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for a final decision, and would not include the whole of the plaintiff's claim in respect of the cause of action." The Court then went on to hold that the Act XVII of 1879 had not created a special rule or privilege for agriculturist mortgagors. The Amending Act by section 15 D (1) does create the exception by allowing suit for account. The power given in clause 3 to either the plaintiff-mortgagor or the defendant-mortgagee to apply to the Court to deal with redemption or foreclosure is comparable to an application to amend the plaint or otherwise enlarge the scope of the suit. I think the power to apply to, and the discretion conferred on, the Court may have been given to advance the remedy and at the same time check the annoyance to the mortgagee pointed out at page 620. It is evident, however, that section 15 D (2) was passed to avoid the operation of sections 42 and 43 of the Code, which would have barred a later suit for redemption if, at the time of filing an earlier suit for account, the redemption suit might have been brought then. We ought, therefore, to interpret section 15 D (3) as giving a separate cause of action, *i.e.*, one concerned with account only, and, therefore, distinct from the right to demand redemption. In this view, section 43 creates no bar, for "the correct test is whether the claim in a new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit"—*Moonshee Buzloor* v. *Shumsoonnissa*[1] followed in *Rájah of Pittápur* v. *Sri Rájah Venkata*[2].

Remand order confirmed.

(1) 11 M. I. A., 551. (2) L. R., 12 I. A., 116.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade

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March 28.

RA'MCHANDRA BHA'SKAR NA'NAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAGHUNA'TH BA'CHA'SHET SONA'R (ORIGINAL DEFENDANT), RESPONDENT.*

Land Revenue Code (Bombay Act V of 1879), Sec. 108—Khoti Act (Bombay Act I of 1880), Sec. 17—Evidence Act (I of 1872), Sec. 40—Res judicata—Dhára land—Khoti land.

An entry of a record prepared under section 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer, describing certain lands as *khoti*

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is by force of section 17 of the Khoti Act, Bombay Act I of 1880, conclusive and final evidence of the liability thereby established, and shuts out the evidence of a prior decision otherwise relevant under section 40 of the Evidence Act, as proof of *res judicata* whereby a civil Court adjudged the land to be *dhára*.

Gopál v. *Sakhojirao*(1) referred to and followed.

THE plaintiff sued as managing khot for the years 1888—90 to recover Rs. 30-8-7 with interest as *thal* (share of the value of the crops) of certain land in the village of Mandki.

The defendant pleaded that the land was *dhára* land and not *khoti*, and that he had always held it as such. He relied on the decision in a former suit that the land was *dhára*.

The Subordinate Judge held the land to be *khoti* land, and passed a decree for the plaintiff.

He relied upon an entry (Exhibit 35) produced by the plaintiff contained in records (botkhat) prepared under section 108 of the Land Revenue Code (Bombay Act V of 1879) by the survey officer which described the lands as *khoti*.

On appeal the District Judge of Ratnágiri reversed the decree, holding the land to be *dhára* land. His judgment on the point was as follows:—

"The lower Court has decided that the plaint land is not *dhára* land and that it is *khoti* land on the strength of an entry in the botkhat (see extract Exhibit 35) where, in a column for entries whether the survey number or sub-division is *inám*, *khoti* or *dhára*, neither the words *inám*, *khoti* or *dhára* are entered, but a certain person is described as *khatedár kul*, which appears to be a phrase compounded by a translator as a rendering of occupancy tenant (whether privileged or not does not appear), rather than a colloquial term: for the designation 'occupancy tenant' is itself a product of comparatively modern evolution. 'Occupancy tenant' is described in the Khoti Act (Bombay Act I of 1880), section 3, clause 8, to mean a holder of *khoti* land who has a right of occupancy in such land.

"In former litigation about the very Chámbár Pál Thikán in suit instituted by the managing khot this thikán has been decided to be *dhára* land and not *khoti* (see Exhibit 8 in Appeal No. 53 of 1884). It is obvious that, if any question had been raised to the knowledge of the appellant before the above entry was made in the botkhat, or any opportunity had been afforded to him to have any such question decided by the survey officer or the special settlement officer appointed under section 18 of the Land Revenue Code (Bombay Act V of 1879), the appellant would not have consented to the land in question being described as other than *dhára* land.

"... rder sections 20, 21, 22 of the Khoti Act the civil Court would not have been

(1) I. L. R., 18 Bom., 133; P. J., 1893, p. 42.

open to the unsuccessful party dissatisfied with such decision, as such a decision is not made final by the Act.

"There is nothing to show that the entry in the botkhat above quoted embodies any decision of any survey officer or special settlement officer under section 16 of the Khoti Act or section 103 of the Land Revenue Code (Bombay Act V of 1879), or that the defendants ever had any opportunity of getting such a decision passed, or that they were ever informed, even if they did ever hear of the entry '*Khatedár kul*,' that this was intended to be a decision or entry that the plot in question is *khoti* and not *dhára* land.

"Under section 16 of the Khoti Act '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.'

"If there had been an entry in the botkhat that the plaint land is *khoti* land, and if it had been shown that such entry was duly made under section 108 of the Land Revenue Code and section 16 of the Khoti Act, then it might have been contended that such entry is conclusive and final evidence under section 17 of the Khoti Act 'of the liability thereby established.'

"Neither of these circumstances are shown in this case.

"On the other hand, looking to the evidence of enjoyment it is manifest that the khots have never received *thal* for the plaint land, and that the occupant has never paid more than the Government assessment thereon and local-fund cess.

"In the receipt-books relied upon by the respondent, *thal* is debited, but is not credited.

"Under these circumstances I hold that the lower Court was wrong in deciding the plaint land to be *khoti* land. The defendants proved in the affirmative that the plaintiff is not entitled to recover more in respect of the plaint land than the Government assessment and local-fund cess; and if the entry in the botkhat, on which the plaintiff relied to prove the contrary, is capable of the construction which the plaintiff (respondent) seeks to put upon it, though it does not describe the plaint land as khoti, section 22 of the Khoti Act (Bombay Act I of 1880) already indicates the procedure which the appellant should follow in order to get the revenue record amended by the Collector and the land in question which has been twice judicially decided to be *dhara* land entered as such in the revenue record."

The plaintiff appealed to the High Court.

Ganesh Krishna Deshmukh for the appellant (plaintiff):—The entry is conclusive under section 16 of the Khoti Act.

"*Khatedár kul*" has been translated by the Government Translator as "*occupancy tenant.*" Every occupancy tenant is a privileged occupant.

Ghanasham Nilkanth Nádkarni for the respondent (defendant):—Under section 13 of the Civil Procedure Code (Act XIV of 1882)

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the question as to whether the land is *dhára* or *khoti* is *res judicata*. The entry in the botkhat as *khatedár kul* is not conclusive in the face of the prior decision that the land was *dhára*

JARDINE, J.:—If the original of Exhibit 55 is one of the records prepared under section 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer "in accordance with such orders as may from time to time be made on this behalf" by Government, then by force of section 17 of Bombay Act I of 1880 any entry duly made as to "the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of section 33 of this Act" * * "shall be conclusive and final evidence of the liability thereby established." The Courts cannot look behind the entry—*Gopál* v. *Sakhojiráv*[1]. The words last quoted "have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court." This authoritative judgment had not been given when the District Judge decided the present cause in appeal. No objection has been taken to the proof by certified copy of the contents of the record; the copy comes from the táluka kacheri.

Assuming for the moment that the conclusiveness of the entry extends to the tenure, *viz.*, that a duly made entry that the occupant is a dhárekari or an occupancy tenant is conclusive, we must see how the District Judge impeaches the entry. He evidently thinks that there is an *onus* on the plaintiff khot to justify the entry by proving that the survey officer passed a decision under section 16 of the Khoti Act or section 103 of the Land Revenue Code, or by proving that the defendants were informed of the entry made or came to know of it. This is another form of the error which the above decision corrects; and, moreover, the presumption is that the survey officer's acts were regularly performed—Taylor on Evidence, s. 1429.

Next, says the Judge, section 17 would apply to give finality if the record had described the land as *khoti*. No requirement of statute or statutable rule to that effect has been shown us. Whether the defendants are dhárekaris or occupancy tenants

(1) I. L. R., 18 Bom., 133; S. C., P.J., 1893, p. 42.

as they and the plaintiff respectively contend, they are privileged occupants within the definition. Section 16, clause 2, requires the register to specify the tenure; this is done by entry of the words *khatedár kul*—the Maráthi translation of the words occupancy tenant—which by the definition means a holder of *khoti* land who has a right of occupancy in such land. The term is used as a sample in the Government form; and being one so fully and clearly defined by the Act, no better way of complying with the requirement about entry of tenure can be conceived. The record appears to us to be, on its face, such as the law and rules require; and the District Judge ought not to have treated it as invalid. The evidence of a decision otherwise relevant under section 40 of the Evidence Act as proof of *res judicata* earlier than the date of the survey entry, whereby a civil Court adjudged the land to be *dhára*, and the evidence that the khots have never received *thal*, are inadmissible under the decision above quoted. They were matters which the defendants might have shown to the survey officer before he arrived at the decision of which the record is the entry.

It has not been argued that the entry of the tenure made in the record is outside the finality given by section 17. It is obvious that the items in section 33 to which the finality is given, depend on a previous decision of the class of the privileged occupant as section 33 clearly shows. Anyhow the nature and amount of the rent have been entered, and the decision applies to them, and the suit is conformable to the entries thereof.

The Court reverses the decree of the District Judge and restores the original decree; costs of both appeals on the respondent.