

(1918) 11 BOM CK 0009
In the Bombay High Court

Chinto Mahadev Khandekar and Others	APPELLANT
Vs	
Mahadev Ramachandra Patkar and Others	RESPONDENT

Date of Decision : 19-11-1918

Acts Referred:

Evidence Act, 1872 — Section 40
Khoti Settlement Act, 1880 — Section 9

Citation : (1919) ILR (Bom) 565

Hon'ble Judges : Shah, J; Basil Scott, J

Bench : Division Bench

Judgement

Basil Scott, Kt., C.J.—Thirty thikans of Khoti land in the jurisdiction of the Rajapur Court were held prior to 1883 by the Khandekar family as occupancy tenants. Seven of these thikans were attached and sold by Vithal Haldavnekar as mortgagee of the Khoti interest under a decree for payment of the Khot's dues which had been obtained against Yessaji Khandekar. Vithal purchased the attached interests by a Benami sale and having taken a transfer obtained possession from the Khandekars. This led to litigation in which Yessaji's brothers claimed that the sale did not affect 5/6ths of the occupancy rights in these thikans.

2. At that time the Khoti Act (Section 9) provided that occupancy rights should be heritable but not 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...thirty years next previous to the commencement of the revenue year 1865-66". The question of transferability was not discussed in the first Court which decided adversely to the contention of Yessaji's brothers, but it was apparently considered in the first appellate Court where it was stated by the Judge that as a matter of custom it must be held that this (occupancy) right was transferable as it had been actually sold through the Court at the instance of the Khot.

3. The learned Judge held, however, that the decree and sale of Yessaji's interest

would not affect the interests of his brother. On second appeal in the High Court it was assumed that the property could be sold under a decree for the Khoti's dues and it was held that in fact the interest of all the parties had been sold.

4. The result was that Vithal as purchaser acquired the whole of the interest of the occupancy tenants in these thikans. The Khandekars, therefore, could not as against Vithal and his assigns assert a title as occupancy tenants.

5. By various mesne assignments Patkar defendant No. 1 in the first suit (who is plaintiff in the second suit) has become the owner of the interests acquired by Vithal in 1883. The defendant No. 1 in suit No. 53 of 1912 is sued by one of the Khandekars in respect of four of the seven thikans now in his possession while in suit No. 290 of 1913 he sues the Khandekars for the possession of the other three thikans.

6. Both suits are occasioned by Mamlatdar's decrees for possession against the respective plaintiffs.

7. Both suits have been decided in the lower Courts against the Khandekars. In these appeals it is contended that whether or not the decision in the suit of 1885 against Vithal decided that the Khandekars' interests were validly transferred to him the subsequent assignments under which their opponent Patkar claims title are invalid under the Khoti Act, Section 9.

8. This however would not profit the plaintiff Khandekar in suit No. 53 of 1912 (who suing in ejectment must prove his title) unless he can show that he is an occupancy tenant.

9. He is, however, precluded from agitating a claim as occupancy tenant in a Court of law against Hari or his assigns by the decision that the occupancy rights of the Khandekars had been sold to Hari--Section 40 of the Evidence Act and Section 11 of the Civil Procedure Code. The rule of evidence laid down in Section 20 of the Khoti Settlement Act that the entry in the settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment inter partes the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry.

10. In the suit No. 290 of 1913 where Patkar is the plaintiff and the Khandekars are tenants--the same estoppel by judgment prevents the latter from asserting an occupancy tenure and it is held as a fact that the Khandekars were in possession for many years since 1890 as ordinary and not occupancy tenants. They cannot, therefore, resist the claim of the plaintiff who has acquired the title of those to whom the Khandekars attorned as tenants.

11. The result is that the decree of the lower appellate Court is affirmed and the appeal dismissed with costs in both cases.