

1892

SEP. 15.

*Dhondu M. Sanzgiri (amicus curiæ)* for the plaintiffs.*Narayan G. Chandavarkar (amicus curiæ)* for the defendant.

APPEL-

LATE

CIVIL.

17 B. 674.

## JUDGMENT.

SARGENT, C. J.—The decision in *Samal v. Jaishankar* (1), which was followed in *Hirijibhai v. Jamsetji* (2) and is in accordance with the remarks of the Calcutta Court in *Bijadhur v. Manohur* (3), is conclusive that the objections taken to the award by the defendant, which are the subject of issues 1, 2 and 3, preclude the Court from filing the award, unless, indeed, as Mr. Justice West expressed it in *Samal v. Jaishankar* (1), the Court considers the objections "obviously unfounded," which there is no ground for doing in the present case. The question, therefore, raised by the decision in *Dandekar v. Dandekars* (4) does not arise and need not be considered.

*Order accordingly.*

17 B. 677.

## APPELLATE CIVIL.

*Before Mr. Justice Bayley Chief Justice (Acting), and Mr. Justice Candy.*

PURUSHOTTAM YAMAN SOMAN (*Original Defendant*), Appellant v.  
KASHIDAS JEYCHANDSHET (*Original Plaintiff*), Respondent.\*

[16th September. 1892.]

*Khoti lands—Mortgage—Sale in execution of decree in mortgage—Suit for possession by assignee of purchaser at such sale—Consent of Khot to alienation.*

One Babsha, the registered occupant of certain lands situate in a *khoti* village mortgaged the lands to one Velji, who got a decree on the mortgage. In execution of the decree the lands were sold to Panachand, who assigned them to the plaintiff. In January, 1878, the defendant, as *khot*, took possession of the land, alleging that Babsha had no right to mortgage; that he had left the village and forfeited his occupancy; that he (the defendant) had thereupon rightfully taken possession of the land in 1878, and that the occupancy had been declared forfeited by revenue authorities in August, 1887, under ss. 86 and 153 of the Bombay Land Revenue Code, Bombay Act V of 1879. In 1888 the plaintiff brought this suit to recover the lands. The lower Court held that the defendant by accepting rent from the mortgagee was proved to have "consented to the mortgage and its necessary consequences."

[678] On appeal to the High Court.

*Held*, reversing the decree of the lower Court, that the plaintiff on the strength of his purchase from Panachand in 1887 had no right to eject the defendant.

[R., 30 B. 290 (303) = 7 Bom. L.R. 941.]

SECOND appeal from the decision of M. P. Khareghat, Assistant Judge of Thana.

Suit to recover possession of certain lands. The lands in dispute were *khoti* lands, of which one Babsha *alias* Babaji Hir Mehtar was the registered occupant. He had mortgaged the lands with possession to Velji, the brother of the present plaintiff. The mortgagee got a decree on his mortgage, and the lands were sold under the decree at a Court sale and were purchased by one Panachand Girdhar, who subsequently assigned his rights under the purchase to the plaintiff. The plaintiff thereupon let

\* Second Appeal, No. 307 of 1891.

(1) 9 B. 254. (2) P.J. for 1890. 250. (3) 10 C. 11. (4) 6 B. 663.

out the lands to tenants, from whom the defendant Purushottam Vaman Soman, the *khot* of the village in which the lands were situate, took possession. The plaintiff now sought to recover possession of the lands, alleging that the defendant had illegally taken possession.

The defendant contended that the lands in dispute being *khote*, the tenant Babsha had no right to alienate them. He alleged that Babsha having left the village for more than twelve years, he (defendant), as *khot* had applied to Government in the year 1878 to have the lands entered as *khote khalsa* (lapsed to the *khot*), and that his application having been granted, he had been in possession and enjoyment of the lands as owner, and that he had no knowledge of the decree on the mortgage, nor of the Court sale and purchase thereunder, and that the plaintiff was not entitled to recover possession after the lands had been entered in the Government records as *khote khalsa*.

The Subordinate Judge (Rao Saheb B. S. Joshi) allowed the plaintiff's claim.

The defendant appealed, but the Assistant Judge confirmed the decree. The defendant preferred a second appeal.

*Purushottam Parashuram Khare*, for the appellant (defendant):—The Judge found that as we received assessment from the [679] mortgagee Velji, we had consented to the mortgage by Babsha. He held that we had waived our right to object to the alienation by receiving rent from the alienee. We submit that though we received rent from the mortgagee, we never consented to the sale of the property either to the respondent or to his assignor the auction-purchaser. We are, therefore, not bound by the sale. Further, the sale had the effect of forfeiting the occupancy rights of the original tenant, and the lands being entered in the Government records as *khote khalsa*, we have become their full owner.

The Judge has found that the plaintiff's vendor did not obtain any greater right than the original tenant, and, therefore, he could not further alienate, our consent being only to the first alienation and its necessary consequences. We contend that the sale to the respondent was not a necessary consequence of the original alienation, *viz.*, the mortgage transaction effected by Babsha. It may be that the auction sale to Panachand was the necessary consequence of the mortgage, but the sale by Panachand to the plaintiff was not a further necessary consequence. The appellant is the *khot* of the village, and the lands in dispute were entered in his name, as *khote khalsa*, in or about the year 1878; while the Court sale was held in January, 1886, and the assignment to the respondent is dated February, 1887; so neither at the time of the Court sale, nor of the purchase by the respondent, the tenant had any interest in the land. We, therefore, submit that the respondent is not entitled to recover possession.

*Narayan Ganesh Chandavarkar*, for the respondent.

#### JUDGMENT.

CANDY, J.—This suit was brought in 1888 for possession of certain lands by plaintiff as assignee from one Panachand, who was the purchaser in a sale in execution of a mortgage decree against Babsha, the registered occupant of the lands in a *khote* village. Plaintiff alleged that he had let the lands to his tenants, but that the defendant *khot* had wrongfully taken possession in January, 1878. Defendant—the *khot*—pleaded that Babsha had no right to mortgage the lands, and that, by leaving the village, Babsha had forfeited his occupancy, and that he (the *khot*) had taken possession in 1878.

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[680] The Subordinate Judge found that the plaintiff as purchaser from Panachand (the purchaser at the Court sale) was entitled to bring the suit; that the occupants of *khoti* lands in defendant's villages could "make a transfer of their occupancy rights as by mortgage or sale," and that the lands were not liable to be classed as "*khoti khalsa*," since, though Babsha had left the village, his son was residing there, and the order of the revenue authorities (Ex. 12) directing the lands to be entered as "*khoti khalsa*" was passed in August, 1888, after the institution of the suit. On appeal made by the *khot* to the District Court the Assistant Judge found that there was "not the slightest evidence that any tenant ever claimed to alienate his tenancy as of right and the *khot* consented to such claim or that he ever led his tenants to expect that he would not contest such a claim. On the contrary his application in 1878 to the Mamlatdar to have the lands given up by tenants transferred to his name (Ex. 12) shows that he was ready enough to exercise his right whenever opportunity offered." But the Assistant Judge held that the *khot's* consent to the particular alienation in question had been established by the fact that he had allowed the mortgagee to be in possession and had taken rent (assessment) from him for six or seven years. "No doubt" (the Assistant Judge said) "the alienee has no more right than the original tenant, and, therefore, he cannot alienate it further, the consent being only to the first alienation and its necessary consequences."

On second appeal made to this Court by the *khot*, it has been pointed out that on the Assistant Judge's finding the plaintiff is not entitled to succeed; for admitting that the *khot* consented to the particular mortgage by Babsha to Velji (as to which reference may be made to the remarks of this Court in *Nagardas v. Ganu* (1)), and that a necessary consequence of that alienation was a suit brought by Velji on the mortgage, and a Court sale, in which Panachand was the purchaser, it was not a further necessary consequence that Panachand should sell his rights to the plaintiff. To this the plaintiff's pleader rejoins that the plaintiff is an undivided brother of Velji, the original mortgagee. This may be so; but the suit was not brought by the plaintiff as [681] mortgagee: the claim is distinctly based on the fact that Panachand had assigned his rights, as Court purchaser, to the plaintiff, and that he (plaintiff) while in possession through his tenants was dispossessed in January, 1888. It has now been found by the Assistant Judge that the *khot* took possession of the lands in 1877 or 1878, (and has held possession ever since), and that he then applied to the revenue authorities for the forfeiture of the occupancy (ss. 86, 153, Land Revenue Code). It is also clear that the occupancy was declared forfeited to the *khot* in August, 1887, before the institution of this suit (not after, as supposed by the Subordinate Judge). Whether Babsha's son resided in the village or not, it is not contended that the registered occupant or any one on his behalf paid or tendered the assessment since 1879. It is thus clear that the plaintiff, on the strength of his purchase from Panachand in 1887, has no right to eject the *khot*. Under these circumstances we must reverse the decree of the Assistant Judge, and reject the claim. All costs on plaintiff throughout.

*Decree reversed.*

(1) P. J. (1891) 107.