APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justic Shah.

CHINTO MAHADEV KHANDEKAR AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 4 TO 8), APPELLANTS *v.* MAHADEV RAMCHANDRA PATKAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3 AND 9 TO 14), RESPONDENTS.*

1918. *November* 19.

Khoti Settlement Act (Bombay Act I of 1880), section 20—Entry in settlement register—Occupancy Tenant—The fact of tenancy not conclusively settled by the entry.

The rule of evidence laid down in section 20 of the Khoti Act that the entry in the settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry.

SECOND appeals against the decision of T. R. Kotwal, Assistant Judge of Ratnagiri, in appeals Nos. 254 of 1914 and 30 of 1915 confirming the decrees passed by S. A. Naik, Subordinate Judge at Rajapur.

The facts material for the purposes of this report are sufficiently stated in their Lordships' judgment.

Coyajee with *B. G. Kher*, for the appellants.

K. N. Koyaji, for respondent No. 1.

SCOTT, C. J.:—Thirty *thikans* of Khoti land in the jurisdiction of the Rajapur Court were held prior to 1883 by the Khandekar family as occupancy tenants. Seven of these *thikans* were attached and sold by Vithal Haldavnekar as mortgagee of the Khoti interest under a decree for payment of the Khot's dues which had been obtained against Yessaji Khandekar. Vithal purchased the attached interests by a Benami sale and having taken

* Second Appeals Nos. 779 and 838 of 1916.

1918.

CHINTO MAHADEV v. MAHADEV RAMCHANDRA.

a transfer obtained possession from the Khandekars. This led to litigation in which Yessaji's brothers claimed that the sale did not affect 5/6ths of the occupancy rights in these *thikans*.

At that time the Khoti Act (section 9) provided that occupancy rights should be heritable but not otherwise transferable "unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the Khot, at some time within...thirty years next previous to the commencement of the revenue year 1865-66". The question of transferability was not discussed in the first Court which decided adversely to the contention of Yessaji's brothers, but it was apparently considered in the first appellate Court where it was stated by the Judge that as a matter of custom it must be held that this (occupancy) right was transferable as it had been actually sold through the Court at the instance of the Khot.

The learned Judge held, however, that the decree and sale of Yessaji's interest would not affect the interests of his brother. On second appeal in the High Court it was assumed that the property could be sold under a decree for the Khot's dues and it was held that in fact the interest of all the parties had been sold.

The result was that Vithal as purchaser acquired the whole of the interest of the occupancy tenants in these *thikans*. The Khandekars, therefore, could not as against Vithal and his assigns assert a title as occupancy tenants.

By various mesne assignments Patkar defendant No. 1 in the first suit (who is plaintiff in the second suit) has become the owner of the interests acquired by Vithal in 1883. The defendant No. 1 in suit No. 53 of 1912 is sued by one of the Khandekars in respect of four of the

seven *thikans* now in his possession while in suit No. 290 of 1913 he sues the Khandekars for the possession of the other three *thikans*.

Both suits are occasioned by Mamlatdar's decrees for possession against the respective plaintiffs.

Both suits have been decided in the lower Courts against the Khandekars. In these appeals it is contended that whether or not the decision in the suit of 1885 against Vithal decided that the Khandekars' interests were validly transferred to him the subsequent assignments under which their opponent Patkar claims title are invalid under the Khoti Act, section 9.

This however would not profit the plaintiff Khandekar in suit No. 53 of 1912 (who suing in ejectment must prove his title) unless he can show that he is an occupancy tenant.

He is, however, precluded from agitating a claim as occupancy tenant in a Court of law against Hari or his assigns by the decision that the occupancy rights of the Khandekars had been sold to Hari—section 40 of the Evidence Act and section 11 of the Civil Procedure Code. The rule of evidence laid down in section 20 of the Khoti Settlement Act that the entry in the settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry.

In the suit No. 290 of 1913 where Patkar is the plaintiff and the Khandekars are tenants—the same estoppel by judgment prevents the latter from asserting an occupancy tenure and it is held as a fact that the Khandekars were in possession for many years since 1890 as

1918.

CHINTO MAHADEV v. MAHADEV RAMA-CHANDRA.

ordinary and not occupancy tenants. They cannot, therefore, resist the claim of the plaintiff who has acquired the title of those to whom the Khandekars attorned as tenants.

The result is that the decree of the lower appellate Court is affirmed and the appeal dismissed with costs in both cases.

Decrees confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Pratt.

1918. *November* 20.

DAUDBHAI ALLIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* DAYA RAMA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res Judicata—*Civil Procedure Code (Act V of 1908), section 11—Finding recorded on an issue which is not necessary in the first suit—Finding does not become* res judicata—"*Finally decided*," *meaning of.*

In 1903, the plaintiff sued the defendant to recover possession of land and arrears of assessment at an enhanced rate, alleging that the defendant was a tenant-at-will and not a permanent tenant. The Court held in that suit that the defendant was a yearly tenant ; and though it decreed the claim to recover arrears of assessment at the enhanced rate, it dismissed the claim to recover possession on the ground that notice to quit had not been given by the plaintiff. Ten years later, the plaintiff gave to the defendant a legal notice to quit, and brought a second suit to recover possession of the land, alleging that the defendant was a tenant-at-will and that he was prevented from contending otherwise by *res judicata.*

Held, by *Heaton J.*, that though the issue as to the nature of the tenancy was undoubtedly directly and substantially in issue, it could not be said that it was finally decided, in the earlier case.

Held, by *Pratt J.*, that the dismissal of the claim for possession prevented the finding that the defendant was not a permanent tenant from operating as *res judicata* ; and that the issue as to the character of the tenure was a matter collateral to the liability to pay enhanced assessment.

* Second Appeal No. 559 of 1917.