APPELLATE CIVIL.

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

1896. *February 3.*

GOPAL SADASHIV PALEKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NAGESHWAR SITARAM PHANSALKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Khoti Settlement Act (Bombay Act I of 1880)—Survey register—Defendants entered by Survey authorities as occupancy tenants—Suit by plaintiffs for reversal of Survey Officer's decision and for declaration that defendants were ordinary tenants—Decision of Survey Officer as to tenure not final—Khot holding dhára land.

A Survey Officer under the Khoti Settlement Act (Bombay Act I of 1880) having determined and entered in the survey register that the defendants held the lands in suit as occupancy tenants, the plaintiffs, who were the khots of the village, objected to the decision and brought a suit for its reversal and to obtain a declaration that the lands were held by them on the dhára tenure, and that the defendants were ordinary tenants thereof. The Judge dismissed the suit in appeal, holding that the survey entry was conclusive proof of the tenant's liability, and that it gave no cause of action to the plaintiffs.

Held, reversing the decree, that the decision of the Survey Officer as to tenure is not final, and that a suit like the present will lie.

A khot of a village can hold dhára lands.

SECOND appeal from the decision of T. Walker, District Judge of Ratnagiri, reversing the decree of Ráo Sáheb Parashram B. Joshi, Subordinate Judge of Rájápur.

The plaintiffs sued for a declaration that they were dhárekaris of the lands in dispute which were situate in the village of Tervan, alleging that there was no khoti land in the village; that notwithstanding that the whole village was dhárekari the defendants had fraudulently induced the Special Assistant Collector to apply the rules of the Khoti Act (Bombay Act I of 1880) to the village and got the lands entered as khoti and themselves as occupancy tenants.

The Subordinate Judge found that the plaintiffs were owners of the lands in dispute and allowed the claim in the terms of the prayer of the plaint, which was that (*a*) the lands be entered in the Government books as plaintiffs' dhára, that (*b*) defendants' name be erased, and that (*c*) it be declared that there were no khoti rights in the lands and the Khoti Act did not apply.

* Second Appeal, No. 708 of 1893.

1896.

GOPAL v. NAGESHWAR.

The following is an extract from the Subordinate Judge's judgment :—

"The village of Tervan is dhárekari, but there are hereditary khots whose duty it is to collect Government revenue from dhárekaris, and credit it to Government, and for which the hereditary khots obtain certain remuneration. The khots of dhárekari villages are like *pátils* in the villages above the Ghâts. They have no right to claim any more *vasul* from dhárekaris beyond that fixed by Government. These khots are like *talátis*."

On appeal by the defendants the Judge reversed the decree. The following are extracts from his judgment :—

"That plaintiffs are in the position of the khots of this village is proved by their having in that capacity seized upon the khata of Hari Narayan Palekar, who died without heirs, instead of allowing it to pass to Government under section 72 of the Land Revenue Code. The Khoti Act, therefore, applies to this khoti village, and the Survey authorities have rightly framed registers showing the various tenants as dhárekaris, quasi dharekaris and occupancy tenants. Their entry is conclusive proof of the tenant's liability under section 17 of the Khoti Act.

"The relief sought by plaintiffs must thus be refused. For, while the Collector will amend the record in accordance with any decree obtained by the parties, the survey entry gives no cause of action. I cannot, therefore, order plaintiffs' name to be entered in his books, nor defendant's to be erased; and, as above shown, the Khoti Act does apply.

"As regards the declaration that plaintiffs are dhárekaris, I am of opinion that it also must be refused as not arising between the parties. A dhárekari is a person who holds land, in perpetuity or for thirty years, on payment of Government assessment to the khot. It would be absurd to pass a decree that plaintiffs are their own dhárekaris, and this is not what they really want. They probably wish it declared that defendants have no rights in the land; but they do not state whether defendants are tenants-at-will, yearly tenants, trespassers, or what they are; and on this ground also I am justified in throwing out the claim. It discloses no cause of action, and there is besides no demand for consequential relief."

The plaintiffs preferred a second appeal.

Ganesh K. Deshmukh, for the appellants (plaintiffs).

Manekshah J. Taleyarkhan, for the respondents (defendants).

PARSONS, J.:—The Assistant Judge has not gone into the merits of the appeal, but has dismissed it on the preliminary point that the suit would not lie. In this he is wrong. The Survey Officer under the Khoti Settlement Act, 1880, had determined and entered in the survey register that the defendants held the lands in suit as occupancy tenants. The plaintiffs objected to that decision and entry, and they brought this suit

1896.

GOPAL v. NAGESHWAR.

for its reversal and to obtain a declaration that the lands are held by them on the dhára tenure, and that the defendants are ordinary tenants thereof.

That the decision of the Survey Officer as to tenure is not final, and that such a suit as the present will lie, was hardly disputed before us and has now been settled by the Full Bench decision in *Antaji Kashinath* v. *Antaji Mahadev*[1]. The fact that the plaintiffs are the khots of the village does not seem to us to affect the case, for a khot can hold dhára land just as any one else can. The Subordinate Judge disposed of the suit on its merits, and the Assistant Judge should have heard the appeal also on its merits and determined the real point at issue between the parties, *viz.*, whether the lands are the dhára lands of the plaintiffs or whether the defendants are the occupancy tenants thereof within the meaning of the Khoti Settlement Act.

We reverse the decree of the lower appellate Court and remand the appeal for legal disposal. Costs to be costs in the cause.

Decree reversed.

(1) P. J. for 1896, p. 1 ; I. L. R., 21 Bom., 480.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1896. *February* 3.

PURSHOTAMDAS MANEKLAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI MANI (ORIGINAL DEFENDANT), RESPONDENT.*

Husband and wife—Restitution of conjugal rights—Defence—Plea of impossibility of sexual intercourse—Legal defences to suit for restitution—Judge has no discretion to refuse decree except when legal plea is proved.

A plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal rights.

A Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to live with her husband, and he cannot abstain from passing a decree in favour of a plaintiff-spouse, because he considers that it would not be for the benefit of either side that the decree should be granted.

* Second Appeal, No. 245 of 1895.