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Now here what are the circumstances of the case? The rival decree-holders applied for execution *on the same day* to the First Class Subordinate Court and the Small Cause Court respectively. An order for attachment was made on the same day by both Courts, express notice being given to the Judge of the inferior Court of the proceedings in the superior Court. Though attachment was actually made by the inferior Court two days before it was made by the superior Court, the order for sale was made by the superior Court about a month before the order for sale was made by the inferior Court. The sale by both the Courts was held on the same day, and it was alleged, and apparently not denied, that the sale by the inferior Court took place about two hours before the sale by the superior Court. I cannot find a trace of any suggestion that the rival proceedings were not perfectly well known to all parties, or that the purchaser in the Small Cause Court sale has ever contended that he is a *bonâ fide* purchaser *without notice*. He has obtained a decree in the Small Cause Court simply on the ground that the attachment in that Court was actually made two days before the attachment was made in the First Class Subordinate Court—an attachment, as shown above, made with express notice of the proceedings in the superior Court.

Under these circumstances I am of opinion that the purchaser in the Small Cause Court has not got a good title. On the other points I concur with the learned Chief Justice.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

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March 20.

VITHAL ATMARAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* YESA (ORIGINAL DEFENDANT), RESPONDENT.*

Khoti Act (Bom. Act I of 1880), *Secs.* 17, 20, 21 *and* 33—*Entry in the Settlement Officer's record not conclusive.*

An entry by a Survey Officer that an occupancy tenant holds the land *rent-free* is not an entry under section 17 of the Khoti Act (Bombay Act I of 1880),

* Second Appeal, No. 577 of 1893.

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and not being final, it can under section 21 be reversed or modified by a decree of a civil Court.

Balaji Raghunath v. *Bal bin Raghoji*(1) distinguished.

SECOND appeal from the decision of Rão Bahádur Kashinath B. Marathe, First Class Subordinate Judge, A. P., at Ratnagiri.

The plaintiffs as khots of the village of Kurtade in the Ratnágiri District brought this suit to recover *thal* (rent) for the years 1886-87, 1887-88 and 1888-89 from the defendant, who was the occupancy tenant of Survey No. 60.

The defendant pleaded (*inter alia*) that the land in suit was not arable, but was used as a place for the deposit of bones and the remains of dead animals of the village; that the Special Settlement Officer had by his order exempted it from payment of *thal*, and that the claim was barred by limitation, inasmuch as it was not made within a year from the decision of the special Settlement Officer.

It appeared from the evidence that the plaintiffs had recovered *thal* for the land from 1858-59 to 1883-84; that it was voluntarily paid in some years, and in others recovered by suits.

In 1888 the Survey Settlement Officer decided that the land in dispute should be enjoyed rent-free by the occupancy tenant, and an entry was made in the record to the effect that

"Falni No. 4 out of Survey No. 60, being a place used for throwing bones on (*hadgal*), should be enjoyed rent-free."

The reasons for the decision so arrived at were recorded by the Settlement Officer in the following terms:—

"The land is *hadgal* and has never been assessed; one khot is willing to have it still so entered, the other is not, but proves nothing; therefore I order that the land be enjoyed exempt from all payment to the khot as *hadgal*."

This order was passed on 16th January, 1888, and the present suit was filed on 1st October, 1889.

The Joint Subordinate Judge of Ratnágiri held that the suit not having been brought within one year from the date of the Survey Officer's order was time-barred, and dismissed the suit.

In appeal the First Class Subordinate Judge, A. P., of Ratnágiri confirmed the decision of the Joint Subordinate Judge.

(1) I. L. R., 21 Bom., 235.

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Against this decision plaintiffs preferred a second appeal to the High Court.

Nagindas Tulsidas for the appellants (plaintiffs) :—The Settlement Officer had no authority to exempt the defendant from liability to pay *thal* or any other rent. His decision was *ultra vires*. See *Antaji Kassinath* v. *Antaji Mahadev*[1].

Vasudev Gopal Bhandarkar for the respondents (defendant) :—The Settlement Officer having passed an order under section 17 of the Khoti Act (Bombay Act I of 1880) exempting the land from *thal*, the plaintiff cannot claim it. So long as the entry under section 17 is on the record, it is conclusive. See *Gopal Krishna* v. *Sakhojirav*[2]. It is not open to a civil Court to go behind this entry and enquire whether the order was correctly or validly made—*Balaji Raghunath* v. *Bal bin Raghoji*[3].

PARSONS, J. :—This suit is brought by the plaintiffs as khots of the village of Kurtade to recover *thal* rents for the years 1886-87, 1887-88 and 1888-89 from the defendant, who is the occupancy tenant of Falni No. 4, Survey No. 60, and cultivated it in the years in suit.

It is proved in the case that the plaintiffs have been recovering *thal* for the land from 1858-59 to 1883-84, the same has been voluntarily paid in some years, in others it has been obtained by suit. It is further shown that in 1888 the Survey Officer—presumably acting under section 33 of the Khoti Act—decided that the land should be enjoyed rent-free by the occupancy tenant and an entry was made in the record, and apparently made under section 17, to the effect that "Falni No. 4 out of Survey No. 60 being a place used for throwing bones on (*hadgal*) should be enjoyed rent-free." The grounds of his decision are thus recorded. "The land is *hadgal* and has never been assessed, one khot is willing to have it still so entered, the other is not willing, but proves nothing: therefore I order that the land be enjoyed exempt from all payment to the khot as *hadgal*."

The point in the case is whether the entry that the land shall be enjoyed rent-free is an entry duly made under section 17 and,

(1) I. L. R., 21 Bom., 480. (2) I. L. R., 18 Bom., 133.
(3) I. L. R., 21 Bom., 235.

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therefore, final and conclusive. The first essential of an entry under section 17 is that the rent payable shall be according to the provisions of section 33. Section 33 enacts that the rent payable by an occupancy tenant shall be "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 varkas lands." Thus the occupancy tenant must pay either a fixed amount or a fixed share, and a determination that he shall pay neither one nor the other, in fact that he shall pay nothing at all, is clearly beyond the jurisdiction of the Survey Officer. It really is a determination of tenure, for it amounts to a decision that the cultivator is not a tenant at all, but the proprietor of the land, holding it on better terms than the khot himself, since he has not to pay even assessment for it. Thus an entry that a privileged occupant held his land rent-free, would not be an entry under section 17 at all, for it does not specify the nature and amount of rent payable according to the provisions of section 33. The provisions of section 33 are wholly ignored, and the Survey Officer instead of determining the amount of rent payable has determined the nature of the tenure on which the land is held. Such an entry cannot be conclusive or final evidence.

It may seem that this opinion is opposed to the decision of this Court in *Balaji Raghunath* v. *Bal bin Raghoji*[1]. It is, however, not so really when the different facts are considered. In that case there was a holding of six survey numbers. The Survey Officer determined that for the whole holding 7¼ maunds of rice should be paid. In working out the details he set out that this amount was payable for five survey numbers, nothing being paid for the sixth number. If based on agreement such a determination as this would not be contrary to the provisions of section 33. I admit that the words used both by myself and

(1) I. L. R., 21 Bom., 235.

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by the Chief Justice are wider than the case required, but I have consulted him in the matter and I have his authority for stating that his words should be taken as applicable only to the case we had before us in which, as I have said, the amount payable on the holding as a whole was determined, though in working out the calculation of the whole rent it was found that a small piece of land was thrown in for which no rent was separately charged.

In the present case there has been no determination of any rent being payable by the defendant for his land, but the whole of it has been held to be rent-free, and that, too, not by virtue of any agreement, but by a consideration of the character of the land itself. Such a decision is not declared to be final under the Khoti Act, and it can, therefore, under section 21 be reversed or modified by a decree of a civil Court. The plaintiffs have clearly established that the defendant is not entitled to hold the land in suit rent-free, that he is the occupancy tenant thereof, and that he is liable as such to pay them the customary rent.

We reverse the decrees of the lower Courts and award the *thal* claimed, with costs throughout on the defendant.

CANDY, J.:—It is unnecessary for me to repeat what I have set out at length in my judgments in the Full Bench Reference in *Antaji Kashinath* v. *Antaji Mahadev* [1] and in *Krishnaji Narsinva* v. *Krishnaji Narayan* [2]. I adhere to the conclusions at which I arrived in those judgments with regard to the various provisions of the Khoti Act (Bombay Act I of 1880).

Here we have the following facts:—In 1884 the Settlement Officer under section 33 determined the customary rents of the village. No suggestion was then apparently put forward that as between the khot and the occupancy tenant of the land in suit there was "at the time of the framing of the survey record" an agreement that for the land in suit the khot should take "a fixed amount whether in money or in kind." The entry made in the survey record in accordance with that decision was under sections 17 and 21 *final*. In 1888 the Settlement Officer passed another decision holding that the land in suit should be held rent-free. In accordance with that subsequent decision an entry

(1) I. L. R., 21 Bom., 480. (2) *Ibid.* p. 467.

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has been made in the "botkhat of the village." This apparently is a "village record" and not a "survey record." (See my remarks in *Krishnaji Narsinva* v. *Krishnaji Narayan*.)

But assuming that an entry has been made in the "survey record" in accordance with the subsequent decision, and assuming that the Settlement Officer could in 1888 alter the decision and entry made in 1884, (it is not pretended that between 1884 and 1888 any agreement to take and pay a fixed amount was made between the khot and occupancy tenant), then the question arises whether the entry made consequent on the decision of 1888 is final and conclusive. It can only be so if it is "according to the provisions of section 33." But it is directly contrary to those provisions. It states that defendant is entitled to hold the land in suit rent-free. Section 33 provides that an occupancy tenant *shall* pay such fixed share of the produce as shall be determined to be the customary rate of the village, or such fixed amount, whether in money or kind, as may be agreed upon between the khot and the said tenant. If these words have any meaning at all, they must mean that an occupancy tenant must pay something for his land.

As my learned colleague, who was a party to the decision in *Balaji Raghunath* v. *Bal bin Raghoji* (1), has distinguished that case from the present one, it is unnecessary for me to refer further to that case, with some of the remarks in which I respectfully dissent. The result of the decision in the present case is that the decrees of the lower Courts must be reversed, and the *thal* claimed, which the lower appellate Court has found to be correct, must be awarded.

Decree reversed.

(1) I. L. R., 21 Bom., 235.