector; and a failure to pass that kabuláyat worked a forfeiture of the right. Besides, during the ten years of direct management by Government the Revenue Survey had been introduced.

"The Assistant Judge found that the right of a khot, equally with the right of a shilotridár, was proprietary in its nature; and that the failure of the khot to pass the yearly kabuláyat could not be construed into an abandonment of this proprietary right, because it was the universal custom of Government to restore the management of the village to the khot, on his application, and, therefore, in giving up his village into the hands of Government, the khot must have done so under the impression that it would be any day recoverable. And besides the custom of restoring the management of the village to the khot as a matter of course had gone on for so long—ever since the accession of the British government—that the right of refusal, if it ever existed, must, in the absence of proof to the contrary, be held to have been lost. The law applicable to the rights of khots was, the Assistant Judge held, Reg. XVII. of 1827, Sec. VIII., which expressly aimed at the perpetuation of the tenure; and though the second clause of this section provided for the reversion of the village to Government, to ensure, in certain cases, the realisation of the revenue; yet this reversion must be held to be only temporary, by the application of the principle embodied in Sec. XI., cl. 5, of the same Regulation.

"The Assistant Judge, therefore, decreed that plaintiff should, on making good the loss incurred by Government during their time of management, be allowed to reassume herself both the management of the khotí village, and the one and a half shilotrí khárs.

1866. August 1. S. A. No. 669 of 1863.

"Against this decision the Collector has appealed, on various grounds; but the main point for decision is that raised by the Assistant Judge, namely, whether the respondent has, as khot, a right to reënter on the management of the village and khárs, which management was assumed by the Government on the failure of the khot's mortgagee to pass the annual kabuláyat.

"The Court allows the appellant to put in the evidence of Mr. Scott, late Collector in the Konkaṇ Zillah, and also of certain extracts from the Peshwá's daftar; considering that the question at issue is of importance to a large class of interests, besides those of the parties in the case, and that additional light for its settlement should not be excluded even at this stage of the proceedings.

"The consideration of the khot's claim to a restoration of his khotí rights over the half-village ought, the Court thinks, to be kept distinct from that of his claim to a restoration of his shilotrí rights over the khárs.

"It is necessary first to settle what is the nature of the khot's right. Is it proprietary? that is, is the right inherent in the khot to a certain portion of the produce of the khotí village, to be obtained through his management of the village? or is it a right perpetually derived from the State, to farm the revenues of the village and enjoy the possible profits. The settlement of this question is necessary, because the vitality of these two descriptions of right would, the Court thinks, depend on different principles.

"First, then, what is the meaning of the word 'khot'? It is stated in Molesworth's Dictionary to be 'a renter of a village, a farmer of land or revenue, a farmer of the customs, a contractor or monopolist; an hereditary officer whose duty it is to collect the revenue of the village for Government, also an officer appointed for this office; a tribe of Brahmins in the Southern Konkaṇ.' The last meaning, no doubt, refers to the khots now in question, but the previous meanings show the etymology of their designation.

1866.
August 1.
S. A. No. 659
of 1863.

"In the second place, what was the footing of the khots in relation to the Peshwá's government? To answer this question fourteen extracts from the Peshwá's daftar have been put in evidence, and they show mostly instances of the khot's removal from his khotship at the arbitrary will of the Peshwá's government; and sometimes for such reasons as failure of the khot to satisfy the increased demands of the government, oppression of the ryots by the khot, disagreements between two shareholders of the khotship causing disgust to the ryots.

"In the third place, What are the features of the khotí tenure as continued under the British government, and as it has grown up to the present day? On this point the Court has the benefit of the evidence of Mr. Scott, who has enjoyed the unusual experience of ten years in the Revenue Department, passed in the collectorates of Tháná and Ratnágirí.

"The khot, it appears, engages each year by kabuláyat to pay the Government a consideration for the management of the village, fixed in kind. The option is given him of paying in money, according to the commutation rates laid down for each year by the Collector, and so far as there may be variations in the market value of grain, there may be variations in the yearly consideration paid by the khot to Government. But there is no variation in the grain estimate of that payment, and the same would be exacted in times of an abundant harvest and in times of famine. The khot, on the other hand, collects for his own benefit as much as he can from the cultivators; his demands being ostensibly limited by custom to one-half of the actual produce of field of good quality, and one-third of fields of inferior quality. The realisations of the khot, therefore, must depend on the amount of land under cultivation, and the goodness or badness of the season. His management of the village is a speculation. If the total of his collections rises above the Government claim, he gains; if it falls below, he loses; and how speculative is the nature of the khot's interest, appears in the frequent instances which have occurred of the khot's

1866. August 1. S. A. No. 669 of 1863.

temporary withdrawal from the management of his village. It cannot be supposed that he would do so if his profits were certain; and it is probable that the prospects of a bad season, or disagreement with the cultivators, or some other cause affecting the chance of large collections, has on these occasions induced the khot to spare himself both risk and trouble, and wait for better times. The natural way of effecting this withdrawal is the khot's refusal to sign his yearly kabuláyat. On this refusal the Collector assumes the direct management of the village on behalf of Government, and collects, or rather has a right to collect, the same as the khot would have had. At the end of the village accounts a memorandum is entered, comparing the total of actual receipts with the fixed payment in gross which the khot has ceased to make, and showing in fact whether the direct management has caused to Government a gain or a loss. When after a time the khot applies for a restoration of his position, it has been the invariable custom for the Collector—whether as a matter of indulgence or a matter of legal necessity, being the point at issue—to accede to the application. But a reference is first made to the accounts, and if they show that the direct management has caused to Government a loss, the khot must make good the same before he can recover his rights; while if it has caused a gain, the same is credited to Government, and is not, as a rule, made over to the khot.

"It is necessary here to state that the consideration which gives a value to the khot's rights, is not only the chance of his collecting more from the ryots than he has to pay to Government, but his power of occupying on his own account land out of cultivation, land thrown up by ryots, and land from which ryots can be legally ousted; and it appears to be generally the fact that a khot does occupy a portion of the land in his own khotship. As the extension of the khot's private holding makes no difference in the fixed sum which he has to pay to Government, the khot in point of fact holds the same rent-free, that is, as long as his khotship endures; but when the khot withdraws, and the Collector takes his

1866. August 1. S. A. No. 669 of 1863.

place, he loses the peculiar advantage of his holding. He sinks, as regards his holding, into the position of a ryot, and becomes liable to pay, like any other ryot, one-half or one-third of the produce of his holding, as dictated by the custom of the country.

"Now the object of the Court in describing the idea it has gained from the evidence of a khot's tenure, has been to lay down the *data* for judging whether the nature of the khot's interest is proprietary or otherwise.

"It has been argued on the one hand that the proprietary nature of the khot's right has been signified: (1) by its admitted susceptibility of sale or mortgage; (2) by the usage which has permitted its exercise or non-exercise according to the pleasure of the khot; (3) by the khot's power to assume for himself the occupancy of neglected and vacated land.

"On the other hand it has been argued that the non-proprietary nature of the khot's interest has been signified: (1) by his liability to pay rent, and as much rent as any other tenants, for lands held by himself during any cessation of his khotship; (2) by his liability to make good any loss incurred by Government during such cessation, coupled with absence of right to any gain; (3) by usage of Government taking from the khot a renewed kabuláyat year by year.

"It appears to the Court that the first argument, founded on the right being alienable, may tend to prove that it is hereditary, but does not affect the question of its nature.

"The second argument, of the exercise of the right being by usage optional, begs the question at issue. No doubt the option has been exercised; but whether as a consequence of the khot's right or the Government's permission, is the point now to be settled.

"The privilege of the khot to enjoy the first refusal of all vacant and available land in his khotship is a natural incident of his position; but his liability to pay as much rent as any other tenant for his holding, during any suspension of his khotship, renders that privilege no support to a proprietary claim.

1866. August 1. S. A. No. 669 of 1863.

"The khot's liability to make good loss to Government, if there has been loss, during such suspension, without claiming the profit, if there has been profit, shows that his option to resume his khotship, if he possesses it, is fettered with a condition significant of his want of proprietary title.

"On the other hand, the Court does not look on the practice of the khot having to pass a yearly kabuláyat as a disparagement of his proprietary claim. The necessity of his giving renewed security supplies a sufficient reason for the practice. The kabuláyat, moreover, marks the privilege of the khot to settle directly with Government; and the technical form assumed by his demand for reinstatement, is the assertion of his right to pass these kabuláyats.

"On the whole, however, looking at the meaning of the term 'khot,' at the khot's footing with the Peshwa's government, and comprehensively at the features of the tenure as continued till the present day, the Court arrives at the conclusion that the khot has no proprietary right in the soil in his village, but an hereditary right to farm the revenues.

"But the Assistant Judge has held that the khot's right in the soil has been pronounced in some measure proprietary by express enactment of the Legislature, in Reg. XVII. of 1827, Sec. VIII. Now certainly the tenure alluded to in that section, presents one or two salient points of correspondence with the khotí tenure. The subjects of the section possess an hereditary right to settle for the revenues of their village in the gross; but the bulk of the allusions in this section are to the Court unintelligible when applied to the khotí tenure. In the first place the subjects of the section are designated 'shareholders of villages,' and they are said to be jointly responsible for the revenue. Now a khot's interest, like most Hindú interests, may, no doubt, be held in shares, but there is no essential necessity that it should be so. And when it is held in shares, it seems to be the practice for the Government sometimes to hold one sharer responsible for the whole revenue, as the representative of all the sharers, and sometimes each for his share; but we hear nothing of their hold-

1866. August 1. S. A. No. 669 of 1863.

ing each sharer responsible not only for his own share, but also for the whole revenue due from all the other sharers; and this is the real meaning of joint responsibility. The tenure is then said to involve peculiarities in the occupancy, disposal, and assessment of lands, and in the collection of the revenue; but though these points may have afforded fertile subjects of dispute between the khot and his tenants, yet they are not touched by any features in the tenure. The khot's position towards his tenants is as simple as the position of Government. Indeed it is the same thing. Lastly, it is said, on a final failure of payment of the Government rent, 'the land shall revert to the Government, unaffected by the acts of the shareholders, or any of them, so far as the public revenue is concerned, but without prejudice in other respects to the rights of individuals,'—words that are without meaning when applied to the khots, for a reversion to Government involves in their case the annihilation of all rights dependent on the tenure.

"The Court is less inclined to strain the section in question to fit the case of khotí tenure, from the facts of its fitting in an easy and natural manner the case of certain tenures in Gujarát, viz., the bhágvár, narvádár, and perhaps others. The bhágvár tenure, for instance, as described in Colonel Monier Williams' Memoir of Baroche, appears to be roughly as follows:—The village is divided for revenue purposes, by its own corporate authority, into shares called bhágs, and sub-shares called áṇás. These are not specific terms of measurement; for the component parts of the different bhágs may be intermixed, and soil and situation are taken into consideration in the constitution of an áṇá. In this way the áṇás are rendered of equal value, and the liability of each holder of land for his share of the Government revenue is determined among the villagers themselves by the áṇá estimate of his holding. The Government, having apparently no cognisance of the bhág and áṇá system, estimate their demand for rent at a certain rate on the number of cultivated bighás in the village, and settle for the gross total with the principal shareholders or bhágdárs.

1866. August 1. S. A. No. 669 of 1863.

These collect from the villagers according to their holding per áṇá. The bhágdárs are jointly responsible for the whole revenue, each sharer being as it were a security for the others. It further appears that generally the whole land in the village is not included in the bhágs; but the bhágdárs, as representing the village community, have the disposal of the extra land. They lease it to the best advantage, and the rents are applied to the satisfaction of the Government demand; thereby reducing the amount which the real shareholders will have to pay per áṇá on their holdings.

"Now it appears to the Court that this tenure corresponds exactly with the terms of the section in question. Its essence, as the term 'bhágvár' implies, is a holding in shares. The joint liability of the shareholders is its main feature, its object being security to the Government for their rent, and security to the villagers against the destruction of their tenure. The occupancy, disposal, and assessment of the land, and the collection of the revenue, are marked by delicate peculiarities, springing immediately out of the shareholding system. Lastly, the reversion of the lands of the village to Government, and the collection of the revenue by the Collector, 'in the same way as in other villages,' would still leave it possible for the villagers to adjust the burden among themselves according to their bhág and áṇá system. The proviso, therefore, at the end of Sec. VIII., so unintelligible when applied to the khotí tenure, becomes quite intelligible when applied to the bhágvár. Indeed it was indispensably necessary, for otherwise the introduction of the government system of collecting revenue at bighá rates, in a bhágvár village, would be calculated to cause a *bouleversement* of the whole rights of the villagers among themselves.

"It appears, therefore, to the Court that the law in question has no application to the khots. But it may be asked, What law, then, does apply to them? To this question the Court is disposed to agree in the answer given by the counsel for the appellant. The law is silent on the khot's rights; and when it is considered how anomalous is the posi-

1866. August 1. S. A. No. 669 of 1863.

tion of an hereditary farmer of revenue, how subversive of the ideas of property in land as cherished by the villagers, and how obstructive to an improvement in their condition, the Court is not surprised that the perpetuation of the system has not been secured by the Legislature, and that the rights of the parties interested have been left to be cared for by the consideration of the executive government, and the equitable principles enforced by the Civil Courts.

"What difference, then, is made by the decision that the khots have no proprietary right in the soil of their villages, but only an hereditary right to farm the revenue.

"It appears to the Court that, if the primary object of the khot's right were a portion of the produce of the soil, his management of the village could be looked upon only as the prescribed means to effect the realisation of that portion. And, therefore, although the cessation of that management would involve, for the time being, the non-realisation of the khot's portion; yet, unless his right was lost by disuse for thirty years, he would necessarily be entitled at any time to claim back the management as the only means of placing his hand on the portion of the produce which belonged to him. His interest in the village would be property, in a most anomalous and inconvenient form, but still property. And this view seems to be sanctioned by Reg. XVII. of 1827, Sec. 3. The khot would be in the position of a superior holder, and it is nowhere hinted, either in that section or in Sec. 6, thathis failure to settle with Government would do more than suspend his right.

"But if, as the Court has held, the khot's right is the hereditary farming of the revenue, the living principle of that right would not be property inherent in the khot, but a perpetually running contract with the State. And although it would be in the power of the khot, by perpetually fulfilling his part of the conditions, to keep the contract alive, yet it would nevertheless expire on any breach of the conditions. The terms of the contract are that, on the one hand, the Government should give up to the khot its right to all legal

1866. August 1. S. A. No. 669 of 1863.

collections above a certain fixed sum; and, on the other hand, the khot should pay that fixed sum, and relieve Government of all risk and trouble. To hold that the contract is binding on the Government and not binding on the khot is inequitable, and puts the Government in a false position. It must naturally be a troublesome thing for Government to apply the machinery of assessment and collection to a village unused to Government management; and that they should have to do so at the bidding of the khot, and withdraw at the bidding of the khot, and refrain in the mean time from using their legal power to improve the system of assessment &c. according to the progress of ideas, in order that the khot's rights might be kept intact till it suited his convenience to resume them, appears to the Court to be assigning to Government a position inconsistent not only with its dignity, but with the nature and object of Government.

"It is argued, however, that the Government have always, as a matter of fact, assumed and restored the management of the village at the pleasure of the khot; and that, as a gift is not to be presumed, it must be held they acted from legal necessity. But this presumption is not conclusive, and in the Court's opinion it has been rebutted by the general facts of the case, which establish that each restoration by Government of the khot's rights has been a separate act of indulgence, mixed probably more or less with expediency. The Court cannot agree with the Assistant Judge that the Government have slumbered on their rights.

"All the preceding remarks have been intended to explain the Court's general decision, that a khot having once thrown up the management of his village, has no right to demand it back. But this decision must now be applied to the particular facts of the case.

"Has the plaintiff thrown up the management of her village? is a question of fact to be settled. Her representative, the mortgagee, certainly declined to pass the yearly kabuláyat in 1851-52; but what significance attached to that fact? It did not necessarily signify throwing up the manage-

1866.
August 1.
S. A. No. 669 of 1863.

ment, because it might have been done with the express or presumed permission of the Government. There was no express permission, but there had been a long and invariable usage implying such permission. The Court finds it impossible to deny that this usage must have affected the understanding on which the management was given up by the khot, and accepted by the Collector. Were it shown that there had been any warning given to the khot to counteract the effect of this usage, making it clear that his right of restoration would be disallowed, or even would be questioned, then the Court would have held that the khot acted with his eyes open, and must take the consequences. But as the facts stand, the Court cannot help suspecting that, had not the khot been misled by the usage, he would never have relaxed his hold of the khotship. Although, therefore, the Court holds that the Government can, by a notification of its intentions, prevent a recurrence of claims similar to those of the plaintiff, yet the claims of the plaintiff must be treated in the mode hitherto prevailing, and which Government, through invariable usage, may almost be said to have promised.

"It appears that five years ago the Collector gave the khot the chance of resuming his khotship, on payment of all Government loss during their direct management, and as the khot refused to accede to these terms, it might be said that his right to resume then terminated. But the loss which the Collector required the khot to make good was disconnected with his khotship, and arose entirely from the direct management of plaintiff's khárs. Now the plaintiff's rights over the khárs as shilotridár are, the Court think, quite distinct from his khotí rights—distinct in nature and distinct in origin. And although it appears that his liability as khot and as shilotridár was secured by the same kabuláyat, yet, in the Court's opinion, the two things are independent of each other, and therefore the khot in this case was justified in refusing the terms offered by the Collector.

"The Court then decides that in the present case the

1866. August 1. S. A. No. 669 of 1863.

plaintiff has a right to resume the management of her village, on a ground independent of the general nature of a khot's rights. But the examination of that question was necessary, as there is a complication to be dealt with. During the direct management of the village by Government, the Revenue Survey assessment has been introduced. Is the plaintiff, then, at liberty, on resuming her khotship, to set that assessment aside, to hold the engagements entered into between the Government and the ryots as void, and to return to the old and bad practice of collecting what the khot chooses to call the half or the third of the actual produce of each field?

"The Court thinks not. Under the view above laid down, although the Government was pledged to restore the management of the village to the khot; yet it held it in the mean time in its own right, and not as the trustee for the khot. It was, therefore, free to manage the village as it pleased, and in the same way as the non-khoti villages. This was a risk the khot ran when he withdrew from his post; and yet it was really no risk at all. The survey assessment was not introduced on a sudden, and in the dark. The operations commenced in 1855-56, and finished in 1859-60. If the khot wished to oppose the survey, he should have forced the restoration of his rights when the survey was threatened, instead of waiting till it was an accomplished fact. It may be said that the Court is dealing with a question which would naturally arise between the khot and the ryots, and to which the Government are no party. But the Court holds that it is a question in which the Government are interested, through their reversionary right to the khotship, whether with a view to future revenue prospects, or to the well-being of the village community, which may equally be considered the concern of Government.

"The Court, therefore, amends the Assistant Judge's decree, and decides that the plaintiff may, on paying any Government loss, resume her khotship, subject to the necessity of observing the engagements entered into between the Government and the tenants, through the Revenue Survey,

1866. August 1. S. A. No. 669 of 1863.

whether as regards the rates of assessment or the rights of tenancy.

"Regarding the plaintiff's claim to restitution of her shilotrí haks, as above observed, the Court holds that her rights stand on a different footing. They are essentially proprietary. The term shilotrídár is derived from *shel*, an embankment; and the shilotrídár is the representative of the person whose labour or capital in the construction of *shels* has reclaimed land from the sea, and, as far as cultivation and consequent revenue go, has really called it into existence. The plaintiff's rights are secured by *kaúl*, and no argument has been put forward to prove their extinction, except the failure to pay the Government rent. But if plaintiff is now ready to make good all Government demands for rent, the khárs must be restored to her.

"As regards the one and a half khárs, therefore, the Assistant Judge's decree is affirmed: costs on appellant."

The grounds of objection taken to this decree on special appeal were as follow:—

That it is contrary to law, in that: (1) The Judge has erroneously held that the Collector, during the years of direct management by himself of the khotí in question, did not manage as trustee for the khot, but independently, by virtue of some right inherent in Government; (2) the Judge has erroneously held the applicant liable for not having claimed the khotí in question previous to the introduction of the Revenue Survey, his failure in that respect having nothing to do with the merits of the case; (3) the Judge has erroneously held the applicant bound by the contract alleged to have been entered into by Government with the ryots, such contract, if made at all, not being such as should be allowed to operate to the prejudice of the applicant's right; (4) the Judge has gone beyond the subject-matter at issue between the parties to this suit, which was simply the right of the applicant to have the khotí in question returned to him, and not the terms and conditions the applicant should observe towards the ryots,—this being a matter affecting the appli-

1866. August 1. S. A. No. 669 of 1863.

cant and the ryots alone. II. That there has been a substantial error in law in the investigation of the case, which has produced an error in the decision of the case on its merits, in that: (5) the Judge has failed to inquire as to the condition of other khots, in whose villages the Revenue Survey rules have been introduced; and more particularly with respect to the other half-sharer of the khotí in question, to whom Government has granted greater privileges than those allowed the applicant by the Judge; that (6) the Judge has failed to determine the amount of loss sustained by Government during the years of direct management by the Collector of the khotí in question; or whether, in calculating the same, the applicant should have credit for any profits that may have accrued during any particular year of this direct management, or on any particular item of the khotí.

Anstey, McCombie, Vishvanáth N. Mandlik, and Mádhavráv K. Khárkar for appellant.

White and *Dhirajlál Mathurádás* for respondent.

Cur. adv. vult.

The judgment of the Court was delivered this day (ARNOULD, J., concurring) by—

NEWTON, J.:—This was a suit by a khot to compel the Sub-Collector of Kulábá to restore to her the management of a half-share in a khotí village, and also one and a half khárs which she claimed as a shilotrídár. It has been found that both the khotí and shilotrí rights were mortgaged by her deceased husband in 1845-46, and that, on the failure of the mortgagee to pass the customary agreement (kabuláyat) for the security of the revenue, in 1851-52, the Sub-Collector took the half-share of the khotí and shilotrí haks directly under Government management. In 1860-61 the plaintiff paid off the mortgage and claimed restoration of her rights; and on the Sub-Collector's refusal to make restoration, she instituted this suit.

The Courts below have decreed absolutely for the plaintiff with respect to the shilotri khárs, and as regards them,

1866.
August 1.
S. A. No. 669
of 1863.

therefore, no question has been raised for our consideration. The plaintiff's right to them is based on grounds entirely distinct from those on which she claims the half of the khotí —as distinct necessarily as are the khotí and the shilotrí tenures.

But, the award for the plaintiff's restoration to her half-share of the khotí having been given on special grounds, the Judge has decreed that she reënter, only on the condition of reimbursing Government for any loss sustained by her absence, and observing the rights of cultivators as guaranteed at the Revenue Survey, which has been meantime carried out. The Sub-Collector does not oppose her restoration on these conditions; but, as she objects to them, it becomes necessary, in order to determine whether she can claim reëntry unfettered by the terms imposed, to inquire into the character of her rights as khot.

The question may be stated as being in effect, whether as khot she possessed a proprietary right in the *soil*, or was merely an hereditary farmer of the revenue;—or, more explicitly: (1) Whether as khot she retains a right to reënter on the management of half the village of Pegode, after having abandoned it for several years, during which it was conducted by Government; (2) whether she is bound to conform to the revenue settlement made by Government with the cultivators in the interval.

On looking to decided cases for assistance in determining these points, we find that, though disputes between individual claimants to khotships have on several occasions formed the subjects of litigation, no decision appears to have been given by the late Ṣadr Court or by the High Court as to the right of a khot as against Government.

Nor do we find any express law applicable to the case, except the provisions of Reg. XVII. of 1827, Chap. VI., which are applicable to farmers generally. Sec. VIII. of that Regulation has been held by the court of original jurisdiction to include the khotí tenure; but we cannot concur in that

1866. August 1.
S. A. No. 669 of 1863.

opinion. The holdings to which the provisions of that section relate are those to which the element of "shareholders" is essential, as the tenures of bhágdárs and patidárs with joint liability in Gujarát. In a khotí village the circumstance that there are shareholders, when it exists, is an accident resulting from the operation of the prevailing laws of inheritance. The class of holdings, respecting which this section provides for the realisation of the revenue, "without destroying the tenure," seems to be the same as those for the preservation of which it was subsequently found necessary to pass the Bombay Act No. V. of 1862, on the ground, as stated in the preamble, that the permanence of the tenures was endangered.

No lease or titledeed of any kind is relied on. It is admitted that a khot is a farmer of land revenue, and, further, that the right has now become hereditary. This result was to be expected in a country in which from time immemorial the succession of a son to his father's occupation has always been looked upon as the natural and fitting arrangement. It has been pointed out to us that at so late a date as A.D. 1808, in cl. 2, Sec. XVIII. of the Bombay Reg. I. of that year, the term "khot" is defined as a temporary farmer, to whom the lands were let out annually; but from the context it does not appear that this definition was considered to be applicable at the date of the Regulation, though Sec. XX. shows that it applied down to A.D. 1788 in the island of Salsette.

The material facts found in the able judgments of the courts below with regard to the tenure appear to be the following:—1*st*, Since 1819-20 khots have been required annually to enter into formal agreements, in which they engage to make good to Government the fixed sums at which the revenues of their khotís are assessed:—2*ndly*, A limit is fixed by custom to the demands of the khot against the actual cultivators; and the khot, while a gainer if he can realise more than the fixed sum due to Government, is a loser if unable, on account of unfavourable seasons or other causes, to exact that amount:—3*rdly*, As the khot settles

1866. August 1. S. A. No. 669 of 1863.

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 account, any waste or uncultivated land of the village. If, however, he fails to contract by kabuláyat for the fixed assessment for any year, and the duty of realising 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:—4*thly*, As a matter of fact, whenever a khot, after failing for some years to execute the usual kabuláyat and pay the fixed assessment, has applied to be restored to the management, Government have always acceded to the application; 5*thly*, In such a case the khot is required, before restoration, to make good any loss which Government may have sustained in collection of the revenue, during the years in which he failed to pay it; but if any profit has accrued to Government, it is, as a rule, retained; 6*thly*, The rights of a khot are commonly transferred from one individual to another by sale or otherwise.

Do these facts establish more than is admitted, namely, that the plaintiff had an hereditary right of farming the half of the village of Pegode, as long as she continued annually to enter into the customary agreement? Do they prove that she as khot had any such proprietary interest in the village, as would authorise her to claim restitution of the half-share unconditionally, after failure during several years to discharge the office of khot? We think not. We think, further, that some of the above facts militate against the title alleged by the plaintiff.

The fact of most apparent value for the purpose of showing that a khot has more than an hereditary right to farm the revenues of his khotí, dependent on his execution of the annual security for the amount, is the circumstance that when a khot has thrown up the duties of his office for a time, he has invariably, except in the present case, been restored to it on application. This fact is deprived of almost all its force as the groundwork of an argument in the plaintiff's

1866. August 1. S. A. No. 669 of 1863.

favour, by the consideration that the same motives of convenience, which originally led to the farming of the revenues of those poorer and more isolated villages of the Konkan—where the population is so little advanced that even down to the present date the assessment is, it appears, payable in kind,—may have induced the Government readily to accept the proposals for reëntry made by a farmer whose *right* to reenter, it would not have acknowledged; and it seems that the Peshwa's government did not hesitate to eject khots when it suited its convenience.

The only other ground on which an argument favourable to the title alleged by the plaintiff can be founded, is the circumstance that a khot's rights are commonly made the subject of mortgage, sale, or other transfer; but that the existence of such power of transfer does not establish the right asserted, is clearly shown by the fact that the right of occupancy of *gatkuli* land,—which also is hereditary and transferable, and indefeasible as long as the assessment is annually paid,—is yet a right, the continued possession of which is conditional on due payment of the assessment.

On the other hand, the fact that Government, on reinstating a khot, retains any profits which may have accrued from the management of the village or share during his failure to act as farmer, strongly negatives the supposition that Government in such a case act as trustee for the khot during his absence; while it confirms the conclusion already drawn, that Government reinstates a defaulting khot, not as admitting his right to be restored to the vacated office, but because it has hitherto been inconvenient to enforce the forfeiture.

So, again, the annual execution of a *kabuláyat*, and the terms of these documents must be considered as rather opposed, than favourable, to the claim set up by the plaintiff.

And 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

1866. August 1. S. A. No. 660 of 1863.

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.

The most, therefore, that the plaintiff has succeeded in establishing, is, that down to 1851-52 she possessed an hereditary right to farm the revenues of half the village of Pegode, dependent on the performance by her, from year to year, of the duties discharged by a khot with respect to the realisation of the revenue and otherwise; and the lower appellate court having for special reasons decreed that she be restored to the management of the share of the khotí, we do not consider that she has made out any right to object to the conditions on which reëntry has been awarded,—namely, that she pay any loss which Government may have suffered through her default, and observe the engagements entered into between the Government and the tenants, through the Revenue Survey, whether as regards the rates of assessment or the rights of tenancy.

We affirm the decree of the Judge; and order that the costs of this appeal be borne by the special appellant.

TUCKER, J.:—This suit was instituted to recover a moiety of the khotí estate in the village of Pegode, and also certain lands styled khárs, *i.e.*, reclamations from the sea, which it is stated belonged to the plaintiff, but had been taken possession of by the revenue authorities ten years prior to the institution of the suit.

So far as the khárs are concerned, decrees have been given by both the lower courts in favour of the plaintiff; and with reference to this portion of their decision no special appeal has been made to this court: so it is only with the khotí estate we have to deal.

1866. August 1. S. A. No. 669 of 1863.

The court of first instance (H. Birdwood, Assistant Judge of the Konkaṇ) decreed to plaintiff the restoration of the khotí estate absolutely, on the payment of any losses which may have been sustained by Government during its interim management; but this decree was modified by the lower court of appeal (C. Gonne, Joint Judge of the Konkaṇ), by annexing to the restoration a condition that the plaintiff was to observe the engagements which had been entered into between Government and the sub-tenants of the estate, through the Revenue Survey, whether as regards the rates of assessment or the rights of tenancy.

The case was argued before us by Mr. *Anstey* for the plaintiff, and Mr. *White* on the part of Government; and it was contended by the former that, the lower appellate court having substantially admitted in its judgment that the plaintiff had a valuable estate or interest in the village, of which she could compel the restoration, it was not competent to the said court to add to the restoration a condition that the plaintiff was to abide by any arrangement or settlement which the Government might have made intermediately with the sub-tenants, to which she was no party; and further that, in taking an account of the management of this estate, the lower courts should have directed the plaintiff to be credited with the profits that had been made by Government in any particular year, to set off against the losses in other years, for which she was made responsible.

Mr. *White*, on the other hand, contended that, as plaintiff was a mere farmer of the revenue, who entered into an engagement with Government annually, Government had a right, during her temporary abandonment of the farm, to make such arrangement with the actual cultivators of the soil as it pleased; and the plaintiff, when re-admitted to the farm, would be bound by the settlement which had been made in the interim.

The main question which we have to determine depends upon the nature of the estate possessed by the plaintiff in the village. If this was definite and permanent, and partook

1866. August 1. S. A. No. 669 of 1863.

in any degree of a proprietary character, and if it comprehended a right of reëntry after temporary abandonment, it seems to me that, while this estate existed, no change could be made in the relations between the khot and the inferior tenants, which would be binding on the khot after restoration, unless the khot had previously assented to the intermediate settlement made by Government, or had subsequently ratified it. In other words, if the plaintiff was entitled to demand the restoration of the estate, it seems to me that she was also entitled to require that it should be returned to her in its integrity.

The description which the Joint Judge has given of the khotí tenure, as it exists in the South Konkaṇ, founded chiefly on the evidence of Mr. George Scott, a revenue officer of experience, who was the principal witness brought forward by the Sub-Collector, appears to me to demonstrate conclusively its proprietary character.

Though the khot is styled a farmer of the revenue, who is obliged annually to sign a kabuláyat, or written agreement, in which the conditions on which the village has been leased are recited, and to give security for the annual revenue due to Government, yet it is admitted that he has an hereditary right to hold this farm, and can transfer his interest by sale or mortgage. It is also acknowledged that he can abandon this farm temporarily, at the conclusion of any year, if he pleases; but that he is entitled to readmission, on paying up any losses which may have resulted to Government during the time he has been out of occupation. It is further admitted that the revenue which he has to pay is a fixed grain rent, which can only be altered on a general survey of the district, and that he may levy rents from the occupants of the soil who are not *dhárekaris*, in excess of the Government demand, subject only to the limit which has been sanctioned by general usage. It was also allowed by Mr. White, in the course of the argument, that during the existence of the farm he had full proprietary rights over the lands which were unoccupied at the first creation of the

1866. August 1. S. A. No. 669 of 1863.

farm, and which had been brought under tillage through his agency. Now, an interest in land which is heritable, alienable, and includes a power of disposal over particular portions of the soil, and also a capability of restoration after temporary relinquishment, possesses all the essential characteristics of proprietary right; and an estate composed of these ingredients cannot be said to be defective in any of the elements which ordinarily constitute property in land. An hereditary right to farm a particular tract of land, on payment of an assessment which can only be varied under certain determinate circumstances, is a proprietary estate in the said land, though the possession of that estate may not confer unrestricted dominion over the whole or any part of that land, and though the estate itself may be limited by the estates which other persons have acquired in portions of the said land, or in the entire territory.

In Captain Wingate's able Report on the Ratnágirí collectorate in 1851, which has been published by the Government of Bombay in its printed Selections, Part II., it is stated that the khotí tenure originated in the times of the Bijápúr kings, and that it had grown into a regularly established and acknowledged right of farm. It would seem that in 1819 and 1820 and in 1821 and 1822 our chief revenue authorities in that district, whose Reports are quoted by Captain Wingate, were of opinion that the khots possessed an absolute proprietary right over the entire lands in their respective villages; but afterwards the extent of this right came to be questioned, and it was contended that there were tenant-rights vested in certain classes of occupants, which limited the khot's rights. Captain Wingate, who was a strenuous supporter of the latter view, appears to have admitted that in a certain description of lands, which he styles *gávák*, a khot's right of disposal was unrestricted; so that, if we accept his view of a khot's interest in his village, it was undoubtedly proprietary in its character.

I confess I do not understand what property in land means, if an hereditary and saleable right to a farm, added to a power of disposal over a portion of the lands included

1866.
August 1.
S. A. No. 669 of 1863.

in the said farm, does not constitute a proprietary right. That such interests are esteemed property, and valuable property too, is proved beyond dispute by the numerous suits which have been brought to obtain possession of a share in these estates, since the British occupation of the country.

The origin of a khot's estate seems to be precisely the same as that of the zamindar's in Bengal, to whom absolute dominion was given by the permanent settlement of Lord Cornwallis; but though the non-recognition of tenant-rights on that occasion may have been an error, and in my humble judgment it was an error, yet the existence and recognition of such tenant-rights cannot divest the mesne or intermediate estate of its proprietary character. In the lands where the tenant-right existed, the khot would have a reversionary interest, if the occupant abandoned them, or refused to pay the prescribed rent, and over the other lands his ownership would be complete. It seems to me, then, that there is some confusion of thought in the conclusion that an estate which involves incidents of this kind is not a property in land.

If I had entertained any doubt of the proprietary character of a khot's estate in a khoti village in the South Konkan, it would have been removed by the words used in Reg. XVII. of 1827, Sec. VIII. (*a*), from which it would appear that

(*a*) The section referred to is as follows:—

Clause 1:—"Nothing contained in any of the preceding sections shall be understood to affect in any way the peculiarities of the tenures of shareholders of villages settling hereditarily and by right for the revenues of their villages in the gross, and thus possessing in some measure a proprietary right in the land of their villages; the said peculiarities shall be respected and preserved, whether they relate to the occupancy, disposal, and assessment of the lands of the village, the collection of the revenue, and the joint liability of the shareholders, or to the intermediate steps prescribed by the terms of the tenure and by local usage for the purpose of realising of revenue in the case of non-payment without destroying the tenure."

Clause 2. "Provided, however, that the land and its crop shall, in these villages as well as in others, be held to be ultimately liable for the revenue; and that when the shareholders fail to pay such revenue, and the intermediate steps in such cases prescribed by the tenure and the local usage have been inefficient, it shall be competent to the Collector to manage the said villages in the same way as others, and the lands of any such village shall then revert to the Government, unaffected by the acts of the shareholders, or any of them, so far as the public revenue is concerned, but without prejudice in other respects to the rights of individuals."

1866. August 1. S. A. No. 669 of 1863.

the Legislature of that day considered that persons settling hereditarily and by right for the revenues of a village in the gross, did possess in some measure a proprietary right in the land of such villages.

I am unable to concur with my learned colleagues that the provisions of this section are not applicable to a person in the position of the plaintiff in this suit. She is a shareholder in a village divided into shares, who settled hereditarily and by right for the revenues in the gross, and as such is entitled to have all the peculiarities of her tenure respected and preserved, whether they relate to the occupancy, disposal, or assessment of the lands of the village.

The terms of the enactment are general, and she clearly comes within the words, so that she is entitled to benefit by the protection which the statute affords. It may be that the framers of this Regulation had in contemplation more especially the bhágdárí and narvádárí tenures of Gujarát, though the fact that, in the Maráṭhí translation published by the authority of Government, the words "watní khot" are actually used, renders the conclusion somewhat doubtful; but there is nothing in the language of the Regulation which limits its operation to the Gujarát landholders above named, who are nowhere specifically mentioned; and I conceive that under no just principle of interpretation can the plaintiff be excluded from any advantage which the law in question confers. The circumstances that a khotí estate may sometimes vest in a single individual, and that it does not necessarily always comprehend any joint liability, are not, in my judgment, sufficient reasons for concluding that the proprietors of such estates did not come within the scope of this law. An estate of inheritance, following the Hindú law of succession, will usually descend to a body of shareholders; and at the time when the Code of 1827 came into operation, a large majority of the khotí holdings (which in the Ratnágirí collectorate amount to more than nine-tenths of the entire number of villages in the district) (*b*) must have been in the occupation of groups of coparceners. It is a signi-

(*b*) Captain Wingate's Report.

1866.
August 1.
S. A. No. 669
of 1863.

ficant fact that in the court of first instance, the defendant, the Sub-Collector, founded his assertion that the village had reverted to Government on the second clause of this particular section of the Regulation, so that at that time he appears to have had no doubt of the applicability of this law to khots. Mr. White was unable to explain this change of opinion on the part of the defendant.

Mr. White, in his opposition to the plaintiff's claim, mainly relied on the fact that an annual agreement being passed by the khot to the Collector reduced his estate to little more than a tenancy from year to year. It appears to me, however, that the proposition cannot be maintained. The agreement appears to have been introduced by the British Government for the preservation of the conditions of the lease, and in order that the payment of the annual revenue or rent might be duly secured; and I concur with the Joint Judge in considering that the execution of this periodical agreement by the lessee does not alter the character of a khot's estate, though it is certainly a peculiar incident. It is worthy of remark that the practice of requiring this agreement is said to have commenced in A.D. 1819-20, at which time the absolute proprietary right of the khot in the entire lands of the village was recognised by the revenue authorities. (*c*)

A watandár khot, whatever may have been his origin, has acquired by prescription an hereditary right to enter into this agreement, and to hold the village under the customary conditions of his tenure; and this right cannot now be resisted, so long as he performs those conditions. In the present case the Sub-Collector has refused to allow the plaintiff to subscribe the annual agreement, or to resume the position of a khot, until she shall acquiesce in certain settlements which the Sub-Collector has made with the occupants of the subordinate holdings, fixing the assessment to be levied in future from those ryots for a long term of years. The attempted imposition of the condition is an admitted

(*c*) *Vide* Captain Wingate's Report, paras. 20, 21, and 22.

1866. August 1. S. A. No. 669 of 1863.

innovation; and the existence of no law or usage has been alleged, much less proved, which authorises such a proceeding. I hold, therefore, that the plaintiff is entitled to enter into this engagement, and to reënter upon the khotí estate, on the payment of any losses which may have been incurred by Government during their intermediate management.

The counsel for the special appellant has contended that, in taking an account of these losses, the plaintiff should be credited with any profits which may have been realised by Government during any portion of the term during which the khot's estate was under attachment; and it certainly seems to me only equitable that this should be done. If a khot's interest in a khotí village be a complete estate (which I hold it to be), from the management of which a khot may withdraw, with a privilege of resumption on payment of losses, there can be no just ground for the retention on the part of the Government of any surplus profits which may have accrued during any part of the period of management; and I should not have been disposed to uphold the practice, even though, as Mr. Scott deposes, it may have been for a long time prevalent in the Ratnágirí collectorate, as it would seem that in the Kulábá sub-division, in which the village which forms the subject of this suit is situate, a more equitable settlement of accounts has been permitted in at least four instances. But I consider that this point cannot be entered upon in the present special appeal, as the appellant raised no contention on this ground in the lower appellate court, but would seem to have acquiesced in the Assistant Judge's decree. This particular objection must be held, therefore, to have been waived, and the question cannot be reopened in this special appeal.

For the reasons I have given above, I am of opinion that the District Judge committed an error in law, in adding to a decree for the restoration of plaintiff's estate, a condition that she must be bound by the settlement which had been made by the Sub-Collector when the estate was under attachment, and to which she had not assented; and if the decision of the cause had rested with me, I should have re-

1866.
August 1.
S. A. No. 669 of 1863.

versed that portion of the District Judge's decree, and have affirmed the decree of the Assistant Judge, and have made the defendant, the Sub-Collector, liable for plaintiff's costs in all courts.

I may remark that the opinion which I have given with respect to the rights of a watandár khot coincides with a judgment which I passed when Judge of the Konkaṇ in 1863, in the case of the *Conservator of Forests* v. *Bálkrishṇa Soïru Tipnis*, Appeal No. 541 of 1862.

In the argument at the bar, allusion was made to Reg. I. of 1808, Sec. XVIII., cl. 2, in which the khots in Salsette are described as temporary farmers, and very bad and exacting landlords. From Sec. XX. of the same Regulation we learn that in the year 1788 it was proposed by Mr. Farmer, who was then in charge of the island, "to encourage persons to pursue the cultivation and general improvement of the Company's villages, by ensuring them and their heirs for ever the fruits of their labour and expense, and at the same time securing to the Company, as lords of the soil, a fair participation in these improvements," so as, in his idea, "to convert the system of needy adventurers and temporary farmers into one of permanent zamindars." The Court of Directors of the late East India Company, though inclined to concur in Mr. Farmer's suggestions, required further information before assenting to any final or permanent system. It would seem to me that lapse of time, and the tacit acquiescence of Government, have effected for the watandár khots of the South Konkaṇ, the conversion which Mr. Farmer wished the Court of Directors to make in the case of the temporary farmers of Salsette.

The decree in this case will follow the decision of the majority of the Court, but I direct that my dissent be recorded.

Decree affirmed.