

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

1905. YESA BIN RAMA BOLYA AND ANOTHER (ORIGINAL DEFENDANTS),
 October 10. APPELLANTS, v. SAKHARAM GOPAL GANU (ORIGINAL PLAINTIFF),
 RESPONDENT.*

*Khoti Act (Bombay Act I of 1880), sections 6, 7, 8, 9, 11 †—Khot—
 Occupancy tenant—Mortgage by occupancy tenant—Forfeiture.*

* Second appeal No. 570 of 1904.

† The Khoti Act (Bombay Act I of 1880), sections 6, 7, 8, 9, 11 run as follows:—

6. If an occupancy-right which is not transferable otherwise than by inheritance, has been so transferred, the actual holder of the land shall be deemed to be the tenant thereof, and if he, or his father, or other person from whom he inherits, has occupied or cultivated the land continuously from any time previous to the commencement of the revenue year 1845-46, he shall have a right of occupancy therein:

Provided that, if the actual holder is in possession of the land as mortgagee or lessee merely, his occupation or cultivating shall, for the purpose of this section and of section 5, be deemed to be the occupation or cultivating of the mortgagor or lessor, and that, if such mortgagor or lessor has a right of occupancy in the land, such right shall, notwithstanding the provisions of section 9, be subject to the mortgage lien or lease of the said mortgagee or lessee until the same is duly discharged or determined.

7. Privileged occupants shall continue to hold their lands conditionally on the payment of the rent from time to time lawfully due by them to the khot or other person entitled to receive payment of the same.

8. Tenants other than occupancy tenants shall continue to hold their lands subject to such terms and conditions as may have been, or may hereafter be, agreed upon between the khot and themselves, and in the absence of any such specific agreement shall be held to be yearly tenants liable to pay rent to the khot at the same rents as are paid by occupancy tenants in the village in which the lands held by them are situate: Provided that the said rates shall not exceed the maxima prescribed in section 33, clause (c).

9. The rights of khots, dhárekaris and quasi-dhárekaris shall be heritable and transferable.

Occupancy-tenants' rights shall be heritable, but shall not be otherwise transferable, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the khot, at some time within the period of 30 years next previous to the commencement of the revenue year 1865-66, or, unless in the case of an occupancy-right conferred by the khot under section 11, the khot grants such right of transfer of the same.

11. It shall be competent to the khot at any time to confer on any tenant the right of a privileged occupant of any class, or on a privileged occupant of one class, the right of a privileged occupant of a superior class: Provided that the grant by the khot of any such right shall not affect any right of Government in respect of the land which is the subject of such grant or of the trees or other forest-produce of such land.

There is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another sub-class, to place the land at the disposal of the khot. And so long as his tenancy is not determined, the land is not at the disposal of the khot. And the khot cannot claim to treat the person in possession, under a right derived from the occupancy tenant, either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture.

SECOND appeal from the decision of Mahadeo Shridhar Kulkarni, First Class Subordinate Judge, A. P., at Ratnagiri, confirming the decree passed by J. N. Kale, Subordinate Judge of Sangameshvar, at Deorukh.

Suit to recover possession of land by a khot from the occupancy tenant.

The lands in dispute were situate at Wasi, a khoti village, and stood in Government records in Yesa's (defendant No. 1's) name as his cultivatory holding or occupancy tenancies. Sakharam Gopal Ganu (plaintiff) owned an anna share in the khoti; his share was partitioned off and was designated as Dhada No. 4. The plaint lands were comprised in the plaintiff's Dhada; and he was therefore entitled to all the rights possessed and enjoyed by a khot under the Khoti Act (Bombay Act I of 1830) in respect to lands held by occupancy tenants.

In 1900 Yesa borrowed Rs. 15 from the plaintiff and hypothecated to him a moiety of the plaint lands by a deed (Exhibit 11). Again on the 6th January 1902, in consideration of the debt due under Exhibit 11 and for a fresh advance of Rs. 29, Yesa hypothecated to the plaintiff the whole of the disputed lands by a registered deed (Exhibit 12) for Rs. 44. In the latter deed Yesa covenanted to deliver possession of the lands to plaintiff in case of the default in payment of debt within the time stipulated for repayment of the loan, *viz.*, three years. The deed also contained a covenant for realisation of the amount by sale of the hypothecated property.

But within 4 months of the date of Exhibit 12 Yesa mortgaged the plaint lands to defendant No. 2, by a registered deed (Exhibit 15) dated the 20th of April 1902, and put the mortgagee in actual possession. The consideration for this mortgage was Rs. 100

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made up of Rs. 5 paid in cash and Rs. 95 being the amount of antecedent debt. The mortgagee was to pay the khot's dues.

The plaintiff, as a landlord khot, brought the present suit for possession of the lands on the ground that Yesa by his own conduct lost his occupancy rights, and that the mortgage-deed (Exhibit 15) could not transfer any valid right to defendant No. 2 as against the plaintiff. He prayed for recovery of possession of the lands from defendant No. 2.

It was contended on behalf of defendant No. 2 that the plaintiff granted the defendant No. 1 the right to mortgage the lands; that accordingly the latter mortgaged the land to him with possession, and the plaintiff had no right to complain about it; and that as defendant No. 1 got from the plaintiff himself the right which he did not originally possess, he was free to mortgage the lands to anybody.

The Court of first instance found that the plaintiff did not grant to Yesa (defendant No. 1) the right to transfer the lands in dispute; that the mortgage-deed (Exhibit 15) executed in favour of defendant No. 2 by defendant No. 1 was not passed with the plaintiff's consent and knowledge; that the plaintiff was not estopped from complaining about the mortgage-deed (Exhibit 15); and that the occupancy rights of defendant No. 1 in the lands had become extinguished and the plaintiff was entitled to claim possession thereof.

On appeal, these findings were confirmed by the lower appellate Court.

The defendants appealed to the High Court.

The appeal came up for disposal before Russell and Aston, JJ., when their Lordships sent down issues to the lower Court and wrote the following interlocutory judgment:

"We think, having regard to the unsatisfactory state of evidence in this case, that we must remand it to the lower Court to find (1) whether the plaintiff had such knowledge of the mortgage to defendant 2 as to raise an estoppel against him (the plaintiff); (2) whether the conduct of the plaintiff in any and what respect was such as to induce defendant 2 to believe that the right of transfer was conceded to defendant 1 or that plaintiff waived his right to object to such transfer."

The lower appellate Court found both these issues in the negative.

The appeal then came up for disposal before Russell and Batty, JJ.

M. R. Bodas for the appellants (defendants):—The lower Court having decided the question of estoppel in favour of plaintiff, this Court has now to consider the remaining two questions, *viz.*, whether section 6 of the Khoti Act (Bom. Act I of 1880) does not entitle a mortgagee to retain possession until at least his lien for the mortgage amount is discharged, and secondly, even if the mortgage is invalid the plaintiff khot can forfeit the land except under the circumstances specified in section 10 of the Khoti Act. We say that section 9 must be construed in conformity with section 6. The first clause of section 6 distinguishes between an actual holder and a holder who has occupied the land continuously from before 1845-46. The latter is given the occupancy right, while the former would be an ordinary tenant, who too cannot be evicted without proper notice. Clause 2 of the same section further lays down that if the actual holder happens to be a mortgagee or lessee, or if his mortgagor is an occupancy tenant, he shall have a lien on the land until the mortgage debt is discharged. If the mortgage is invalid the mortgagee may be prevented from recovering possession, but he cannot be ousted if already in possession, at least so long as his mortgagor or the real occupancy tenant has no objection. The mortgagee has a right to retain possession until his lien for the mortgage amount is discharged. At the most he can be said to be in possession as an agent or on behalf of the occupancy tenant, and so long as the occupancy is not forfeited he cannot be ousted. In Bengal it has been held that a ryot having a right of occupancy cannot be evicted merely because he asserts a right of transfer or sells his right without giving up possession: *Srishteedhur Biswas v. Mudan Sirdar*⁽¹⁾. As for forfeiture, section 10 authorizes it only when the privileged occupant resigns the land, dies without heirs or fails to pay the rent. The section does not apply to a transfer by mortgage, because in that case the

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occupant does not resign the land or give up all his rights. The equity still remains with him. He may forfeit his tenancy, only in case of complete alienation such as sale: see *Nagardas v. Gannu*⁽¹⁾. In case of a temporary transfer of possession there is no such resignation and hence there can be no forfeiture. The tenant still retains his occupancy right and the mortgagee may be said to cultivate the land on his behalf. The objection that if section 6 is interpreted in this way, section 9 is rendered practically ineffective in cases of mortgages, is clearly groundless, because the section is intended to protect the khot against being saddled with an undesirable occupancy tenant for ever. Temporary transfer or sub-leases affect him in no way and are not meant to be barred. The argument that section 6 applies to mortgages before 1845 A. D., or at least before 1880 A. D. when the Khoti Act came into operation, is also not tenable, because that is going against the plain meaning of the section, and importing things into the Act which are not expressly provided.

D. A. Khare for the respondent (plaintiff):—The khot is entitled to forfeit and recover possession of the land under section 9 of the Khoti Act. Section 6 of the Act applies only to mortgages before 1845, or at the most to mortgages before the Khoti Act came into operation. To apply it to all mortgages would be practically to nullify section 9 so far as mortgages are concerned and thus defeat the object of legislature. The khot has a right to prevent a stranger stepping into the occupancy of the land without his consent. If a person advances money on land which cannot be mortgaged, he does so at his own risk. If a tenant transfers the occupancy against the express conditions of his tenancy, he is liable to forfeiture for breach of condition and the landlord can evict any trespasser who may be found on the land. The tenant by mortgaging the land resigns his occupancy and is therefore liable to forfeiture.

BATTY, J.:—In this appeal the question for decision is whether the respondent, being a separated sharer in the Khotki of Wasi, is entitled to recover possession of certain land in which the first

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

defendant had admittedly occupancy rights, but which that defendant had mortgaged with possession to the 2nd defendant.

Both the lower Courts found that the 1st defendant had no right of transfer in respect of the land in question.

But in second appeal to this Court, questions were raised as to whether the plaintiff had in any way estopped himself from disputing the validity of the mortgage, and the case was remanded to the lower Court for findings on the questions so raised.

The lower Appellate Court has found on the issues formulated in the negative and in favour of the plaintiff.

On the return of these findings, the 2nd defendant, the mortgagee-appellant, reverted to other questions of law left undecided at the time when the interlocutory order of this Court was issued.

A decision on those questions would not have been necessary, had it been found that the plaintiff was estopped from disputing the mortgage. They revive in consequence of the issues of fact having been determined in the plaintiff's favour.

These further questions, which Mr. Bodas now urges on behalf of the mortgagee, were raised in grounds 6, 7 and 8 of the memo. of appeal to this Court, which run as follows:—

6. Apart from the question of alienability, the plaintiff has no right to claim possession of the lands by forfeiture.

7. The lower Courts erred in finding that the lands were forfeited and the reasons given to support the finding are wrong and mutually contradictory.

8. The lower Court erred in ignoring the provision in section 6 of the Khoti Act of 1880.

Mr. Bodas urges that, under section 6 of the Khoti Act, 1880, his client as a mortgagee in possession is entitled to remain in occupation and cultivation of the land, and to have his occupation and cultivation deemed the occupation and cultivation of the mortgagor, the occupancy tenant, and that the occupancy right is subject to the lien of the mortgagee, until the same is duly discharged. And he further urges that no power is given by the Act to the Khot to resume or recover possession of the land, save in the events specified in section 10 of that Act, none of which he contends have yet happened.

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The Honourable Mr. Khare on the other hand, on behalf of the Khot respondent, contends that if section 6 is to be construed as applying to such a case as the present, the result would be to render the provisions of section 9, prohibiting transfer, practically inoperative in the case of mortgages and leases—a result which, he urges, could not have been intended by the legislature. The alternative construction of section 6 which he suggests is that its operation is limited to cases arising for decision at the commencement of a survey settlement, similar to those with which section 5 deals, that is, as to rights acquired by continuous possession dating back from a time previous to 1845, and found to exist at date of the settlement. It was, however, pointed out that the first part of section 6 and the proviso to the section are alike silent as to possession prior to 1845, and that if the section were only applicable at each successive settlement, the rights of mortgagees and lessees thereunder would depend on the mere contingency of their subsisting in the particular year of a settlement, a result which could hardly have been seriously intended. The Honourable Mr. Khare then somewhat modified his contention and argued that such privileges conferred on mortgagees and lessees of non-transferable rights, were limited to transferees in possession at the date when the Act came into force: that the phrase “has been so transferred” indicates that only such transfers as had already been effected, were in contemplation: and that transfers, subsequently made, were left to the operation of section 9. The mortgagee in this case took therefore no title by the transfer and is, Mr. Khare contends, a mere trespasser, and the Khot as superior holder can eject him.

Several cases were cited in argument, but admittedly none of them turn upon the construction of section 6 *et seq.* of the Act.

The discussion of any considerations which they may suggest by analogy or with reference to general principles, must be postponed to a study of the particular enactment which governs this case.

The Act (Bombay Act I of 1880), as indicated in the preamble and in section 1 defining its extent, deals with villages held by Khots. But its interpretation clauses (section 3) mention another class of land-holders designated privileged occupants,

This class consists of three sub-divisions. The first two are not tenants of the Khot. The third sub-division, with which alone we are concerned in this case, consists of occupancy tenants who hold Khoti land with a right of occupancy, which right is common to all three sub-divisions. Their respective liabilities for rent are set forth in section 33 and their other liabilities in section 36.

The privilege common to the class and distinctive of it as a whole, is declared in section 7, and consists of the right to hold land conditionally on payment of rent lawfully due thereon. The circumstances by which the privilege is acquired and ascertained, are laid down in sections 5, 6 and 11. All these 3 sub-divisions are within the definition, in section 3 (14) of the Bombay Land Revenue Code, 1879, of inferior holders, and are included accordingly in those provisions of Part II of the Khoti Act which appear under the heading of inferior holders. Those provisions deal also with another class of inferior holders, separately treated in section 8 as tenants other than occupancy tenants. These are designated in the marginal note to that section as ordinary tenants. The essential distinctions between the two main classes, privileged occupants and ordinary tenants, are to be found in sections 7 and 8. Those sections show that while in the first class (viz., privileged occupants) the continuance of the tenure is dependent solely on the fulfilment of obligations defined by and ascertained under the Act, the second class of ordinary tenants are subject to terms settled by agreement or, in the absence of agreement, have only a yearly tenancy, on rents determined, subject to a specified maximum, by local usage. The last class of ordinary tenants come within the provisions of section 84 of the Bombay Land Revenue Code, 1879, and their holdings are terminable, therefore, by the three months' notice therein prescribed.

These very familiar and obvious distinctions, it is essential to bear in mind in applying the provisions of sections 9 and 6 to questions relating to the transfer of rights by inferior holders. The necessity for stating them at length arises from the fact that they seem to have been overlooked in the lower Courts. Section 9 declares that the rights of the first two sub-divisions of

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privileged occupants (Dhārekaries and quasi-Dhārekaries) are both heritable and transferable.

As to the third sub-division, that of occupancy tenants, the language of the Act requires careful consideration with reference to the foregoing distinctions.

It lays down that occupancy tenants' rights shall not be transferable otherwise than by inheritance, unless the right of transfer is established by circumstances found to have no existence in the present case. Those rights, as above shown, are the security of tenure on payment of statutory rent, which exempts them from liability (1) to enhanced rent and (2) to a determination of tenancy, by efflux of time or on notice given.

It is these rights of exemption alone which section 9 declares to be non-transferable, save by inheritance.

The section is silent as to the rights of the second class of inferior holders, viz., ordinary tenants. That is to say, it does not declare their tenancy rights to be equally non-transferable.

In the absence of any provision, there is no reason why the ordinary tenancy rights should not be transferable. That they are transferable has indeed been judicially decided in *Sonshet Antushet Teli v. Vishnu Babaji Johari*⁽¹⁾.

The prohibition then is only as to the transfer of the occupancy right distinctive of an occupancy tenant, and leaves untouched the right of ordinary tenancy.

There is no prohibition to disable an occupancy tenant from conferring on another any rights which fall short of the occupancy right. The occupancy tenant can therefore, without infringing section 9, allow another to enjoy such of his rights as involve no transfer of the permanent occupancy on the statutory rental. What he cannot give is his immunity from enhancement and ejection on 3 months' notice. Any attempt to transfer that is null and void. The transferee would, by section 9, be prevented from insisting on the transfer as conferring any such right on him as against the Khot.

This is recognized in the case above cited, where it was said: "In the case of an ordinary tenancy the Khot can at any time

(1) (1894) 20 Bom., 78.

get rid of the tenant by giving him notice: whereas if a transfer of an occupancy tenancy could be carried out against his wishes, he might be provided with a tenant whom he did not like and could not eject." A further reason for not recognizing the right of an occupancy tenant to alienate his special privilege is this, that it would prejudice the Khot's reversionary interest. For on the resignation by an occupancy tenant the land resigned is at the disposal of the Khot.

But there is no reason for supposing that an occupancy tenant has less power of alienation than an ordinary tenant. And therefore the transferee from an occupancy tenant would at the very least be entitled to claim that he had by the transfer obtained such rights as every ordinary tenant could give. But no ordinary tenancy, even in the absence of specific agreement, being terminable without the notice required by section 84 of the Bombay Land Revenue Code, the transferee from a tenant could in any case insist on the benefit of that provision. It is not in the present case alleged that any such notice has been given by the plaintiff to the 2nd defendant. The plaintiff claims to eject the 2nd defendant as a mere trespasser, without any notice whatever. But the 2nd defendant is not a trespasser coming in without any colour of any legal right. He is at the least entitled to rely upon the right of a yearly tenant to notice, which right nothing in section 9 prevented the 1st defendant as occupancy tenant from conferring on him.

If the premises above set forth be correct, the occupancy tenant, defendant 1, could, so far as section 9 is concerned, confer on defendant 2 all his own rights short of an occupancy tenant's rights.

But the plaint alleges that "by reason of the unauthorized and illegal transfer, the occupancy rights of defendant 1 were put an end to."

There is nothing in section 9 which entails this consequence. And it is necessary, therefore, to consult the other provisions of the Act in order to see whether this consequence follows. The only other sections relating to the determination of an occupancy tenancy are sections 7 and 10. The first of these declares the continuance of the tenancy to be conditional upon payment of

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the rent from time to time lawfully due. There is no allegation in the plaint of any default made in the fulfilment by the defendant 1 of this condition. The other section (section 10) declares the land of a privileged occupant to be at the disposal of the Khot on the happening of one or other of three events therein specified, viz., resignation, lapse from failure of heirs or others entitled, and forfeiture certified by the Collector on failure to pay rent.

The plaint does not allege any one of these events to have happened.

The plaint alleges transfer of possession, it is true. But there is no reason for supposing that transfer of possession is the same thing as resignation in the case of a privileged occupant any more than it would be in the case of an ordinary tenant. The case of *Sonushet*, above cited, shows that transfer of possession would not, of itself, operate as a surrender in the case of an ordinary tenancy otherwise undetermined.

The word 'resignation' is not defined in the Act. Its ordinary use as a legal term would imply the returning a fee by a vassal into the hands of a superior. There is no reason to suppose that it was intended to include such temporary relinquishment of personal cultivation in favour of another as might be made under section 74 of the Bombay Land Revenue Code, a section which indeed is not applicable (section 39 of Bombay Act I of 1880) to Khoti villages. For the phrase is used in section 10 in connection with all three sub-divisions of the class of privileged occupants, and the first two classes can indisputably transfer possession temporarily and even permanently without the land being thereby placed at the disposal of the Khot. The first defendant, so far from resigning, claims the right to hold the land at his own disposal, with power reserved to resume the actual possession.

It has been suggested that the transfer worked a forfeiture as a breach of the conditions of the tenure. But the only breach of the conditions declared in the Act to have that effect is failure to pay the rent, and even that must be followed by the Collector's certificate.

The Act attaches no consequence to a prohibited transfer but merely renders it abortive, null and void. It does not annihilate

the occupancy-tenants' rights. And unless they are otherwise determined therefore, the land is not at the disposal of the Khot, and he has no right under sections 7, 9 and 10 to maintain any objection except this, that the transferee cannot claim for himself any permanent tenure on the fixed statutory rent.

If the 2nd defendant, the mortgagee, depended solely on the transfer from the 1st defendant, the occupancy tenant, of the occupancy rights, he would necessarily fail under the provisions of section 9. And this would be the case if the rights of the 1st defendant were determined on the happening of any of the events specified in section 10. But as long as those rights continue, the 1st defendant is not prevented by anything in section 9 or any other provision of the Act from disposing, at his will, of any rights which he possesses other than those occupancy rights which are conferred by section 7. Thus, as decided in the case of *Sonshet v. Vishnu* above cited, he can, as long as his own tenancy is undetermined, grant to another the right which is in him, but he cannot give a right which would survive his own interest, so as to force upon the Khot a tenant claiming in his own right a permanent occupancy as against the Khot, surviving after the rights of the transferor had determined. Section 11 reserves to the Khot alone the power to confer such rights upon tenants. But no provision of the Act prevents any tenant of any class from allowing another person to cultivate in his stead or to take the profits of such cultivation as long as the tenancy subsists. The line is drawn only at the transfer of perpetual tenant rights at fixed rents by occupancy tenants who have not acquired the right of transfer under section 9 or section 11.

Thus apart from section 6 it appears to us, the mere occupation or cultivating of non-transferable land by a person who is not a tenant of the Khot, is insufficient to place such land at the disposal of the Khot, if the occupation and cultivating be in the exercise of a right derived from any tenant whose tenancy is still subsisting, and it would be but a question of academic interest to determine whether in section 6 the legislature intended only to provide for cases existing at date of the Act. For no other consequences would in the present case result from holding

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that the rights of the parties were governed only by the other sections of the Act. Had section 6 been intended, however, to apply only to the state of things existing when the Act came into force, it would be reasonable to suppose that in lieu of the phrase "has been so transferred" some such phrase would have been employed as "has before the coming into force of this Act been so transferred." Moreover, the reference to the provisions of section 9 in the last paragraph of section 6, suggests that future mortgages and leases were in contemplation. The first part of the section manifestly contemplates cases not being cases of mortgages or leases, in which the occupancy right no longer subsists in the person originally entitled thereto, and consequently the transferee having no right in the transferor to fall back upon, would not even be an ordinary tenant but for the special provision in the first sentence of the section. Hereditary occupation by such a transferee is there declared to confer occupancy rights only if dating from a time previous to 1845. The proviso in removing all doubt as to the right to occupation by a mortgagee or lessee, whose mortgagor's or lessor's tenancy is still subsisting, appears to have been deemed necessary to make it clear that the transferor could not repudiate the transfer in such cases as one beyond his powers as restricted by section 9. It does not validate, however, the survival of occupancy rights after the extinction of the transferor's tenancy. For they would then be extinguished by section 10. It only declares that the lien or lease shall subsist so long as the occupancy rights of the transferor continue. There is nothing that suggests that these provisions only apply to mortgages and leases subsisting when the Act came into force. Had it been intended that subsequent mortgages and leases should work a forfeiture in favour of the Khot, that intention would, we think, have been clearly expressed. Moreover, such an intention would obviously be liable to frustration, as nothing could prevent an occupancy tenant from giving to another all the profits of the land which a mortgagee could enjoy.

To deal briefly with the cases cited in argument, *Abalak Rai v. Udit*⁽¹⁾ turns on the language of a local Act and relates only

(1) (1877) 1. All. 353.

to transfer by sale in execution of decree. *Narendra v. Ishan*⁽¹⁾ deals with a section of a Bengal Act and a different tenure. The transferor in that instance had abandoned the land after a sale in execution. The basis of the decision was the complete abandonment by out-and-out sale and it was recognized that sub-letting was allowable and did not determine the occupancy right (page 289). *Srishteedhur v. Mudan*⁽²⁾ turns on the same principle that the entire abandonment by out-and-out sale with possession transferred, determines all occupancy rights where they are not transferable, but a sale asserting a transferable right unaccompanied by transfer of possession was held not to entail liability to ejectment. *Bhram Ali v. Gopi*⁽³⁾ also deals with the Bengal Tenancy Act, and relates to a sale, which necessarily involves the determination of all occupancy rights in the person whose interest is sold.

Of the Bombay cases *Purushottam v. Kashidas*⁽⁴⁾ is one in which the occupancy right had been declared by the Collector to be forfeited, so that section 10 of the Act applied, and extinguished all pre-existing rights. That case followed *Nagardas v. Gannu*⁽⁵⁾ in which the tenant had sold out-and-out, relinquishing possession, and thus had determined his tenancy altogether.

In *Dattatraya v. Nilu*⁽⁶⁾ all the cases above cited were considered, and section 9 was held to invalidate execution sales of occupancy rights as property over which or the profits of which the judgment-debtor had no disposing power which he could exercise for his own benefit. This clearly does not affect the transfer of rights not extending to the non-transferable privilege of permanent occupancy on a statutory rent. The case of *Sonshet v. Vishnu*⁽⁷⁾ has already been discussed as showing that a transfer of a right to an ordinary tenancy is not prohibited—a doctrine in accordance with *Narendra v. Ishan* (*vide supra*). The result is that there is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land

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(1) (1874) 13 Beng. L. R. 274.

(4) (1892) 17 Bom. 677.

(2) (1883) 9 Cal. 648.

(5) (1891) P. J. p. 107.

(3) (1897) 24 Cal. 355.

(6) (1898) P. J. p. 378.

(7) (1894) 20 Bom. 78.

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to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another subclass, to place the land at the disposal of the Khot.

And so long as his tenancy is not determined, the land is not at the disposal of the Khot. And the Khot cannot claim to treat the person in possession under a right derived from the occupancy tenant, either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture.

The utmost, therefore, to which the plaintiff Khot is in this case entitled, is, we think, a declaration that no occupancy tenant's rights in the land in question have been transferred by the first defendant to the second defendant. In the circumstances of this case, we think both parties having failed to establish their contentions to the full, we should leave the parties to bear their own costs.

Decree accordingly.

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Before Mr. Justice Chandavarkar.

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Indian Registration Act (III of 1877), secs. 17, 18 clauses (d) and (f), 21, 24 and 77—Transfer of Property Act (IV of 1882), secs. 6, 19 and 21—Indian Succession Act (X of 1865), sec. 107—Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property.—Registration—Refusal to register on the ground that the document did not contain sufficient description of property—Discretion of Registrar—Jurisdiction of Civil Court—Vested or contingent interest—Spes successionis—Alteration not affecting the legal effect of the contract.

A Mahomedan daughter executed in favour of her father a document under which, in consideration of her receiving Rs. 9,000, she relinquished her right of inheritance to the father's property and also to certain ornaments directed to be given to her by her mother. The document was presented for registration to the Sub-Registrar, who accepted the registration fee, which was endorsed on the document, and subsequently refused to register the document on the ground

* Original Suit No. 460 of 1905.