APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

MADHAVRAO APPAJI SATHE (ORIGINAL PLAINTIFF), APPELLANT, *v.* DEONAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896. *February* 6.

Khoti Settlement Act (Bombay Act I of 1880), *Secs.* 20 *and* 21(1)— *Evidence Act (I of* 1872), *Sec.* 35—*Decision of a Survey Officer as to tenure—Binding effect of the decision—Burden of proof.*

Section 20 of the Khoti Settlement Act (Bombay Act I of 1880) throws upon the Survey Officer the duty of investigating and determining disputes as to any matter which he is bound to record. The tenure upon which any particular survey number is held is one of such matters which he has to determine between the khot and its holder. His decision is, under section 21 of the Act, binding upon the parties affected thereby until reversed or modified by a final decree of a competent Court. The burden of proof in such case lies upon the party seeking to vary the decision.

Statements of facts made by a Settlement Officer in the column of remarks in the dhárepatrak, but not his remarks for the same even though they may consist of statements of collateral facts, which it was no part of his duty to inquire into, are admissible in evidence as being entries in a public record stating facts, and made by a public servant in the discharge of his official duty, within the meaning of section 35 of the Evidence Act (I of 1872).

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Ratnágiri, reversing the decree of Ráo Sáheb K. N. Patankar, Subordinate Judge of Dápoli.

The plaintiff alleged that the lands in dispute were khoti lands and brought this suit to set aside the decision of the Survey Officer that they were dhára and not khoti. He also asked for *thal* rent (customary rent in kind).

The Subordinate Judge set aside the Survey Officer's decision and declared that the lands were plaintiff's khoti. He rejected the claim for rent.

* Second Appeal, No. 415 of 1894.

(1) Sections 20 and 21 of the Khoti Settlement Act (Bombay Act I of 1880) :—

20. If it shall appear to the survey officer, who frames the said register or other record, that there exists any dispute as to any matter which he is bound to record, he may, either on the application of any of the disputant parties, or of his own motion, investigate and determine such dispute and frame the said register or other record accordingly.

21. In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

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On appeal by the defendants the Judge reversed the decree and rejected the claim, holding that the lands were dhára. The plaintiff preferred a second appeal.

Robertson with *Mahadeo V. Bhat* for the appellant (plaintiff):—The question is whether the lands are the plaintiff's khoti or defendants' dhára. We contend that they are our khoti lands and the defendants are occupancy tenants. The Survey Officer wrongly decided in the year 1889 that the lands were defendants' dhára. The lands are situate in the village of Susheri which is a khoti village, and, therefore, *primâ facie* the presumption is that these lands are khoti. The burden of proof lay upon the defendants that they are not so. The Judge has wrongly placed upon us the burden of proving that the lands are khoti and not dhára —*Muhammad Yakub* v. *Muhammad Ismail*[1]. A finding arrived at by a Settlement Officer under section 21 of the Khoti Act (I of 1880) can be interfered with by a civil Court when there is a dispute as to the correctness of that finding. Where in a khoti village a tenant claims to hold lands as his dhára, the burden of proof is on him.

Assuming, however, that the burden of proof lay upon us, we submit that we have sufficiently discharged it by the production of the original sanad which was granted to our predecessor by the Peshwa in 1775. It shows that the whole village was khoti, and there was no dhára land in it at the time of the grant. The defendants ought, therefore, to show how they acquired dhára lands in the village.

He cited *Kirpal Narain Tewari* v. *Sukurmoni*[2].

Ganesh K. Deshamukh, for the respondents (defendants):—The case of *Muhammad Yakub* v. *Muhammad Ismail*[1] cited as to the burden of proof was decided long before the Survey Act was passed. The burden of proof lies on the plaintiff. The Khoti Act clearly lays down that a person claiming land as khoti must prove that it is not dhára. The decision of the Settlement Officer being in our favour, the burden of proving that the lands are khoti lies on the plaintiff.

(1) 9 Bom. H. C. Rep., 278. (2) I. L. R., 19 Cal., 91, at p. 100.

Robertson, in reply:—The ruling in *Muhammad Yakub* v. *Muhammad Ismail*[1] shows that the question of tenure was considered in that case, because specific issues on that point were raised.

The entry of 1862 is admissible in evidence under section 35 of the Evidence Act.

FARRAN, C. J.:—Upon the first point which has been argued before us in this second appeal we do not entertain any doubt. The Khoti Settlement Act by section 20 throws upon the Survey Officer the duty of investigating and determining disputes as to any matter which he is bound to record. The tenure upon which any particular number is held is one of such matters. That he has to determine between the khot and its holder. When he has done so, his decision is, under section 21 of the Act, binding upon the parties affected thereby until reversed or modified by a final decree of a competent Court. It is treated as decisive as to the matter recorded until the contrary is proved in a competent civil Court. The District Judge has rightly thrown the burden of proof upon the plaintiff who sought before him to vary the decision of the Settlement Officer.

The determination of this case rests almost altogether upon the inference to be drawn from the numerous documents which have been put in evidence and to the degree of weight which is to be attached to each. Upon a full, careful and exhaustive consideration of them the District Judge has come to the conclusion that the plaintiff has not succeeded in showing that the decision of the Survey Officer was erroneous. We are asked to review that conclusion and to hold that the plaintiff has established his case. It is not, we consider, competent for us sitting in second appeal to adopt that course. The lower appellate Court has decided a question of fact within its competence from which no appeal lies, and it is not the less binding upon us because the evidence adduced is chiefly of a documentary character.

It has, however, been argued that the lower appellate Court has committed an error of law in treating as irrelevant the reasons which the Assistant or Acting Superintendent, Revenue Settlement, has given in the column of remarks in the dhárepatrak of

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1862 for his statement that "the tenant paid the assessment through the khot." Their admissibility depends upon whether they are entries in a public record stating facts and made by a public servant in the discharge of his official duty within the meaning of section 35 of the Evidence Act. The fact that the tenant paid the assessment through the khot has been treated by the District Court as admissible in evidence, but not the reasons which led him to say so. This view is in accordance with the *dictum* of West, J., in *Govindrav* v. *Ragho* (1). It is, in our opinion, correct. The Settlement Officer had to fix the assessment upon the land and to ascertain the name of the then "vahivátdár" and who paid the assessment. Statements made by him as to these are statements of fact and relevant. The reasons which he assigns for making them are not, even though they consist of statements of collateral facts, but which it was no part of his duty to inquire into.

As to the opinion of the Survey Officer as evidenced by the effect of the dhárepatrak and the place assigned to the defendants' ancestor in it the Survey Officer at that time was not invested with authority to decide questions of tenure between the khot and his tenants, and his opinion upon such a subject, even if regularly recorded, would not have been admissible as evidence between the parties. This is the view taken by the District Judge. He has, however, contemplated the possibility (as in these cases of the doubtful relevancy of evidence it is safest to do) of the Survey Officer's opinion being regarded as evidence, and has expressed his view as to its weight, and has come to the conclusion that, even if he were to take it into consideration, its effect is overborne by the other evidence in the case. We confirm the decree with costs.

Decree confirmed.

(1) 1, L. R., 8 Bom., 543.