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to revert to the former practice. At the end of a year they will approach the subject with calmer minds on each side.

Attorneys for plaintiffs:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for defendants:—Messrs. *Payne, Gilbert and Sayani.*

### APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.*

1894.

June 26.

BA' LKRISHNA MHA'DSHET (ORIGINAL DEFENDANT NO. 1), APPELLANT,  
v. VISHVANA'TH KESHAV JOG (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Khásgi (private or personal) land of a khoti sharer—Mortgage of the khoti takshim (share)—Sale in execution of a decree on the mortgage—Partition among the khoti sharers—Interest acquired by the purchaser at the execution sale—Agreement by the mortgagor to be responsible for the revenue—Agreement coming to an end with the extinction of the equity of redemption.*

*Primá facie* all land not shown to be alienated is liable to assessment, and the mere fact that no revenue was paid by a khoti co-sharer in respect of *khásgi* (private or personal) land in his occupation is not sufficient to prove its exemption from liability when it has passed into the hands of a stranger.

One Sadáshiv, a sharer in a khoti village, mortgaged his *khásgi* land appertaining to his share in the khoti to the plaintiff and undertook to pay the Government dues on it. Plaintiff got a decree on his mortgage and in execution the land was sold, and purchased by defendant in the year 1878. In the year 1881 the khoti sharers effected partition. In 1883 defendant took possession of the land. In 1884 and again in 1885 Sadáshiv having mortgaged his *takshim* (share) including the *khásgi* land to plaintiff, the latter as mortgagee brought a suit to recover *maktá* (fixed) rent in kind payable for the *khásgi* land purchased by the defendant.

*Held*, that as the partition between the khoti sharers took place after the execution sale, only the occupancy of the land was sold to the defendant, and that the plaintiff was entitled under the circumstances to recover a fair assessment.

*Held*, disallowing the defendant's contention as to exemption from payment of the rent, that the agreement by the mortgagor to be responsible for the revenue came to an end with the extinction of the equity of redemption by the Court sale.

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnágiri, confirming the decree of Ráo Sáheb B. Y. Gupte, Second Class Subordinate Judge of Sangameshvar in the Ratnágiri District.

The facts of the case were as follows :—

Sadáshiv Raghunáth Levalekar had a share (*takshim*) in the khoti of the village of Levale. On the 23rd June, 1874, he mortgaged with possession a certain field or *thikán* which was *khásgi* (private) land pertaining to his share situate at the said village to the plaintiff, and undertook to pay the Government assessment thereon. In 1875 the plaintiff obtained a decree on the mortgage, and on 24th January, 1878, in execution of the decree, the field was sold and purchased by the first defendant, Bálkrishna.

In 1881 the khoti sharers in the village effected a partition in which the field in question was allotted to Sadáshiv.

In 1883 the first defendant took possession of the field.

In 1884, and again in 1885, Sadáshiv mortgaged with possession his share to the plaintiff who, in the year 1890, as mortgagee, brought the present suit against the first defendant and Sadáshiv to recover *maktá* (fixed) rent in kind and the local fund cess, Rs. 55-8-0, for the years 1886-87 to 1888-89 in respect of the *thikán*.

The first defendant set up his purchase at the execution sale, and contended that as the mortgage bond on which the decree was passed and property was sold contained no stipulation for the payment of the *maktá* rent and the local fund cess, he was exempted from the payment of the same, and that the rent claimed was excessive.

The Subordinate Judge allowed the claim to the extent of Rs. 38-12-9. The following is an extract from his judgment :—

“ The question, however, remains whether the first defendant is liable to pay any such rent. Defendant No. 1 pleads exemption from that rent on a double ground. His first contention is that he is not liable to pay any such rent because he purchased the land in execution of a decree obtained by the plaintiff on a mortgage-bond which stipulated that no Government revenue or rent should be paid in respect of the land. There is no dispute that the decree which led to the auction-sale was obtained on such a bond, and Exhibit 15, which is a copy of the bond, shows that the plaintiff was not to pay any revenue or rent in respect of the land during the continuance of the mortgage. But I do not think that the stipulation can avail the first defendant. The stipulation was to bind the plaintiff and Sadáshiv during the continuance of the mortgage transaction only, and I apprehend that it would not have exempted the plaintiff from the payment of the Government revenue on the land after the

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extinction of the mortgage, if he had purchased the land. The liability to pay the Government revenue on a land is annexed to it and the real purport or signification of the stipulation under consideration was that Sadáshiv was to pay the Government revenue on the land as long as the plaintiff should continue to hold the land as his mortgagee. In other words, Sadáshiv was to pay the assessment on the land only as long as he held the equity of redemption in it. Sadáshiv's liability to pay that assessment or rent ceased as soon as he lost the equity of redemption. It is true that where a mortgagee obtains a decree on his mortgage and brings the mortgaged property to sale for the purpose of satisfying the mortgage-debt, the interest of both the mortgagor and mortgagee passes to the purchaser as laid down in *Sheshgiri Shánbhog v. Salvador Vas*(1); but the first defendant's acquisition of such interest in no way affects his obligation to pay the Government revenue on the land, which is at all times annexed to the land. Defendant No. 1 could not have escaped his liability to pay the assessment on the land if it had been situate in a dhárekari village, and it makes no material difference in the nature of the payment because it is styled *maktá* by reason of the situation of the land in an inám village."

On appeal by the first defendant the Judge confirmed the decree on the ground that the defendant had by his purchase at the execution sale obtained only the right of occupancy of the land, and that Sadáshiv's khoti rights therein had remained unaffected.

The first defendant preferred a second appeal.

*Máneksháh J. Taleyárkhán*, for the appellant (defendant No. 1):— Sadáshiv mortgaged the field as his own. Being a khoti sharer, he had not to pay anything in respect of the land to anybody, nor could he as a khot recover rent from himself as tenant. Whatever rights Sadáshiv had, passed to us by the Court sale; the plaintiff himself as mortgagee caused the land to be sold. Under the mortgage-deed he was exempt from the payment of assessment. He cannot, after the sale, seek to recover assessment from the purchaser. A grantor cannot derogate from his own grant—Elphinstone on the Interpretation of Deeds, Rule 57. The plaintiff acquired no right over the field, as it was not mentioned in his deed. The partition effected by the khoti sharers in 1881 cannot affect us. The managing khot pays the assessment and recovers the rents in a khoti village. But the plaintiff's suit is not to recover assessment on the ground that he has paid it to the inámdár or that he is liable to pay it; nor does he say that he is the managing khot of the village.

(1) I. L. R., 5 Bom., 4.

*Vásudev G. Bhándárkar* for the respondent (plaintiff):—A khot in possession of *khásgi* land is a tenant in respect of that land of the whole khoti co-parcenery including himself—*Rámchandra v. The Collector of Ratnágiri*<sup>(1)</sup>. In the absence of a special agreement among the khots, a khoti sharer is liable to pay rent in respect of the *khásgi* land in his possession, though as a matter of arrangement it may not be levied from him; but a purchaser from him is liable to pay rent—*Rámchandra v. Visáji*<sup>(2)</sup>. By the Court sale defendant No. 1 only acquired the tenant right of Sadáshiv over the land, and the plaintiff, who is mortgagee of Sadáshiv's khoti *takshim*, is entitled to recover rent from him, as it has not been suggested that there was any special agreement among the khoti sharers exempting the land from payment of rent. The agreement in the mortgage-deed came to an end when the *thikán* was sold. The objection on the ground that the plaintiff was not a managing khot was not taken in either of the lower Courts.

FULTON, J.:—As the sale of the *thikán* to the first defendant took place in 1878 while the partition of the khoti between Sadáshiv and his co-sharers was not effected till 1881, we agree with the Assistant Judge in thinking that only the occupancy of the land was sold, and that the rights of the body of khots, which have now by reason of the partition and subsequent mortgages become vested, so far as this *thikán* is concerned, in the plaintiff remained unaffected. It was indeed contended that the *thikán* was not specifically mentioned in the mortgage deeds, and that, therefore, the plaintiff had not acquired any interest in it; but this argument fails, because, as pointed out by the Subordinate Judge, it was comprised in Sadáshiv's share, the whole of which was mortgaged.

Under these circumstances, we think the lower Courts were right in holding the plaintiff entitled to recover a fair assessment. *Primá facie* all land not shown to be alienated is liable to assessment, and the case of *Rámchandra v. Visáji*<sup>(2)</sup> is authority for holding that the mere fact of no revenue being paid by a khoti co-sharer in respect of *khásgi* land in his occupation is insufficient to prove its exemption from liability when it has passed into the

(1) 7 Bom. H. C. R., A. C. J., 41.

(2) P. J., 1880, p. 297.

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hands of a stranger. In the present case no special custom or circumstances have been put forward to establish such exemption. The agreement of the mortgagor to be responsible for the revenue while tending to show that the land was not considered exempt, came to an end, as explained by the Subordinate Judge, with the extinction of the equity of redemption by the Court sale which transferred to the purchaser both the personal rights and liabilities of the judgment-debtor.

We must, therefore, confirm the decree with costs.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Jardine and Mr. Justice Ránade.*

1894.  
July 2.

BHIVRA'V (ORIGINAL DEFENDANT), APPELLANT, v. SITA'RA'M  
(ORIGINAL PLAINTIFF), RESPONDENT.\*

*Hindu law—Joint family—Partition—Accounts—Manager's liability to account—Right to mesne profits previous to partition—Mesne profits subsequent to partition, how recoverable—Civil Procedure Code (Act XIV of 1882), Secs. 13, 244.*

Although, as a general rule, no member of an undivided Hindu family can have any claim to mesne profits previous to partition, yet mesne profits may be allowed on partition where one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member who claimed to treat it as impartible, and, therefore, exclusively his own.

Where a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to such profits by a separate suit. Section 244, para. 2 of the Code of Civil Procedure (Act XIV of 1882) expressly reserves such a right of suit.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, in Appeal No. 88 of 1892.

The plaintiff, Sitáram Balvant Potnis, sued to recover Rs. 1,288-11-10 on account of his share in certain cash allowances payable to the defendant Bhivráo Mádhavráo from the Government treasuries at Poona, Ahmednagar, Shrigonda, Sholápur, Bársi, Mangi, and Dadegaon.

\* Second Appeal, No. 741 of 1892.