APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

BA'LA'JI RAGHUNA'TH PHADKE (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'L BIN RA'GHOJI DALVI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1895. *November* 22.

Khoti Act (Bombay Act I of 1865*)—Khoti Settlement Act (Bombay Act I of* 1880*), Secs.* 16, 17, 21 *and* 33 *(c)*†*—Khot—Occupancy tenant—Entries made by the settlement officer in a form headed as issued under Bombay Act I of* 1865 *when Act I of* 1880 *was in force—Finality of the entry as to the liability of the tenant.*

* Second Appeal, No. 762 of 1893.

† Sections 16, 17, 21 and 33 of the Khoti Settlement Act (Bombay Act I of 1880) :—

16. Whenever a survey settlement of the land-revenue of any village to which this Act extends is made or revised under the provisions of Chapter VIII of the Bombay Land Revenue Code, 1879, the settlement register prepared under section 103 of the said Code shall show the area and assessment of each survey number and also whether such survey number is held by a privileged occupant or not.

If a survey number is held by one or more privileged occupants, the said register shall further specify the tenure on which such number is held, the name of the registered occupant thereof, and, in the case of a survey number held by an occupancy-tenant, whether his interest therein is transferable otherwise than by inheritance or not.

Survey numbers which are not held by privileged occupants shall be entered in the said register in the name of the khot, or if a partition of the khotki has taken place, of the co-sharers to whose shares they respectively belong.

The said register shall also contain a list of all the co-sharers of the khotki, if the village be not held by one khot in his own sole right, and shall specify the extent of each such co-sharer's interest in the khotki.

17. The other records prepared under the said section shall specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of section 33, and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established.

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.

33. Rent payable to the khot by privileged occupants shall be as follows, (namely) :—

(*a*) by a dhárekari : the survey assessment of his land ;

(*b*) by a quasi-dhárekari : the survey assessment of his land and in addition thereto the amount of grain or money respectively set forth in the schedule ;

(*c*) by an occupancy tenant : such fixed amount, whether in money or in kind, as may have been agreed upon or as may at the time of the framing of the survey record, or at any subsequent period, be agreed upon between the khot and the said tenant ;

or on the expiry of the term for which any such agreement shall have been, or shall be made, or if no such agreement have been, or be made, such fixed share of the gross annual produce of the said tenant's land not exceeding one-half in the case of rice-land, nor one-third in the case of warkas-land and such share, if any, of the produce of the fruit-trees on the said tenants' land, as the survey officer who frames the survey record shall determine to be the customary amount hitherto paid by occupancy tenants in the village in which the said land is situate.

1895.

BÁLÁJI RAGHUNÁTH v. BÁL BIN RÁGHOJI.

At a time when the Khoti Act (Bombay Act I of 1865) had been repealed and the Khoti Settlement Act (Bombay Act I of 1880) had come into operation, the survey officer made, in a form which was headed as being issued under Act I of 1865, entries of rent payable by the occupancy tenant to the khot with regard to some survey numbers of a fixed amount of grain and with respect to one survey number as held rent-free instead of a fixed share of the gross annual produce of the land as directed in the second paragraph of clause (c) of section 33 of the Khoti Settlement Act (Bombay Act I of 1880) without recording that the rent had been so fixed by agreement.

Held, that the entries of the rent payable by the occupancy tenants were duly made under section 17 of the Khoti Settlement Act (Bombay Act I of 1880) according to the provisions of section 33 so as to make them conclusive and final evidence of the tenant's liability which it was not open to a Civil Court to question.

SECOND appeal from the decision of T. W. Walker, Assistant Judge of Ratnágiri, confirming the decree of Ráo Sáheb Parashrám B. Joshi, Subordinate Judge of Rájápur.

The plaintiff, a khoti sharer in the village of Khanaoli, sued for a declaration that he was entitled to recover from defendants Nos. 1, 2 and 3 one-third of the produce of bhát and varkasal by pahání (survey settlement) as rent of certain lands situate at mauje Khanaoli and for an order directing the said defendants to deliver to him the said fraction of the produce. He alleged that the defendants were cultivating tenants and liable to pay rent according to pahání, and that the survey settlement officer, on the 18th March, 1890, had wrongfully decided that the said defendants were liable to give to the khot only 7¼ maunds of bhat on account of the aforesaid lands, and that the settlement officer also wrongly decided that the said defendants should enjoy part of the said lands rent-free. The plaintiff further alleged that defendants Nos. 4—12, who had along with him an eight-annas share in the khoti, were made party defendants, as they would not join him in instituting the suit.

Defendants Nos. 1 and 2 denied the plaintiff's claim.

The other defendants were absent.

The Subordinate Judge dismissed the suit.

The following are extracts from his judgment:—

"I do not think from the wording of the section (17 of Bombay Khoti Settlement Act I of 1880) that a civil suit is barred to rectify the entry made under sections 16, 17, 33 of the Khoti Settlement Act, if that entry be shown to be wrong. What I understand from the above-named section is that if the khot were to claim more rent from the privileged occupant, then the privileged occupant can show, from the

entry made under section 33, that he is not liable for more. It is only when the question is as to what rent the privileged occupant is liable, the entry made in the register under section 33 of the Khoti Settlement Act is conclusive and final evidence. The entry would be final and conclusive evidence in a rent suit, if any, instituted by khot against occupancy tenant. The entry is not said to be conclusive and final for all purposes. Having regard to the provisions of the Bombay Revenue Jurisdiction Act (X of 1876), Bombay Land Revenue Code (V of 1879) and Bombay Khoti Settlement Act (I of 1880) I do not think that the khots in the Ratnágiri and Kolaba districts have lost the right of instituting suits to set aside decisions of survey settlement officers, if those decisions be shown to be wrong and when those decisions refer to matters in dispute between superior and inferior land-holders. The decision referred to in this suit, and which is sought to be set aside, has reference to matters in dispute between the khots and occupancy tenants. I am, therefore, of opinion that this suit is maintainable in this Court.

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"There is no reliable evidence to show that the defendants ever used to give *vasul* by pahání. None of the plaintiff's witnesses or the plaintiff has produced papers of the management of the village of the last 25 or 30 years. This the plaintiff could have easily done if defendants Nos. 1—3 were really tenants paying *vasul* ⅓rd by pahání. The settlement officer, when he made inquiry, found that within 12 years previous to the inquiry no *kam jast vasul* (less or more rent) was given, that is, one and the same amount was given throughout for 12 years continuously (see Exhibit 63). If the *vasul* had been taken by pahání, the same amount every year could not have been found due against defendants Nos. 1—3. The plaintiff has, therefore, failed to prove that defendants Nos. 1—3 are tenants of the plaint lands and are liable to pay rent ⅓rd of the produce by pahání."

On appeal by the plaintiff the Judge confirmed the decree on the ground that the suit was barred by the entry made by the settlement officer on the 18th March, 1890.

The plaintiff preferred a second appeal.

Ganesh K. Deshmukh, for the appellant (plaintiff):—We sued to recover *thal* (rent in kind according to the Khoti Settlement) in spite of the *makta* (fixed rent) settled by the survey authorities. With respect to one of the survey numbers, the survey authorities settled that nothing was payable and that the tenants should enjoy the land rent-free. The settlement was made on the 18th March, 1890, and the present suit was brought on the 16th March, 1891. The entry made by the settlement officer is Exhibit 63 in the case. The settlement was made under Bombay Act I of 1865 and Government Resolution No. 1474, dated the 26th April 1876. If the entry was made under Bombay Act I of 1865, then it was not final. The settlement which

1895.

BÁLÁJI RAGHUNÁTH v. BÁL BIN RÁGHOJI.

was completed in 1890 came into operation when Bombay Act I of 1865 was in force. It had commenced before the Khoti Act I of 1880 came in operation. Section 30 of Act I of 1880 shows that all the khoti villages in the Konkan did not come directly under the operation of the Act as soon as it was passed. It appears from Government order (Exhibit 21) that Act I of 1880 was not made applicable till the 30th August, 1890, that is, after the settlement was made applicable to the village on the 18th March, 1890.

Assuming that the settlement was made under Act I of 1880, we submit that the decision of the settlement officer is *ultra vires*. The entries under section 17 of the Act would be final if they were in accordance with the provisions of section 33. In the present case the tenants are occupancy tenants, and, therefore, clause (*c*) of section 33 applies. Under this clause the settlement officer has jurisdiction to settle a fixed amount only when there is an agreement. In the present case the settlement officer has fixed the amount of rent at 7¼ maunds of grain. Under paragraph 2, clause (*c*), the settlement officer is empowered to settle only a fixed share of rent and not the amount of the rent. In column 5 of Exhibit 63 the reason given by the settlement officer for settling the fixed amount of rent is that the khot did not show that varying rent was paid during the last twelve years. We submit that the reason is bad. Further, the settlement officer had no jurisdiction to declare that a tenant should hold particular land rent-free.

Dáji A. Khare for the respondents (defendants) :—There is no allegation on the part of the plaintiff that the settlement was made under Bombay Act I of 1865. Under that Act no such settlement as the present could be made. The first Court held that the settlement was made under the Khoti Act I of 1880. The settlement in dispute is the settlement between the khot and occupancy tenants, and such a settlement could not be made under Bombay Act I of 1865. That Act refers only to a general settlement. Act I of 1880 provides for a settlement between khots and their tenants. The entry in Exhibit 63 being made under section 17 of Act I of 1880 must stand. Government

Resolution No. 1474, dated the 26th April, 1876, was the result of a compromise between the khots and rayats, and the Khoti Act I of 1880 is the outcome of that Resolution. It may be contended that section 38 of Bombay Act I of 1865 provides for a settlement between the khots and rayats, but that provision was repealed some time before the settlement was made in 1890. We submit that a settlement, which commenced under an existing Act, but finished after that Act was repealed and another Act has come into force, would be good under the latter Act —*Sankáppa* v. *Basáppa*[1].

Next we contend that, even according to the provisions of the Khoti Act I of 1880, the entry made by the settlement officer in Exhibit 63 is not *ultra vires*. The Act has given some particulars for the guidance of the settlement officer, and in fixing the amount of rent it took into consideration the circumstance that the khot did not prove that the tenants paid more or less rent during the past years. An entry made under section 17 of the Act is conclusive, and no suit can be brought to set it aside —*Gopál Krishna* v. *Sákhojiráo*[2]; *Rámchandra* v. *Rághunáth*[3]; *Rámchandra* v. *Mukundshet*[4]; Second Appeals, Nos. 565 and 673 of 1893, decided on the 11th November, 1895 (Jardine and Ránade, JJ.)

If the plaintiff thinks himself aggrieved by the entry of the settlement officer, he can seek redress under section 21 of the Khoti Act I of 1880.

With respect to the entry that the tenant should enjoy particular land rent-free, it seems that the khot did not take any rent from the tenants with respect to that land for the past years, and, therefore, the settlement officer made an entry to that effect.

FARRAN, C. J.:—I do not entertain doubt that, notwithstanding the heading of the record of the settlement officer in this case, the particulars entered therein, in accordance with the provisions of sections 16 and 17 of the Khoti Settlement Act, 1880, must be taken to have been entered in pursuance of the provisions of those sections. At the time when the entries were made, Bombay Act I of 1865, section 38, had been repealed, and Bom-

(1) P.J. for 1880, p. 106.
(2) I. L. R., 18 Bom., 133.
(3) P. J. for 1895, p. 142; I. L. R., 20 Bom., 475.
(4) P. J. for 1895, p. 145.

1895.

BÁLÁJI RAGHUNÁTH v. BÁL BIN RÁGHOJI.

bay Act I of 1880, which repealed it, had come into operation. It was only under the provisions of the later Act that the survey officer could have made the entries, and the fact of his making them under an improper heading, probably having used an old form, does not, I think, deprive them of legal validity. See *Sankáppa* v. *Basáppa*(1). When, therefore, the settlement on the 12th of August, 1890, came into force, as sanctioned by Government by the order (Exhibit 21) of the 18th of March, 1890, those entries became, if made in accordance with section 33 of the Act, conclusive and final evidence under section 17.

The more important question argued before us hence arises whether the entries of the rent payable by the occupancy tenants, the defendants in this case, were duly made under section 17 of the Khoti Act according to the provisions of section 33 so as to make them conclusive and final evidence of the defendants' liability, which it is not open to the Civil Court to question—*Gopál Krishna* v. *Sákhojiráo*(2).

It is contended that the entries are not in accordance with the provisions of section 33, because the rent entered is not a fixed share of the gross annual produce of the land as directed in the second paragraph of clause (*c*) of that section, but is in the case of some of the survey numbers a fixed amount of grain, and in the case of No. 118 it is entered as held rent-free, and it is not recorded that the rent has been so fixed by agreement. In considering this question it must be borne in mind that the object of the Act, as appears from the preamble and the provisions of sections 16 and 17, is to compile, through the agency of the settlement officer, a complete record of the nature of the holding of each and every privileged occupant in the khoti village, and to ascertain and define the amount of rent payable by each. Section 33 accordingly provides for the case of occupancy tenants, which it places in two classes—those tenants who have their rents fixed by agreement, and those whose rents are not so fixed. It is, I think, clearly intended that such classification shall be exhaustive. The section makes no special provision for the case in which tenants have been paying a fixed rent for a long period, but who may be unable to prove the origin of their right to pay

(1) P. J. for 1880, p. 106. (2) I. L. R., 18 Bom., 133.

in that form. As it cannot, I think, have been intended that such tenants should be deprived by the settlement operations of their established right, it seems to me that the Legislature must have intended to embrace them within the class of those whose rents have been agreed upon before the time of the survey. As the Courts in such cases would presume a lost agreement, it would be open to the settlement officer to infer the same. Where in such cases there is a dispute between the khot and the occupancy tenant as to the rent payable by the latter, section 20 imposes upon the survey officer the duty of investigating and determining it, and framing the record accordingly. When he has thus, after such investigation, framed the record under section 17, it becomes conclusive and final evidence of the rent payable by the tenant.

In the present case the survey officer found the tenant paying a fixed amount of grain in respect of part of the land and as to part holding the land rent-free. To that effect he has made an entry, and it is not, I think, open to the Civil Courts to say that he has made his entry on insufficient or inadequate evidence. It must, I think, be taken that he has found the tenant to fall within the scope of the first paragraph of clause (*c*) of section 33 and to have made the entry accordingly. If we were to hold otherwise we should be frittering away the finality as evidence which section 17 gives to the entry of the settlement officer and opening the door to litigation (which it was the object of the Act to avoid) in every case in which the settlement officer has recorded a fixed amount of rent as payable by the tenant. It appears to me to make no difference whether the tenant has established his right to the satisfaction of the settlement officer to hold his land on a fixed rent or rent-free. The settlement officer is bound to frame his record in accordance with his decision.

In so deciding I follow what has been already ruled in Second Appeals Nos. 565 and 673 of 1893 by another Bench, though the particular instance of an occupancy tenant holding rent-free did not arise in these cases.

PARSONS, J.:—This case raises a very important question between khots and occupants of land in khoti villages. The plaintiff is in the position of the khot. The defendants have been

1895.

BÁLÁJI RAGHUNÁTH v. BÁL BIN RÁGHOJI.

held by the survey officer to be occupancy tenants, and the rent payable by them to the khot has been determined by him after inquiry to be 7½ maunds of rice. The plaintiff disputes the legality of this determination, and has brought this suit for a declaration that he is entitled to recover from the defendants for rent one-third of the actual produce of the land.

In the face of the decisions of *Gopál Krishna* v. *Sákhajiráo*[1], *Rámchandra* v. *Raghunáth*[2] and *Rámchandra* v. *Mukund Shet*[3] it is not contended that the determination if duly made would not be conclusive and final and would not bar the present suit. The argument is, first, that the determination has not been made under section 33 of the Khoti Settlement Act, 1880, at all, and, secondly, that if it has, it is not a legal determination under that section.

The first argument is founded upon the heading of the form in which the entry is recorded, which is thus "Maoji Khanavle Tirf Sanji, Táluka Rájápur, Appendix D classifying the Ryots, etc., under Act I of 1865, and Government Resolution No. 1474 of the 26th April, 1876." The determination was made on the 18th March, 1890, at a time when the Khoti Settlement Act, 1880, was in force and Act I of 1865 was repealed. There could, therefore, have been no proceedings at all held under Act I of 1865; proceedings could have been had under the Act of 1880 only, and I must assign the acts of the survey officer to a valid and proper enactment. In all probability the misdescription arose from the fact that the survey had been commenced at a time when Act I of 1865 was in force, though it was not introduced until 1890, and the printed forms that were suitable to the time when the survey was commenced continued to be used throughout. There can be no doubt that the determination in question was really made under section 33 of the Khoti Settlement Act, 1880, and that the entry of it in the record was made under section 17 of the same Act. I think, therefore, that there is no force in this first argument.

The second argument relates to the determination itself. It is laid down in section 33 that an occupancy tenant shall pay

(1) I. L. R., 18 Bom., 133. (2) I. L. R., 20 Bom., 475.
(3) P. J. for 1895, 145.

such fixed amount, whether in money or kind, as may have been agreed on in the past or may in the present or future be agreed on between him and the khot, and in the absence of agreement, such fixed share of the gross annual produce of his land as the survey officer shall determine to be customary. In the present case the survey officer has determined the rent for survey Nos. 121, 123, 122, 36 and 28 to be a fixed amount of 7¼ maunds of rice, and has held that survey No. 118 (9) is rent-free. The award of a fixed amount of grain in the absence of agreement and awarding no rent at all for survey No. 118 (9) are relied on as illegalities under the section.

It appears, however, to me that it is not open to a Civil Court to go behind the entry and inquire whether it is the correct result of a legal and valid determination. The Legislature has entrusted to the survey authorities the duty of determining the amount of rent that an occupancy tenant shall pay to the khot, and has declared that the entry of the nature and amount of rent so determined to be payable in the record made under section 17 shall be conclusive and final evidence of the liability thereby established. Determinations on other matters it has allowed to be reversed or modified by decrees of competent Courts. This one it has declared to be final (section 21). Unless a Court can go behind the determination and enquire into its merits, it is impossible for it to say that it is either illegal or invalid. In the present case, for instance, the survey officer may have found upon absolutely undeniable evidence that there was an agreement to pay the amount of grain he fixed for the rent of the land and to pay nothing for survey No. 118 (9), in other words, an agreement to pay for the whole holding 7¼ maunds of rice. If this was the case, his determination would be perfectly legal and valid.

For this reason I think that the lower Courts have rightly dismissed the suit. Plaintiff's remedy is clearly not by suit in a Civil Court. If he has a remedy at all, it is before the authorities to whom the Legislature has entrusted the work of framing and keeping the record. We confirm the decree with costs.

Decree confirmed.