APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

KRISHNOVA NAYAK (ORIGINAL PLAINTIFF), APPELLANT, *v.* KESHAV BALKRISHNA (ORIGINAL DEFENDANT), RESPONDENT.*

1902. *August* 7.

Khot—Khoti Settlement Act (Bombay Act I of 1880), section 8—Khoti-nisbat lands—Settlement Officer—Thal—Occupancy tenants—Rents payable by other tenants in absence of agreement with the Khot—Landlord and tenant.

Where in a khoti village the Settlement Officer has determined the share of *thal*(1) with regard to the occupancy tenancies, and the tenants other than the occupancy tenants do not appear to hold their lands on any terms agreed upon between the Khot and themselves, such tenants are entitled, under section 8 of the Khoti Settlement Act (Bombay Act 1 of 1880), to pay rent to the Khot at the same rates as are paid by occupancy tenants.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree passed by Ráo Sáheb J. N. Kale, Subordinate Judge of Sangameshvar at Devrukh.

Suit to recover *thal*. By an award, dated the 27th January, 1850, the khoti village of Wanzole was divided between two branches of the Sardesai family. The defendant belonged to one branch; the plaintiff was a mortgagee from the other, and in 1897-98 was the managing Khot of the village. He now sued the defendant, who was a cultivator both of occupancy land and of *khoti-nisbat* land(2) in the village, to recover one-third *thal*, alleging that to be the amount fixed by the Settlement Officer.

The defendant denied that the Settlement Officer had fixed the amount of *thal*, or that he had authority to do so. He contended that only one-eighth *thal* was payable by him under the above award of 1850.

The following are the material clauses of the award :

4. The defendant claimed partition and possession of his share of all rice lands, inám, khálsa and varkas lands, ancestral lands, trees and house sites in the

* Second Appeal No. 535 of 1901.

(1) *Thal* means the portion of produce due from an under-tenant to the landlord. (Molesworth and Candy's Maráthi-English Dictionary (2nd Edition), page 395.)

(2) *Khoti-nisbat* lands, *i.e.*, lands held by cultivators most of whom have occupancy and some also transferable rights. (Per *Candy, J.*, in *Raghunathrao* v. *Vasudev*, (1899) 23 Bom. 776.)

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khoti village of Davale, and house sites and thikáns unmeasured according to shares. The plaintiff's share is given to plaintiff and the defendant's share to defendant. Thus the shares of both are partitioned by mutual consent and given in possession of each, respectively, and so received by plaintiff and defendant as follows :

* * * * *

In this way land has been apportioned between plaintiff and defendant by mutual consent. Out of these, thikán Ukadambyacha-mál is given to the share of the defendant and has these boundaries .... The other lands have no definite boundaries as can be found. Varkas land surrounds them on all sides alike. Stones have, therefore, been fixed to the boundary on the four sides of the lands apportioned to plaintiff and defendant. Within the boundary plaintiff and defendant should cultivate in their own shares, or if they get cultivation done by tenants, they should not pay *thal* to each other. Each should appropriate it to whose share the land is assigned. Details have been given of lands apportioned between both plaintiff and defendant for cultivation in the Gávik lands (*khoti-nisbat*); besides these, if either plaintiff or defendant makes cultivation, they should pay each other *thal* at the rate of one-eighth, that is to say, if there is crop of eight maunds, one maund should be taken out for *thal* and divided half and half by both, while if there is a mortgage on behalf of either of the two, one-third should be taken from him by the party whose share is mortgaged.

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7. Defendant had mortgaged his half shares in the villages of mouje Wanzolo and mouje Dabhole with creditors, and they are in another's management. Hence rice and varkas lands, as well as trees, have not been partitioned in those villages. Therefore after the defendant redeems and recovers the villages from the mortgagees, the khásgi cultivated lands should be partitioned according to quality and then both parties should act according to the terms in the fourth clause.

The Subordinate Judge awarded to plaintiff one-third *thal* in respect of the occupancy lands, holding that the Settlement Officer had determined it; but in respect of the *khoti-nisbat* lands he awarded one-eighth *thal*, holding that clause 4 of the award (Exhibit 49) applied to them, and that the Settlement Officer had not determined the *thal* in respect to them. In his judgment he said :

As regards *khoti-nisbat* land. The Settlement Officer has not determined *thal* in respect thereof. Plaintiff has adduced no evidence to show the previous custom as to levy of *thal* in respect of *khoti-nisbat* lands. I therefore accept the version given by the defendant in his written statement and corroborated to a certain extent by the terms in the *award* (Exhibit 49), and I hold one-eighth *thal* is payable in respect of *khoti-nisbat* lands.

On appeal the District Judge confirmed this decree.

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The plaintiff appealed to the High Court.

Scott (Advocate General) (with him *M. R. Bodas*) for the appellant (plaintiff) :—The case mainly rests on the construction of the award. It was made between the ancestors of the defendants and their *bhaubands* from whom the plaintiff derives his title as mortgagee of a half share. Plaintiff is entitled to one-third *thal*, as determined by the Settlement Officer. The award does not prevent it. Clause 4 of the award, on which the lower Court relied, does not apply to Wanzole village, and is besides, according to clause 7, not to come into operation until the village is redeemed from the mortgage and partitioned. A moiety of the village was under mortgage in 1850, the date of the award, from which it was finally redeemed only in June, 1897. It is not yet partitioned. There being, therefore, no agreement, section 8 of the Khoti Settlement Act (Bombay Act I of 1880) applies, and one-third *thal* must be paid in respect of *khoti-nisbat* lands.

C. H. Setalvad (with him *D. A. Khare*) for the respondent (defendant) :—The point raised by the appellant was not raised by him in the lower Court : he cannot, therefore, raise it now. Clause 7 of the award (Exhibit 49) does not bear the interpretation that the rule of one-eighth *thal* was to operate only after partition. Redemption and partition are not made necessary preliminaries.

Scott in reply :—The award is not held by the Subordinate Judge to be binding on the parties : he only uses it as corroborative evidence of the rent levied on *khoti-nisbat* lands. Section 8 of the Khoti Settlement Act (Bombay Act I of 1880), however, is explicit : wherever there is no agreement, all tenants, other than occupancy tenants, must pay at the same rate as occupancy tenants. The Subordinate Judge has awarded one-third *thal* on occupancy lands in the village and the plaintiff is, therefore, entitled to the same rate in respect of *khoti-nisbat* lands.

BATTY, J. :—The appellant in this case objects that the award (Exhibit 49), limiting the liability of defendant to one-eighth of the produce for *khoti-nisbat* land in Wanzole, was subject to

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the condition precedent that partition should be first effected. The respondent contends that this objection was not raised in the lower Courts and cannot be taken now. The judgment, however, of the Court of first instance, adopted by the lower Appellate Court, does not treat the award as concluding the parties, but after observing that it does not help the defendant at all, refers to it only as evidence corroborative of the defendant's statement as to the customary rate of *thal* in respect of *khoti-nisbat* lands which the judgment states was left undetermined by the Settlement Officer in respect of the land in question. But the lower Court has found that, with regard to occupancy tenancies, the Settlement Officer has determined the share of *thal* to be one-third for all khátedárs, other than certain specified classes, to which defendant does not belong, and section 8 of the Khoti Act of 1880 provides that tenants, other than occupancy tenants, shall hold their lands on the terms agreed upon between the Khot and themselves, and in the absence of such agreement shall be held liable to payment to the Khot at the same rates as are paid by occupancy tenants. The plaintiff was not under the necessity of showing the award to be inapplicable as the lower Courts did not make it the basis of decision, and the defendant has not objected to their decision or shown that it could operate in the absence of partition, and the rate must, therefore, be determined in accordance with section 8, *i.e.*, in accordance with the rates fixed for occupancy tenants in Wanzole.

The decree of the lower Appellate Court is, therefore, amended and the plaintiff's claim to recover, for the year in suit, *thal* at the rate of one-third is awarded in respect of the *khoti-nisbat* lands in Wanzole. There is no dispute as to the amount of the produce held proved by Exhibit 31 in the judgment of the Subordinate Judge against whose decision the defendant has not appealed. The defendant is to pay all costs of this appeal.

Decree amended.