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although not completed by the grant of a certificate, was one which the Court, at any rate, would not allow to be disturbed. In *Raj Kishen Mockerjee v. Radha Madhub Holdar* (1), Sir R. Couch says: "There was an order confirming the sale, which order would relate back to the time of the sale; the sale would be confirmed as from the date when it was made. And although the certificate of the sale might be necessary for the purchaser, if he was seeking to establish his title against other persons, yet without any certificate the defendant, the mortgagor in that suit (in which the property was purchased) and the plaintiff in the present suit (who had acquired the title of the mortgagor) would be bound by the proceedings, and there would be a good title against them." In other words, where the question is between a party to the suit under execution and the purchaser at the auction-sale, the former cannot, after confirmation of the sale, dispute the latter's title. The order confirming the sale would complete the title as against him. The plaintiff here represents the interest of her husband, who was the defendant in the suit in execution of which the present defendant acquired his title. The defendant is, moreover, lawfully in possession (having been so originally as mortgagee), and is resisting an equitable right. The circumstances are thus on [595] all fours with those of *Shivram Narayan v. Ravji Sakharam* (2) where this Court, following the decision of Couch, C.J., held that the defendant had a good title against the plaintiff without the aid of a certificate.

We must, therefore, discharge the order of the District Judge, and send back the case for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

FAKI ISMAIL VALAD FAKI ALI SHILOTRI (*Original Defendant*),
Appellant v. MAHOMED ISMAIL VALAD MAHOMED IBRAHIM
MAKBA (*Original Plaintiff*), *Respondent*.* [6th September, 1887.]

Khot—Managing khot's right to create tenancies—Maphi istava lands—Suti lands—Sanad—Construction—Fraud.

A managing *khot* is entitled without any express authorization, to create tenancies in land even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes up land, he can do so consistently with the conditions of the *khoti* tenure; for a *khot*, as regards lands in his private occupation, may be a tenant to himself *qua khot*.

In 1832 the British Government granted to the plaintiff's father, Mahomed Ibrahim Makba, the village of Ransai on *khoti* tenure by a *sanad* which provided (*inter alia*) as follows:—

1. That the whole of the land lying waste in the village in the year 1830-31 was granted as *inam*.
2. That, exclusive of this *inam* land, all the rest of the village was granted on *khoti* tenure on certain conditions and stipulations set forth in twelve clauses, the chief of which were the following:—

Clause 1st provided that the *khot* should annually pay to Government a fixed sum of Rs. 249. 2as. 35rs.

* Appeal No. 87 of 1884.

(1) 21 W.R.C.R. 349 (351).

(2) 7 B. 254.

Clause 7th provided that the *khot* should allow the lands, which had been granted on *maphi istava* tenure to certain *kowldars* before the date of the *sanad*, to continue in their possession; that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the *khotship*.

Clause 9th provided that the holders of the *suti* lands in the village were the owners of those lands. Should a new survey be made and a new assessment [596] settled, the same should be settled by Government for the holders of the *suti* lands agreeably thereto.

From 1845 to 1871 the management of the *khoti* village was entrusted to the defendant as a *maktadar*, or lessee, under two *kabulayats* passed by him—one in 1845 to Mahomed Ibrahim Makba, the grantee of the *khoti* village, and the other in 1858 to the grantee's heirs and legal representatives.

By cl. 5th of the *kabulayat* of 1858 the defendant agreed to carry on the management of the village and render a detailed account of the balance of the village revenue every year.

Clause 7th of the same *kabulayat* was in the following terms:—

“ I (the lessee) will bring under cultivation and into prosperous state the waste, culturable, and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village) nor lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage, you may suffer.”

In 1859 some of the *maphi istava* lands were sold by the Collector for arrears of assessment, and bought in by Government. The defendant applied to the Collector to have the lands transferred to him, and the Collector transferred them to his name.

Shortly afterwards the defendant acquired some more lands, which were held on *suti* tenure in the village. He either purchased them or took them up on the tenants abandoning them. In 1861, when the survey was introduced into the village, he got his title to these lands recognized by the Superintendent of Survey.

In 1871 the defendant's management of the village ceased. But he refused to deliver up to the plaintiff either the *maphi istava* or the *suti* lands which he had acquired during his management.

The plaintiff, therefore, sued, as *khot* of the village, to recover the said lands with mesne profits, alleging that the defendant had illegally and fraudulently acquired those lands on his own account while acting as plaintiff's agent, and praying that he should be declared to have acquired and held them in trust for the plaintiff.

The defendant contended (*inter alia*) that the lands in suit were not included in the *khoti* grant; that they belonged to Government; that he had acquired some from the Collector and the rest from the Superintendent of Survey; that under his *kabulayats* he was entitled to take up the lands direct from Government, and that the plaintiff was only entitled to the assessment due on the lands which he had refused to accept. Lastly, the defendant denied that he had acted in fraud of the plaintiff's rights in acquiring the lands in dispute on his own account.

Held, on the construction of the *sanad*, that the plaintiff being the *khot* of the whole of the village exclusive of the land granted in *inam*, the *maphi istava* lands were included in the *khoti* grant; that the *khot's* interest in them, whatever [597] might be the extent of it, was not separable from the *khoti* estate; and that the *khot* had a reversionary interest in the *maphi istava* lands as well as in the *suti* lands, which had been abandoned by their former occupants.

Held, also, that the defendant was not precluded by the terms of his lease from acquiring the lands in dispute on his own account. The engagement to furnish accounts of the balance of the village revenue at the end of each year was simply an engagement to furnish the plaintiff with information which would be of use to him, and which indeed it would be necessary for him to possess when he resumed the management of the village on the determination of the lease. It imported nothing more than that; and the whole transaction evidenced by the *kabulayats* was merely an assignment, in consideration of a fixed

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annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter to be exercised and discharged for a certain period by the former. For that period the defendant was the *maktadar* or tenant of the plaintiff's *khotship*; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was bound jealously and scrupulously to protect the plaintiff's interests, so far as they were in his keeping, yet he was not bound by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*.

Under cl. 7th of the *kabulayat* of 1858 the defendant was at liberty either to take up waste lands himself or put in tenants; if he put in tenants on leases, the special advantages of any leases were to expire with his own lease. But the actual occupation of land either by himself or by his tenants was not to be interfered with at the determination of his lease, so long as he or they continued to pay the assessment according to the practice of the village.

The defendant could, therefore, without the intervention of the Collector, have taken up the *maphi istava* lands in suit and become himself the tenant; and he could have also acquired the *suti* lands from former *sutidars*, or taken them up if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands he needlessly invoked the assistance of the Revenue authorities, would not invalidate his title if it could not be impugned on other grounds.

Held, further, that the defendant was not guilty of fraud, as there was no evidence to show that he had acted in a surreptitious or secret manner in acquiring the lands in suit. On the contrary his action in applying to the Revenue authorities was a sign of his good faith rather than of any fraudulent intent. The plaintiff was, therefore, not entitled to oust the defendant from the lands in suit.

APPEAL from the decision of Luis J. DeSa, Second Class Subordinate Judge of Panvel, in suit No. 93 of 1879.

By a *sanad* dated 1st December, 1832, the British Government granted to the plaintiff's father, Mahomed Ibrahim Makba, the whole of the land then lying waste in the village of Ransai in absolute *inam*, and the rest of the village on perpetual *khoti* tenure.

[598] The material portions of the *sanad* are as follows:—

"To Mahomed Ibrahim Makba Munshi, residing in the island of Bombay. From George Giberne Saheb, Esquire, Bahadur, Principal Collector (of the) zilla Konkan (with) compliments, *Sur* year one thousand two hundred and thirty-three, (A.D. 1832-33), *Shak* 1754, the name of the year being Nandan. On your having presented a petition to the Bombay (Government) dated the 27th of October, 1831, for the grant of the village of Ransai, taluka Panvel, on *khoti* (1) (tenure) and the waste land in the village as an *inam* (2). (I) was written to from Bombay to institute an enquiry (into the matter), and in consequence thereof (I) having forwarded a communication in writing on the 22nd of December, 1831, an order dated the 9th of January, 1832, was received from Bombay to the effect that the whole of the land that may be waste in the aforesaid village in the (*Sur*) year one thousand two hundred and thirty-one (A.D. 1830-31) be granted as *inam* (2) (to you), and that the village be granted on the *khoti* (tenure), on receiving (from you) every year the amount of the revenue of the aforesaid village in the *Sur* year one thousand two hundred and thirty one (A.D. 1830-31). On (the order) having been received, the waste land in the aforesaid village has been granted to you as an *inam* (2) and the entire village on *khoti* (tenure). The particulars of the clauses respecting the same (are as follows):—*Clause* 1. The particulars of the *kharip* (3) land in the aforesaid *inam* village have not been.

(1) Tenure under which *khots*, who are farmers of Government villages or lands, hold their lands.

(2) A gift or grant in perpetuity.

(3) Land producing autumnal (harvest).

entered in the revenue statement of the year 1830-31, because the practice in the aforesaid *tarf* is according to the *hundibundi* (1) (tenure). Therefore (the particulars) of the waste land have been received in writing from the Mamlatdar according to what the land appears in the survey made of the aforesaid *tarf* in the (*Sur*) year one thousand two hundred and twenty-eight (A.D. 1827-28). It is land held on *maphi istava* (2) agreement, besides which there are *bighas* 73-4 $\frac{3}{4}$, namely, seventy-three *bighas* and four and three-quarters *pands*, which have been granted as an *inam* to you, and the amount (of the revenue) whereof, according to the usage of the *mahal* (3), is Rs. 376 1-84, rupees three hundred and seventy-six and a quarter and *reas* eighty-four, at the rate of Rs. 5-0-56 $\frac{1}{4}$ in cash per *bigha*. (The same together with) the waters, trees, grasses, wood, stones, have been given as an *inam*. Therefore, you and your sons, grandsons and other descendants and heirs, &c., are to enjoy the same. Should this *inam* (land) be sold to any other person, a *nazrana* (4) equal to the amount of one year's revenue shall be taken on the occasion of each of such sales.

Clause 1 (as to) the conditions of the *khoti* (tenure), the *inam* land set forth in the above clause having been accepted, the whole of the remaining village, reserving the *abkari* (5) revenue for the Government, the *ain revenue* (6) together [599] with the *sivaya* (7) *jama* has been agreed to be and is hereby granted to you on perpetual *khoti* (tenure) from (*Sur*) year one thousand two hundred and thirty-two (A.D. 1831-32); the clauses respecting which (are as follows):—

Clause 1.—The amount (of the revenue) of the village, excepting the *abkari*, is as follows:—

* * * * *

Deducting therefrom the following items * * * * * the balance Rs. 249-2-35, namely two hundred and forty-nine and a half rupees and thirty-five *reas*, is the amount fixed according to the revenue settlement of the (*Sur*) year one thousand two hundred and thirty-one (A.D. 1830-31). You are continually to pay this sum every year into the treasury of the Collector Saheb, according to the currency of the *mahal* of *tarf* Aurvalet (namely), a moiety before or immediately at the intermination of each year according to the usage of Government; but should the Collector Saheb think proper at any time in each year to take security for (the payment of) the aforesaid sum, you shall have to furnish one; and if you do not furnish such security to the satisfaction of Government, the revenue of the village shall be attached by Government according to the regulations.

* * * * *

Clause 7.—You are to allow the lands that have been granted to (different) persons on *maphi istava* (tenure) previous to this grant to continue with them. You are to recover every year from the parties holding them on *maphi istava* such Government dues as may have to be received each year on account thereof, and you are to pay the same to Government over and above the amount stipulated with you in (this) grant.

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- (1) A settlement under which the assessment is made in gross.
 (2) A tenure under which land is granted free of assessments for a certain number of years, with an annually increasing tax afterwards, till it amounts to a certain sum.
 (3) A sub-division of a taluka. (4) A present given to a superior landlord.
 (5) Revenue from spirituous liquors. (6) Ordinary or regular revenue.
 (7) Extraordinary revenue.

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Clause 9.—Such persons as possess *suti lands* in the aforesaid village have full authority to (or are the owners of) those lands. Should a new survey be made and a (new) assessment be settled by Government in the aforesaid *mahal*, the same shall be settled by Government for the holders of the *suti* (lands) agreeably thereto.

* * * * *

From 1845 to 1871 the defendant was in management of the village as a *maktadar*, or lessee, under two *kabulayats* executed by him—the first in 1845 to the original grantee Mahomed Ibrahim Makba, and the second in 1858 to the grantee's legal representatives.

The *kabulayat* of 1858 was in these terms:—

"You hold the village of Ransai as *inam* and on *khoti* (tenure) from Government. I have taken the aforesaid village from you on contract for three years at Rs. 249, in letters two hundred and forty-nine. With regard to the agreement for payment of the said amount and of the amount to be paid to Government on account of the *khoti* (tenure) the following are the clauses thereof:—

1. "This contract is to last for three years in all (*viz.*) from the (*Sur*) year twelve hundred and fifty-nine to the (*Sur*) year twelve hundred and sixty-one, (corresponding with the Christian year 1858-59 to 1861-62).

[600] 2. "I will go on paying two hundred and forty-nine rupees every year at the harvest time.

3. "I will go on paying cash by instalments direct to Subha, taluka Panvel, in respect of Government assessment in money and *bhat* in kind on account of *khoti* land.

4. "I will go on carrying the management of the village as is done every year. If I do anything more or less, and if Government attach any balance, I will answer for the same; you have nothing to do with it.

5. "I will carry on the management of the village and render a detailed account of the balance of the village revenue every year.

6. "If Government assessment increases or decreases during the three years, I will pay the same; you have nothing to do with the same.

7. "I will bring under cultivation and in a prosperous state the waste cultivable and uncultivable land of the aforesaid village. I will take the proceeds of the same during the year of my contract. After the expiration of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let the village on lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer.

8. "I will take good care of the teak trees which are reserved in the jungle. I will not suffer the wood thereof to be cut, nor will I cut it. I will not cut the jungle (common or junglee) of timber which may be useful for erecting buildings, nor will I trade in the same. If the rayats should require timber for sundry purposes, I will give the same to them.

9. "After the expiration of the years of the contract should any balance remain I will recover the same. You have nothing to do with the same."

The plaintiff alleged that while the defendant was in management of the village as a lessee, he illegally and fraudulently got certain lands in the village, which had been abandoned by the tenants, to be entered in

his own name in the revenue records, and passed a *kabulayat* to Government for the same; that in 1871, when his management ceased, he refused to deliver up possession of the said lands to the plaintiff, alleging that he had acquired those lands as his private property.

The plaintiff, therefore, sued as *khot* of the village to recover the said lands together with mesne profits from 1871 down to the institution of the suit in 1879 and for the mesne profits from the institution of the suit up to delivery of possession.

The defendant answered that the claim was time-barred; that the lands in dispute being Government property were partly granted to him by the Collector in 1859 and partly by the Superintendent of Survey in 1861-62 at the introduction of the [601] survey into the village; that they had not been acquired by him by unfair or fraudulent means; that the plaintiff could not claim ownership over the said lands under the *sanad* of 1832; that under the agreement, by which the defendant had been put in management of the village, he was entitled to acquire Government lands from Government for his own use and benefit; that the lands which were acquired in 1859 were *maphi istava* lands; that as the occupants of those lands did not pay the assessment, the lands were sold by the Collector for arrears of land revenue, and bought in by Government; that Government subsequently granted them to the defendant; that, therefore, whatever interest the plaintiff might have originally had in those lands, had become null and void as against the defendant's title; that the plaintiff was only entitled to the assessment of the lands in suit, which the defendant had never refused to pay.

The Subordinate Judge of Panvel dismissed the plaintiff's suit as time-barred.

The appellate Court reversed this decision and remanded the case for trial on the merits.

Against this order of remand an appeal was preferred to the High Court. The High Court rejected this appeal, reserving, however, to the parties the right of raising the question of limitation in the appeal against the final decree.

On remand the Subordinate Judge found that the plaintiff was entitled to the lands in dispute, and that the defendant had wrongfully acquired them. He was of opinion that the whole village in question belonged to the plaintiff on *khoti* tenure under the *sanad* of 1832, subject to certain limitations therein set forth, and that when any *rayat* relinquished or lost his interest in his holding, the plaintiff became entitled thereto by reason of his being the *khot* of the village. Accordingly when the occupants of *maphi istava* lands refused to pay the full assessment leviable thereon, and threw up the lands in dispute in 1859, the defendant, as plaintiff's agent, was bound to take up those lands on behalf of his principal. Instead of doing so the defendant, without informing the plaintiff, induced Government to sell the lands for arrears of revenue and then [602] to grant them to himself. This, the Subordinate Judge held, clearly amounted to a fraud on the plaintiff's rights, and the defendant could not equitably be permitted to take advantage of his own wrong.

With reference to cl. 7 of the second *kabulayat* (Ex. No. 23) executed by the defendant, the Subordinate Judge was of opinion that the defendant was empowered by that clause to cultivate unoccupied lands for his own benefit during the term of the lease, and that, consequently, he was

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at liberty to let them to others for the term of his own lease only, and that on the expiration of his lease he was entitled to continue in occupation of the lands on payment of rent at the customary rates. In other words, the defendant was to hold the lands rent-free during the term of his lease, and afterwards on payment of reasonable rent to the *khot*.

Upon the construction of this clause of the *ka bulayat*, as well as of the terms of the *sanad* of 1832, the Subordinate Judge came to the conclusion that the plaintiff was entitled to the lands in dispute, and that the defendant as plaintiff's agent had acquired them in trust for the plaintiff.

He, therefore, passed a decree in plaintiff's favour, awarding the lands in question together with mesne profits as claimed in the plaint.

Against this decision the defendant appealed to the District Court, but the appeal was transferred to the High Court.

Macpherson (with him *Rav Saheb V. N. Mandlik* and *Shantaram Narayan*), for the appellant.—The defendant is not a trustee. There is not a single word in the *ka bulayat* passed by the defendant showing that he stood in a fiduciary relation to the plaintiff. Under those *ka bulayats* the defendant's position is that of a lessee or assignee of the *khoti* rights in the village during the period of his lease. Clause 7th of the *ka bulayat* of 1858 distinctly enables the defendant to take up waste lands in the village, and either cultivate them himself or let them to tenants. If he himself cultivates them, he is entitled to retain them so long as he pays the customary rent. The lands in suit are partly *kowli* lands [603] and partly *suti* lands. The *sanad* shows that there is a distinction between the two classes of land. The *kowli* lands were granted to different persons before the date of the *sanad* of 1832. The *khot's* rights with reference to these lands are only to collect the assessment and pay it over to Government. Those lands are outside his *khoti* estate. They belong to Government, and they were sold by Government for arrears of assessment. Government bought them in, and afterwards granted them to the defendant, not because he was then the managing *khot*, but because he offered to pay and did pay one year's assessment. It was on this account that preference was given to the defendant over another applicant. This occurred in 1859. In 1861 the defendant acquired some *suthi* lands either by purchase from the former *sutidars*, or because they were abandoned by the occupants. And his title to these lands was recognized by the Survey Superintendent. These acquisitions the defendant had a perfect right to make on his own account. There is nothing to show that he acted fraudulently in making these acquisitions. He is, therefore, entitled to retain them on payment of the usual rent.

Telang (with him *Pandurang Balibhadra, M. C. Apte, and S. M. Rele*), for the respondent.—Under the *sanad* granted to the plaintiff's father the whole of the village, except the lands granted in *inam*, is given on *khoti* tenure. The *ahoti* rights would, therefore, extend over *owli* lands equally with other descriptions of land in the village. The *khot's* ulterior rights over the *suti* lands are quite consistent with the *sutidars* rights. If a *sutidar* abandons his holding, the *khot* has a right to take it up and cultivate it either himself or by tenants. There is practically no distinction between *kowli* and *suti* lands. When the assessment on *kowli* lands reaches the full amount, the *kowli* holding becomes a *suti* holding. As *khot* the plaintiff has a right to all vacant lands and to

make profit therefrom. The defendant under cl. 7th of the *kabulayat* was bound to do this for us. When the *kowldars* made default in payment of the assessment, it was the duty of the defendant to declare their holdings forfeited and let to them others. Instead of that, he [604] got the lands sold by the Collector and transferred to his own name. This was clearly wrongful, and in fraud of the plaintiff's rights. The defendant was in a fiduciary relation to the plaintiff. Under cl. 5th of the *kabulayat* he admits his liability to furnish us with a detailed account of the net income of the village. He was our agent, and any benefit he acquired as agent must be for, and on behalf of, the principal—*Balkrishna Vasudev v. Madhavrav Narayan*(1). The defendant who caused the sales and himself became the purchaser must be deemed to be a trustee. Refers to *Jones v. Kearney* (2).

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JUDGMENT.

BIRDWOOD, J.—The plaintiff seeks, as *khot* of the village of Ransai in the Panvel Taluka, to recover, with mesne profits, certain lands which the defendant, while lessee of the village, acquired from the Collector of Thana and the Superintendent of Revenue Survey. The plaintiff says that the acquisition was fraudulent and that the defendant should be declared to hold the lands as his trustee. He says further that he became aware of the fraud at the end of April 1871, when the village was restored to him by the defendant, without the said lands.

The defendant, among other answers to the claim, says that it is time-barred, and that the property in suit was not acquired by him wrongfully or fraudulently; that he passed a *kabulayat* to the Collector for some of the lands in 1859; and that some were granted to him by the Survey Superintendent at the time of the survey settlement in 1861-62; and, further, that the land was the property of Government; and that by the express terms of the lease on which he held the village from the plaintiff he was entitled to take up the land direct from the Government; and that, after giving up the management of the village, he annually tendered the Government assessment due on the land to the plaintiff as *khot*, but that the plaintiff refused to accept payment.

The suit was filed, in the first instance, on the 27th March, 1874, in the District Court of Thana, against the present defendant and the Collector and the Superintendent of Survey. It was decided by the Assistant Judge in the plaintiff's favour [605] on the 14th January, 1875. In appeal, the District Judge reversed the decision on the ground that, as against the Collector and the Superintendent, the suit was barred by time, and that, as against the present defendant alone, the District Court had no jurisdiction to hear it. Thereupon the plaintiff, on the 5th February, 1879, filed the suit in the Court of the Subordinate Judge of Panvel, who dismissed it as barred by time, but his decision was reversed on appeal on the 30th August, 1882, and the suit remanded for trial on the merits. An appeal against the order of remand was dismissed by the High Court, without prejudice to the right of the parties to raise the question of limitation again in a final appeal. The Subordinate Judge, Mr. deSa, who has now heard the suit, has decided it in the plaintiff's favour. His decision was appealed against to the District Court, but the appeal was transferred to this Court on the 1st October, 1884.

(1) 5 B. 73.

(2) 1 Dr. & War. 131.

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In the view we take of the case, it is unnecessary for us to consider the question of limitation. We have no doubt that the defendant is entitled to retain possession of the lands acquired by him in 1859 and 1861-62. Whether he holds those lands conditionally on the payment of the survey assessment, said to have been tendered by him, from time to time, to the plaintiff, or is liable to pay the rent payable by any particular class of *khoti* tenants, is a question which does not fairly arise between the parties in the present suit, and we do not decide it.

The village of Ransai was granted to the plaintiff's father by the Bombay Government in 1832. The *sanad* is filed as Ex. No. 16, and contains two principal clauses;—one dealing with the grant of certain lands in *inam*, and the other relating to the *khoti* grant. By the first clause, the whole of the land lying waste in the village in 1830-31 was granted in absolute *inam*, subject to a *nazrana*, equal to one year's assessment, on alienation by sale. The extent of this land was ascertained by deducting from the amount shown to be waste in a survey statement of the year 1827-28 certain lands which had since been granted on *maphi istava* tenure, under which the occupant at first holds the land free of assessment and then pays a gradually [606] increasing tax, which at last rises to the full assessment. It is one of the questions for consideration in this appeal whether this *maphi istava* land was included in the *khoti* grant. The *inam* grant comprised 73 *bighas* and $4\frac{3}{4}$ *pands*. By the second clause of the *sanad*, all the rest of the village, with its ordinary revenue (*ain jama*) and its extraordinary revenue (*sivai jama*), but not including its *abkari*, which was reserved for Government, was granted in perpetual *khoti* from the year 1831-32 on certain terms, which are set forth in twelve sub-clauses, of which it is necessary to refer only to the following: By the first sub-clause the *khot* was bound to pay annually to Government the sum of Rs. 249½ and 35 *reas*, that being, according to the *jamabandi* or revenue settlement for the year 1830-31, the revenue actually leviable by Government in that year on account of the assessment on *kharrif* and *varkas* land and on toddy trees, and on account of certain dues, taxes and fees, after making certain deductions on account of *paldars* or persons exempt from taxation. In addition to this fixed annual payment, the *khot* was bound, by the seventh sub-clause, to pay to Government the variable sums leviable from the persons to whom lands had been already granted by *kowl* or lease on *maphi istava* tenure. We think that, on the right construction of this sub-clause, the *khot* was not merely bound to hand over to Government the sums actually levied from these *kowldars*, but that he was bound to collect the gradually increasing revenue due by them, using for the purpose the power which he could avail himself of according to law, and that, whether he collected such revenue or not, he was responsible for it himself to Government. The language of the sub-clause might well have been clearer; but it distinctly imposes on the *khot*, at all events, the duty of collecting the whole amount due by the *kowldars* in any year. The sum actually collected was necessarily payable by him. That he was also liable for sums payable to Government on the *kowls*, though he might fail to collect them, we infer from the context. The position of the sub-clause in the *sanad* and the expression used with reference to the grant in *khoti*,—that it was of the "whole" (*darobast*) of the village, exclusive of the lands granted in *inam*, (and of the *abkari* revenue),—alike show that the *maphi istava* [607] lands were included in the *khoti* grants and that the *khot's* interest in them, whatever may have been the extent.

of it, was not separable from the *khoti* estate. That being so, the revenue due to Government in respect of those lands was secure, after the grant in *khoti* was made to the plaintiff's father, whether the *khot* collected the revenue or not. After making the grant, the Government no longer looked, (or at all events it was not necessary for the Government to look) to the *kowldars* for satisfaction of its revenue demand, but to the *khot*; and there can be no doubt that the defendant himself, when lessee of the *khot*, at one time recognized his liability in this matter; for he paid assessment to Government on some of the lands in suit, which were *maphi istava* lands, even when he had failed to collect it from two of the *kowldars*, the lands having lain waste "for many years," as the defendant says in his application, of the 13th December, 1858, to have the lands transferred to his name. (See Ex. No. 134.)

It appears that some of the lands in suit are included in the *suti* lands referred to in the ninth sub-clause of the clause of the *sanad* relating to the *khoti* grant. That sub-clause affirms the right of *sutidars* as owners (*mukhtiyars*) of their lands; and also declares their liability to any future survey settlement. It is not contended that these lands lie outside the *khoti* estate, and apparently they are included in the lands in respect of which a fixed annual revenue was leviable from the *khot*. It was not stated to us, in argument, when the *suti* lands in suit were acquired by the defendant. Perhaps we are not wrong in assuming that these are the lands for which the defendant says he obtained a lease from the Superintendent of Survey in 1861-62, the *maphi istava* lands or the greater part of them having been previously obtained from the Collector in 1859, after the right of occupancy of the defaulting holders had been sold and bought in by Government. It is not apparently contended on behalf of the plaintiff that he himself possessed any right, as *sutidar*, or any other private right, in any of the lands acquired by the defendant, who seems, in some way not explained to us by the counsel on either side, to have acquired the [608] right of a *sutidar* in respect of certain lands, whether by purchase from previous *sutidars* or by taking up land given up by them or otherwise, and to have had his right recognized at the time of the survey settlement when the land was entered in his name in the Government books. It is as *khot*, and not as *sutidar*, that the plaintiff attacks the defendant's position, and he can only succeed, whether as regards the *kowli* or the *suti* land, by showing that the defendant's acquisitions were in contravention and in fraud of his rights as *khot*.

Those acquisitions were made, as the plaint sets forth, while the defendant was in possession and management of the village as the plaintiff's lessee. The first lease or rather *kakulayat* (Exs. 22 and 23) was one for five years and was granted in 1845. The second (Ex. No. 23) was for three years and was granted in 1858. But on the expiry of that lease the defendant continued to be the plaintiff's lessee from year to year till 1871; and the conditions of his tenure of the *khotship* during that period must be held to have been regulated by the terms of the second lease. By the fifth clause of that lease the defendant bound himself to "carry on the management of the village and render a detailed account of the balance of the village revenue every year." It is contended for the plaintiff that this engagement to furnish accounts shows that the defendant occupied the position of a trustee towards the plaintiff, and that as the plaintiff had a reversionary interest in the *kowli* and *suti* lands, it was not competent to the defendant, when those lands ceased to be the

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property of their former owners, to acquire them on his own account. If there was a subsisting relation of trusteeship between the parties, then no doubt this contention would be good; for, under the *khoti* system, even in the Northern Konkan, the *khot* has the power to assume for himself the occupancy of neglected and vacated land comprised within the *khoti* estate. The estate created by the *sanad* in the present case was apparently of the same kind as the *khoti* estates in the Alibag Collectorate of which a description is given in *Tajubai's Case* (1). In the judgment, in appeal, of the District Court in that case, which [609] was confirmed by a majority of the Bench of this Court which heard the special appeal, it is stated that "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." In the judgment of the High Court, delivered by Newton, J., for himself and Arnould, J., it is stated that "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 * * * be viewed as the recognized mode of his remuneration for the services rendered." And Tucker, J., who dissented from that judgment, observed that "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." In the present case, then, it may be conceded that the plaintiff had a reversionary interest in the *kowli* lands, which had been practically abandoned by their former owners, and that if the *suti* lands were similarly abandoned, or if the former owners had no right to alienate them without his consent, he had such an interest also in those lands; but it does not follow that, while managing the village as the plaintiff's lessee, the defendant could not acquire on his own account the lands in suit. The engagement to furnish accounts of the balance of the village revenue at the end of each year was, as we read it, simply an engagement to furnish the plaintiff with information which would be of use to him, and which it would be indeed necessary for him to possess, when he resumed the management of the village on the expiry of the three years for which the village was leased to the defendant in 1858. It imported nothing more than that; and the whole transaction of which Ex. No. 23 is the evidence is merely an assignment, in consideration of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter, to be exercised and discharged for a certain period by the former. For that period and thereafter, till 1871, the defendant was, as he is described in the plaint, the *maktadar* or tenant of the plaintiff's *khotship*; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was [610] bound jealously and scrupulously to protect the plaintiff's interests, so far as they were in his keeping, yet he was not bound, as it seems to us, by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*. Indeed, there is a clause in the *kabulayat*, No. 23, which seems to specially authorize such an acquisition as was made by the defendant in respect of the *kowli* lands in the present case. Clause 7 is in the following terms:—"I will bring under cultivation and into a prosperous state the waste culturable and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract, you are to take the assessment of the fields

according to the practice of the village. I have nothing to do with the same. I will not let (the village?) or lease to any body for a longer period than for the period of the contract. If I let it, I will make good the damages you may suffer." The earlier part of this clause would equally apply to land allowed by an occupant to become waste during the period of the defendant's tenancy*as to land lying waste in 1858. It would apply, therefore, to the *kowli* lands in suit, and may also have applied to the *suti* lands acquired by defendant. It distinctly permits the defendant to bring waste lands into cultivation for his own full benefit pending the lease, and it seems also to permit him thereafter, if himself the cultivator, or else, the cultivator put in by him, to retain them on paying to the plaintiff the assessment "according to the practice of the village." It can scarcely be questioned that, in the present case, the defendant would have been justified in putting in some other tenant than himself on the lands vacated by the two *kowlidars*. It would have been necessary for him to do so to protect his own interests as managing *khot* for the time being, and in order to recover "in the recognized mode" his "remuneration for the services rendered" by him in that capacity. Had he allowed the land to remain waste, he would not only have suffered loss, as he actually says he did "for many years," by having to pay the assessment due on the land to Government, but he would have neglected also the interests of the plaintiff himself, who, on resuming the *khotship*, would have found this land lying waste [611] and might have had some difficulty in procuring a tenant for it. By taking up the land himself, he did not place himself in a position inconsistent with such duty as he owed to the plaintiff, or render himself less fitted to discharge that duty. As assignee of the rights and powers of the *khot* the defendant's power to grant waste lands to tenants other than himself by lease is indeed limited by cl. 7 to the period of his own lease. That restriction seems, however, to apply to any favourable terms that might be granted by the defendant as regards rent, as compared with the customary rent payable in the village. For the earlier part of the clause would apparently be applicable alike to tenants put in by the defendant as to the defendant himself. The intention seems to have been that the defendant was either to take up waste lands himself or put in tenants;—that if he put in tenants on lease, the special advantages of any leases were to expire with his own lease. The actual occupation of land was not, however, to be interfered with; inasmuch as the tenants were to continue to pay rent, though at customary rates, which they could not of course do if any tenancies created by defendant were to be altogether destroyed on the expiry of his lease. Such a construction is a reasonable one to put on the somewhat obscurely worded provisions of cl. 7 of the *kabulayat*; and the right thereby given is no more than what, we should think, would ordinarily be conferred on any managing *khot*, to enable him, even for a short period, to efficiently discharge his duties as *khot*. Such a *khot* ought, without any express authorization, to be able to create tenancies in land, even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes up land, he can do so consistently with the conditions of the *khoti* tenure; for a *khot*, as regards lands in his private occupation, may be a tenant to himself *quakhot*; see *Ramchandra Narsinha Mahajan v. The Collector of Ratnagiri* (1).

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We are inclined to think that, in the present case, the defendant could, without the intervention of the Collector, have taken up the *kowli* lands in suit and become himself the tenant, and [612] that he also could have acquired the *suti* lands from former *sutidars* or taken them up, if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands, he invoked assistance for which there may have been no legal authority, would not, however, invalidate his title, if it cannot be impugned on other grounds.

It is impugned on the ground of fraud; and no doubt, if the imputation of fraud is established, the defendant cannot retain any advantage he may have acquired. As we have said, though the defendant was not a trustee, yet a certain confidence was necessarily reposed in him as a tenant; and the question is whether he, as plaintiff's tenant, has "in a secret manner, for his own advantage," sacrificed the plaintiff's interests. If so, then he cannot be permitted to hold any advantage he has acquired by such means. (See Story's Equity Jurisprudence, s. 323). That is the rule to be applied to the case, and there is no evidence apparently to justify our finding that the defendant acted in a surreptitious or secret manner in acquiring the lands in suit. He was bound, no doubt, to pay the assessment on the *kowli* lands; and if his own wilful or negligent omission to pay the assessment had occasioned the sale by the Revenue authorities and he had then purchased, he would then in equity be treated as trustee of the land purchased by him—*Balkirishna Vasudev v. Madhavrav Narayan* (1). But that was not the case here. He brought the omission of the *kowldars* to pay him assessment to the notice of the Revenue authorities, but not apparently with the object of causing the land to be sold. The right of occupancy seems already, when he made his petition of the 13th December, 1858, to have been sold (see Ex. No. 134) by the Revenue authorities, although the land formed a part of the *khoti* estate. There is nothing to show that the defendant caused the land to be sold. He applied to have it transferred to him;—unnecessarily, so far as we can judge in the present case, to which the Collector is no longer a party;—and, after enquiry, the land was granted to him in preference to another applicant, because he was willing to pay assessment for the then current [613] year when taking up the land. His action in applying to the Revenue authorities may have been unnecessary, but it was not secret; and is rather, as it seems to us, a sign of his good faith than of any fraudulent intent. He may well have thought that an application to the Revenue authorities was necessary in the case of land granted by Government on special terms before the grant in *khoti* was made to the plaintiff. And his action, as we have already said, was distinctly to the advantage of the plaintiff. It certainly placed the plaintiff in no worse position than he was when the original *kowldars* were in occupation; and it may place him in a better position, if any rent higher than the full Government assessment should now be leviable from the defendant.

Nor can we find that, by obtaining the transfer to himself of certain *suit* lands, whether from former *sutidars* or otherwise and obtaining an acknowledgment from the Superintendent of Survey of his right to retain the possession of those lands, if that was really what he did, he acted secretly or sacrificed the plaintiff's interests, though it is quite possible that the action of the Superintendent himself may have had no warrant

in law. As to that, or, as we before said, as to the rents legally leviable from defendant, we decide nothing.

We are of opinion that no ground has been shown for ousting the defendant from the lands in suit; and that finding is sufficient for the decision of this case. The decree of the lower Court is reversed. The plaintiff's claim is rejected with costs throughout.

Decree reversed.

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[614] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

NARO PANDURANG AND OTHERS (*Original Defendants*), *Applicants v.*
MAHADEV PURSHOTAM (*Original Plaintiff*), *Opponent.**
[24th November, 1887.]

Jurisdiction—Civil Court's jurisdiction over suits in respect of an injury caused by exclusion from an hereditary office—Bombay Hereditary offices' Act (III of 1874), s. 40—Election of an officiator—Free election—Agreement in restraint of free election—Act X of 1876, s. 4—Its application to suits between private persons.

The plaintiff and his co-sharers in a *kulkarni vatan* entered into an agreement in 1869 for the performance of the duties of the *vatan* by the several sharers in turn. The agreement provided that if any of the sharers prevented the nomination of a sharer to officiate in his turn, he should pay Rs. 100 as damages to the person thus excluded from office. The plaintiff alleged that in 1883 it was his turn to officiate, that the defendants, instead of electing him in accordance with the agreement, nominated another person, who was confirmed in the appointment by the Collector. The plaintiff, therefore, sued the defendants to recover Rs. 100 as damages for breach of the agreement of 1869.

Held, that the agreement could not be enforced by a civil suit, as it was opposed to the policy of s. 40 of Bombay Act III of 1874, which contemplates a free election of an officiator by the whole body of registered representative *vatan*dars to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers.

Held, also, that a suit in respect of any injury caused by exclusion from office or service is barred by the second paragraph of cl. (a) of s. 4 of Act X of 1876. Having regard to the wording of the several clauses of s. 4, the bar therein provided is not limited to suits against Government.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiff sued to recover Rs. 100 as damages for breach of an agreement dated the 30th December, 1869. He alleged that the defendants were his co-sharers in the *kulkarni vatan* of Gopalpur; that in 1869, when the *vatan* register was prepared, all the co-sharers in the *vatan* entered into an agreement to the effect that the duties of the *vatan* should be performed in turn by the several sharers, and that if any sharer prevented the nomination of any co-sharer to officiate in his turn, he was to pay Rs. 100 as damages to the person thus excluded from office. The plaintiff further alleged that in 1883 it was his turn to officiate; that the defendants [615] objected to his nomination, and induced the Collector to appoint another person, thereby acting in direct violation of the agreement of 1869. Hence the present suit.

* Application under Extraordinary Jurisdiction, No. 103 of 1887.