

## APPELLATE CIVIL.

*Before Mr. Justice Shah and Mr. Justice Pratt.*

1921.

October 14.

MADHAVRAO MORESHWAR BHADANEKAR (ORIGINAL PLAINTIFF),  
 APPELLANT v. KRISHNARAO SATUJI RANE AND OTHERS (ORIGINAL  
 DEFENDANTS), RESPONDENTS\*.

*Khoti Settlement Act (Bombay Act I of 1880), section 10—Transfer by permanent tenant of a portion of his holding without consent of the Khot—Only the portion alienated is at the disposal of the Khot.*

The defendants who were permanent tenants of Khoti lands transferred a portion of their lands without the consent of the Khot. The Khot thereupon sued to recover possession of the entire holding, alleging that owing to the transfer the whole of the lands was at the disposal of the Khot under section 10 of the Khoti Settlement Act, 1880 :—

*Held*, that under section 10 of the Khoti Settlement Act, 1880, only the transferred portion, and not the entire holding, was at the disposal of the Khot.

SECOND appeal from the decision of C. C. Dutt, District Judge of Ratnagiri, reversing the decree passed by L. N. Joshi, Second Class Subordinate Judge at Devghad.

Suit to recover possession of land.

The plaintiff was the Khot of a village, in which the defendants were Khatedars of Khoti lands.

On the 27th January 1914, the defendants mortgaged a portion of their Khoti lands without the consent of the Khot.

In 1918, the plaintiff Khot sued to recover possession of the whole of the Khoti lands in the Khata of the defendants, alleging that owing to the transfer without his consent of a portion of the Khoti lands, the entire lands were at his disposal under section 10 of the Khoti Settlement Act, 1880.

The trial Court decreed the plaintiff's claim.

\* Second Appeal No. 758 of 1920.

On appeal the District Judge was of opinion that the plaintiff could recover only the portion of the lands transferred by the defendants without the plaintiff's consent. The plaintiff's claim was therefore decreed to that extent only.

The plaintiff appealed to the High Court.

*P. B. Shingne*, for the appellant:—Section 10 of the Khoti Act does not enact that only that part of the holding, which is transferred shall be at the disposal of the Khots. The section is wide enough to the effect that the whole of the holding is forfeited. If the section is clear enough, it must be construed as it goes, without looking to its effect. The policy of the Khoti Act is to put limitations on the power of occupancy-tenants and in due pursuance of the policy, any alienation—even of a portion of the holding—is bound to carry with it the loss of the holding. If the Legislature meant otherwise, the language of the section would have been different. This conclusion is supported by the stages through which section 10 has passed in respect of its amendments and by the provision as regards resignation, appearing in section 10.

*A. G. Desai*, for the respondents Nos. 1, 2 and 4:—The section is not so plain as contended on behalf of the appellant. If so, as it is a penal provision, it must be construed as to limit its application to the land already transferred. The portion transferred is practically a severable and separate one. The consideration that an occupant cannot resign a portion of an entire holding without the consent of the Khot will not necessarily lead to the conclusion that an alienation of a holding will involve the forfeiture of the entire holding. It is noteworthy that in spite of the changes through which section 10 has passed, the Legislature has not worded the section so as to bear such a penal meaning.

1921.

---

MADHAVRAO  
v.  
KRISHNARAO.

1921.

MADHAVRAO  
v.  
KRISHNARAO.

SHAH, J. :—The question of law that arises in this second appeal relates to the construction of section 10 of the Bombay Khoti Settlement Act of 1880 as amended by Bombay Acts VIII of 1912 and IV of 1913.

The facts, which are not in dispute, are these. The plaintiff is the Khot and the defendants are the occupancy tenants and their transferee. It appears that there are several survey numbers referred to under six serial numbers in the plaint in which the occupants had a certain share. The interest of the occupants in one of these lands referred to in the plaint as Serial No. 1, was mortgaged by them in January 1914. It appears from the mortgage bond that they had already mortgaged this property so far back as 1872, and this was a fresh mortgage. We are, however, concerned with the fresh mortgage effected in 1914 after the amending Acts of 1912 and 1913. The survey numbers have been described as appertaining to four different Khatas, and it is claimed for the plaintiff that in virtue of the provisions of section 10 of the Khoti Settlement Act, as it stood at the date of this transfer by way of mortgage, all the lands constituting these different Khatas, of which the land, referred to as Serial No. 1 in the plaint, is a part, and in which the defendants as occupants have an interest, are at his disposal, as the transfer was without his consent.

The trial Court accepted this view and passed a decree in favour of the plaintiff in respect of all the lands constituting the different holdings, of which the land mortgaged forms comparatively a small part.

The appellate Court, however, did not accept that view, and held that the lands which were at the disposal of the Khot in virtue of the provisions of section 10 were really those lands which formed the subject-matter of the transfer, and accordingly

dismissed the plaintiff's suit, except as to land Serial No. 1.

1921.

MADHAVRAO  
v.  
KRISHNARAO.

The question that has been argued in this appeal by the Khot is as to whether on a proper construction of section 10 all the holdings, of which Serial No. 1 forms a part, are at the disposal of the Khot or only that part of the land which is transferred. The section as amended by Bombay Act VIII of 1912 and IV of 1913 runs as follows :—

“ If the land held by a privileged occupant lapses for failure of heirs or is forfeited on the occupant's failing to pay the rent due in respect thereof, or if any permanent tenant resigns his land or any portion of his land or does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in section 9), his land shall be at the disposal of the Khot as Khoti land free of all incumbrances, other than liens or charges created or existing in favour of Government.

But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot ; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector. ”

I need not quote sections 9 and 10 as they stood prior to the amending Act of 1912. The effect of these sections prior to 1912 was that, except in certain cases expressly provided for by section 9, the occupancy was not transferable. But no consequence of a transfer of any interest in the occupancy, contrary to the provisions of section 9, was stated in the Act. Among other things by the amendment of 1912 the Legislature provided that any transfer contrary to the provisions of section 9 would involve the consequence that the land would be at the disposal of the Khot free of all encumbrances.

The question to be considered is whether the Legislature intended that by the transfer of any part of the land or of any interest therein, only that land was at

1921.

MADHAVRAO  
v.  
KRISHNARAO.

the disposal of the Khot, or whether all the lands comprised in different Khatas, of which the land wherein the interest of a sharer is transferred formed a part, were at the disposal of the Khot. It appears that by the Act of 1913 certain alterations were made in sections 9 and 10, as enacted by the amending Act of 1912. But those alterations were apparently the result of the change in the definition of the word "holding" as given in the Act of 1913. In any case it seems to me that all the alterations made by the Act of 1913 were merely consequential and do not affect the point under consideration. The alteration, with which we are concerned, is the substitution of the word "his" for "such" in section 10. The section provides that on the transfer of "his land or any portion thereof or any interest therein" "his land" shall be at the disposal of the Khot. This means that where the transfer be of any portion of the land or any interest therein, what shall be at the disposal of the Khot is not merely that portion or that interest but the land itself. But the section gives no indication as to whether it means all lands comprised in the different Khatas of which the particular land forms a part or merely the land, i.e., the particular survey number or any recognised sub-division in respect of which there has been a transfer. The section does not state as to what is to be treated as the unit for the purpose of giving effect to the provision that his land shall be at the disposal of the Khot. This provision deprives the occupant of his existing rights in consequence of a transfer of his interest in the land not allowed by law. In the absence of any clear indication to the contrary it seems to me that such a provision should be so construed as to limit the forfeiture to the land, the interest wherein is transferred. There is no indication in the section that all the lands of the occupant are

1921.

MADHAVRAO  
v.  
KRISHNARAO.

intended to be at the disposal of the Khot even though one of them or only a portion of one land may have been transferred. The second paragraph of the section so far as it provides that it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot suggests, if at all, that but for that provision the meaning of the first paragraph as regards the resignation in respect of any land or portion of the land would be that the land resigned and not necessarily the entire holding would be at the disposal of the Khot. The consideration that an occupant cannot resign a part of the entire holding without the consent of the Khot would not, in my opinion, justify the wider construction of the section which the trial Court accepted in this case, as regards the effect of an unauthorised transfer.

However that may be, it seems to me clear that as regards an improper transfer, the consequences must be limited to the land transferred and cannot be reasonably extended to the entire holding or to all the lands comprised in the occupancy. For this purpose the smallest unit recognised by the Khoti Settlement Act must be taken, i.e., a survey number or a recognised sub-division thereof as defined by the Bombay Land Revenue Code.

The land affected by the transfer in the present case is only Serial No. 1, and that, in my opinion, is the land at the disposal of the Khot under section 10 of the Khoti Settlement Act in consequence of the transfer effected in 1914.

If this reading of the section does not represent the true intention of the Legislature, it seems to me that the section must be amended so as to convey the true meaning. The Courts have to construe such clauses

1921.

MADHAVRAO  
v.  
KRISHNARAO.

of forfeiture strictly so as to involve the least interference with the existing rights consistently with the plain meaning of the words used by the Legislature.

I would confirm the decree of the lower appellate Court and dismiss the appeal with costs.

PRATT, J. :—Defendants Nos. 1 to 4 and 6 represent four brothers and are permanent tenants in the Khoti village of Ghonsari and have four holdings or Khatas which include twenty-eight different survey numbers and pot numbers in that village.

Survey No. 268, pot No. 2 is common to the four holdings and each holding comprises a one-fourth share of it.

These defendants mortgaged that pot number on the 27th January 1914 to defendant No. 5. This mortgage was not justified by the provisions of section 9 of the Khoti Settlement Act.

The question for decision in this appeal is what penalty attaches under section 10. Are all the lands (all the survey numbers and pot numbers) in the four holdings at the disposal of the Khot or only the particular pot number mortgaged?

The District Judge has held that the Khot is only entitled to the particular pot number. The District Judge has based his decision on a consideration of section 10 of the Khoti Settlement Act of 1880 as amended by Bombay Act VIII of 1912 but overlooked the amendment made by Bombay Act IV of 1913. This is a very excusable error, for the Legislative Department of the Government of Bombay have issued no edition of the Khoti Settlement Act since 1904, and no edition of the Bombay Code later than 1909.

It is, therefore, desirable to set forth in parallel columns the section as it stood after the amending

Acts of 1904, 1912 and 1913, and for more convenient study I shall put the clauses in parallel columns :—

1921.

MADHAVRA  
v.  
KRISHNARAO

1904	1912	1913
<p>If a privileged occupant resign the land or any portion of the land in his holding,</p> <p>or if any such occupant's land lapse for failure of heirs, or other persons entitled thereto,</p> <p>or is forfeited on the occupant's failing to pay the rent due in respect thereof,</p> <p>the land so resigned, lapsed or forfeited, shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.</p> <p>But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.</p>	<p>If the land in the holding of a privileged occupant lapses for failure of heirs,</p> <p>or is forfeited on the occupant's failing to pay the rent due in respect thereof,</p> <p>or if any occupancy-tenant resigns the land or any portion of the land in his holding.</p> <p>or does any act purporting to transfer such land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in section 9),</p> <p>such land shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.</p> <p>But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.</p>	<p>If the land held by a privileged occupant lapses for failure of heirs,</p> <p>or is forfeited on the occupant's failing to pay the rent due in respect thereof,</p> <p>or if any permanent tenant resigns his land or any portion of his land,</p> <p>or does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot (except in cases provided for in section 9),</p> <p>his land shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.</p> <p>But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.</p>

1921.

MADHAVRAO  
v.  
KRISHNARAO.

In 1904 the penalty attached in cases of resignation, lapse for failure of heirs and forfeiture for non-payment of rent.

In 1912, the penalty was extended to cases of transfer unauthorised by section 9, and this was in consequence of the decision in *Yesa bin Rama v. Sakharam Gopal*<sup>(1)</sup>.

In 1913, the amendments were merely verbal, the phrase "permanent tenant" being substituted for "occupancy tenant" and "his land" for "such land."

Now the case to be considered is one of unauthorised transfer referred to in the 4th clause of the section of 1913. The penalty refers to "his land" and this penalty attaches if "*his land or any portion thereof or any interest therein*" is unauthorisedly transferred.

Literal grammatical construction would lead to the consequence that a transfer of a portion of the land or an interest in that portion would involve all the land held by the permanent tenant being at the disposal of the Khot. But if there is any ambiguity in the language, the Court may adopt that construction which avoids hardship or injustice. For it is a recognized principle that the construction which appears to be the most agreeable to reason and justice should in all cases be presumed to be the true one. The phrase "his land" applies as well to all the land in the holding as to the portion transferred. It is, therefore, ambiguous, and it is more reasonable to construe it as referring to the portion transferred rather than to the whole, for if the Legislature intended to impose the severer penalty, it would have made that clear by the use of some such words as "all his land" or "the whole of the land in his holding."

(1) (1905) 30 Bom. 290.

1921.

MADHAVRAO  
v.  
KRISHNARAO.

Cases of lapse for failure of heirs or forfeiture for failure to pay rent necessarily affect the whole holding and need not therefore be considered. But the case of resignation may either be of the whole or of a part and therefore affords a guide to the intention of the Legislature.

Now in 1904 it was quite clear that resignation of "the land or any portion of the and in his holding" involved a penalty affecting only "*the land so resigned.*"

The Legislature when including a penalty for unauthorised transfer in 1912, could not have intended to enhance the penalty for resignation. So the words "such land" in the penal clause in 1912 and "his land" in the same clause in 1913 must mean the land *or portion of land resigned*. And indeed this must be so, for a resignation of a portion is only effective with the consent of the Khot and therefore the very phrase implies that the Khot takes back a portion and the permanent tenant continues his permanent tenancy of the remainder. If the word "such" in the penal clause in 1912 includes a portion with reference to resignation, it must also be similarly construed with reference to the clause dealing with unauthorised transfers.

There could be no doubt about this but for the unfortunate phrase in that clause "such land or any portion thereof." This clause follows on the resignation clause when the words are "the land or any portion of the land in his holding." "Such land" should, therefore, refer back to this phrase and include the portion and so the words "or any portion thereof" are redundant and meaningless. If these words are omitted from that clause, all the clauses of the section of the Act of 1912 are harmonious and consistent. It is the unskilful draftsmanship of the section of 1912 that is the cause

1921.

MADHAVRAO  
v.  
KRISHNARAO.

of the obscurity. And this was not remedied in 1913 when the word "his" was substituted for "such" overlooking the fact that the word "such" had two different meanings in the 4th clause and in the penal clause of the section of 1912.

It is true that transfer stands on a different footing to resignation. There can be no resignation of a portion without the consent of the Khot. The tenant may cease cultivating a portion but he would still have to pay the rent of the whole tenancy. The resignation is only effective when the Khot accepts the portion surrendered and then there is a proportionate remission of rent presumably under section 33, Rule II (b). The penalty in the case of resignation of a portion is not so much a penalty as a statement of the consequence of the resignation. An unauthorised transfer is similarly ineffective but it calls for a penalty inasmuch as it introduces a tenant whom the Khot may not like, and who may, by prescription, acquire the right of a permanent tenant and prejudice the Khot's reversionary interest. Can it be said that these considerations induced the Legislature to impose a severer penalty for the unauthorised transfer? or that the effect of limiting the penalty to the portion is to allow the tenant to do indirectly what he cannot do directly by resignation? I think not. In the first place no prescriptive title would be acquired against the Khot unless he accepted rent from the transferee and that would in itself involve consent to the transfer. Nor would the attempted transfer of the portion be equivalent to a resignation of that portion, for the tenant would still have to pay the whole rent of his holding.

On the whole my conclusion is that the difficulty is due merely to unskilful draftsmanship. In *Salmon v.*

*Duncombe*<sup>(1)</sup> the Privy Council declined to allow a statute to be reduced to a nullity by the draftsman's unskilfulness and ignorance of law, and I think we would be justified in refusing to allow the same defect to lead to hardship and injustice. I, therefore, think that the phrase "his land" in the penal part of the section means the portion of the land in the holding which is purported to be transferred or in which an interest is purported to be transferred.

I, therefore, agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

R. R.

(1) (1886) 11 App. Cas. 627.

PRIVY COUNCIL.\*

BAWA MAGNIRAM SITARAM (PLAINTIFF) v. KASTURBHAI MANIBHAI AND ANOTHER (DEFENDANTS).

[On Appeal from the High Court at Bombay.]

*Religious Endowment—Alienation by Shebait—Permanent lease—Validity—Lapse of time—Presumption of validity.*

Where the validity of a permanent lease granted by a shebait comes in question a long time (in the present case nearly 100 years) after the grant, so that it is not possible to ascertain what were the circumstances in which it was made, the Court should assume that the grant was made for necessity so as to be valid.

*Chockalingam Pillai v. Mayanli Chettiar*<sup>(1)</sup>, approved.

Judgment of the High Court affirmed.

APPEAL (No. 151 of 1920) from a judgment and decree (December 22, 1916) of the High Court affirming a

<sup>o</sup> *Present*:— Lord Buckmaster, Lord Atkinson, Lord Carson, Mr. Ameer Ali, and Sir Lawrence Jenkins.

(1) (1896) 19 Mad. 485.