

of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to a person of his position, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

J. V. W.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Drake Son & Parton.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

MEHDI HOSSEIN

v.

UMESH CHANDRA MOOKERJEE*.

Chaukidari Chakaran Lands—Resumption—Putni lease—Transfer to landlord—Suit for recovery of possession with mesue profits—Village Chaukidari Act (Beng. VI of 1870) s. 51.

Where A obtained a putni of two villages from Z, paid a bonus and the annual rent was fixed in perpetuity, and where within the lands comprised in the putni were some chaukidari chakaran lands which were subsequently resumed by Government and transferred to Z, who settled the same with

*Appeals from Appellate Decrees, Nos. 2402, 2501 and 2502 of 1912, against the decrees of Asutosh Sarkar, Subordinate Judge of Birbhum, dated May 6, 1912, modifying the decrees of Girindra Nath Mookerjee, Munsif of Rampurhat, dated March 25, 1911.

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tenants, and where A, the putnidar, instituted a suit for declaration of title and recovery of possession with mesne profits :

Held, that, on equitable grounds, the putnidar and the zemindar must be placed in the position they would have occupied if the chaukidari chakaran lands had been resumed before the putni was created ; the assets of those lands would then have been taken into account in settling the amount of putni rent which would have represented the assessment due to the State, as also a fair share of the profit.

Held, also, that mesne profits were to be calculated on the basis of the rent payable by the tenants to the zemindar and not on that of the actual value of the land produce.

Ranjit Singh v. Kali Dasi Debi (1), *Kazi Newaz Khoda v. Ram Jadu Dey* (2), *Rajendra Nath Mukherjee v. Hira Lal Mukherjee* (3), *Gopendra Chandra Mitter v. Tara Prasanna Mukherjee* (4), *Harak Chand Babu v. Charu Chandra Singha* (5) referred to.

SECOND APPEAL by Khondkar Mehdi Hossein and others, the defendants.

The facts necessary for the purposes of this report are shortly these. On the 27th July 1866, the plaintiffs' predecessor in title obtained a putni of two villages from the zemindar defendants, paid a bonus of Rs. 1,000 for the lease, and the annual rent being fixed in perpetuity at Rs. 501. Some chaukidari chakaran lands at that time in the occupation of the chaukidars were included in the putni. These lands were resumed later by Government and transferred to the zemindar in or about 1898 under the Village Chaukidari Act, 1870. Thereafter the zemindar took possession of the same and settled them with tenants. The plaintiffs, who were the putnidars, instituted this suit on the 11th June 1910, for declaration of their title and for recovery of possession with mesne profits. On the 15th March 1911, the Court of first instance decreed possession and held, (i) that the plaintiffs had

(1) (1917) 21 C. W. N. 609.

(3) (1910) 14 C. W. N. 995.

(2) (1906) I. L. R. 34 Calc. 109.

(4) (1910) 14 C. W. N. 1049.

(5) (1910) 15 C. W. N. 5.

to pay to the zemindar the amount assessed under the Village Chaukidari Act, 1870, as well as a portion of the profits of the lands in dispute; (ii) that the rent payable by the tenants to the zemindar was the measure of damages recoverable by the plaintiffs. On appeal, the lower Appellate Court, on the 6th May 1912, varied the decree holding (a) that the plaintiffs were not liable to pay anything beyond the sum assessed at the time of the resumption as payable to the chaukidari fund, (b) that the plaintiffs were entitled to the actual value of the produce of the land in suit.

From that decision the defendants preferred this second appeal to the High Court.

Babu Ram Chandra Mazumdar and Babu Nogen-dra Nath Sen, for the appellants.

Babu Brojendra Nath Chatterjee, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the defendants in a suit for recovery of possession of land with mesne profits. On the 27th July 1866, the plaintiffs obtained a putni of two villages from the zemindar defendants. A bonus of Rs. 1,000 was paid for this lease and the annual rent was fixed in perpetuity at Rs. 501. Within the ambit of the lands comprised in the putni lease, there were chaukidari chakaran lands, at that time in the occupation of chaukidars. These lands were subsequently resumed by the Government and transferred to the zemindars, in conformity with the provisions of the Village Chaukidars Act, 1870. The zemindar took possession of the lands and settled them with tenants. The plaintiffs, who were putnidars, thereupon instituted this suit on the 11th June 1910, for declaration of their title and for recovery of possession with mesne profits. The Courts below have concurrently made a decree in

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their favour; but the two Courts have disagreed as to the terms under which the plaintiffs are entitled to hold this land as part and parcel of their putni under the zemindars. The Court of first instance held that the plaintiffs were under an obligation to pay to the zemindars, not only the sum assessed under the Village Chaukidars Act, 1870, at the time of resumption, but also a share of the profits of the lands they claim to recover. On appeal, the Subordinate Judge has held that the plaintiffs are liable to pay to the zemindars nothing beyond the sum assessed at the time of resumption as payable into the chaukidari fund. Upon the question of mesne profits also, the two Courts have disagreed. The trial Court held that the rent payable by the tenants settled on the lands by the zemindars was the measure of damages recoverable by the plaintiffs. The Subordinate Judge, on the other hand, has held that the plaintiffs are entitled to the value of the actual produce of the lands in suit. The zemindars have appealed to this Court and have raised only those two questions whereon the Courts below have disagreed; they have not disputed the right of the plaintiffs to recover possession of the lands; and it may be added that in view of the decision of the Judicial Committee in the case of *Raja Ranjit Singh v. Srimati Kali Dasi Debi* (1), the decree for possession cannot possibly be successfully challenged.

As regards the first question, namely, the terms under which the plaintiffs are entitled to recover possession of these lands from the zemindars and the tenants inducted by them into the land, we are of opinion that the view taken by the Subordinate Judge is erroneous. It was pointed out by this Court in the case of *Kazi Newaz Khoda v. Ram Jadu Dey* (2), that

(1) (1917) 21 C. W. N. 609.

(2) (1906) I. L. R. 34 Calc. 109;
 11 C. W. N. 201.

if in assessing the putni rent, the profits of all the lands including the chakaran lands were fully taken into account, the putnidar would not be liable to pay additional rent for the chakaran lands when they came into his possession; but otherwise the putnidar is bound to pay to the zemindar, in addition to the fresh amount assessed on resumption, a fair share of the profits derivable from the land. This view has been subsequently approved in the cases of *Rajendra Nath Mukherjee v. Hira Lal Mukherjee* (1), *Gopendra Chandra Mitter v. Tara Prasanna Mukherjee* (2) and *Harak Chand Babu v. Charu Chandra Singha* (3). In the first of these cases, Brett J. pointed out that it was not correct to hold as a general principle of law that the putnidar is not bound to pay to the zemindar more than the assessment made by the Collector; the zemindar would be equitably entitled, not only to payment of the assessment made by the Collector, but also a proportionate share in the profits such as the zemindar would, in the circumstances, be entitled to impose on the putnidar. We are of opinion that this view is unquestionably sound on principle. In the case before us, there is no indication in the contract between the parties that, at the time of inception of the grant the putni rent was assessed on the basis of the assets of all the lands situated within the ambit of the putni, inclusive of the chaukidari chakaran lands. It is, on the other hand, plain that the rent hitherto paid by the plaintiffs to the defendants has not represented the profits derivable from the chaukidari chakaran lands. Consequently, the terms of the contract between the parties do not entitle the plaintiffs to claim possession of the lands in suit from the zemindars, merely on payment of the sum now assessed

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by the revenue authorities under the Village Chaukidars Act, 1870.

Reliance has been placed by the plaintiffs respondents, upon the provisions of section 51 of the Village Chaukidars Act, which, however, do not really advance their contention. Section 51 provides that the land resumed by the Collector is transferred to the zemindar, subject to the prior contracts made by him. The effect of the application of that principle to the case before us is that the plaintiffs can, under the terms of the putni lease, recover possession of the lands in suit. But the contract does not show that the plaintiffs are entitled to such possession without payment of any rent to the zemindar or without payment of any sum beyond what represents the new assessment. Consequently, on equitable grounds, the putnidar and the zamindar must be placed in the position they would have occupied, if the chaukidari chakaran lands had been resumed before the putni was created; the assets of those lands would then have been taken into account in settling the amount of putni rent, which would have represented the assessment due to the State as also a fair share of the profit. In these circumstances, we are of opinion that the order of the Court of first instance was just and proper and should not have been varied by the Subordinate Judge.

As regards the second question, namely, the basis of calculation of mesne profits, it cannot be disputed that the plaintiffs as putnidars would have been entitled to possession of the lands through tenants; the measure of damages payable to them is consequently represented by the rent payable by the actual cultivators to the plaintiffs as putnidars. This was the view taken by the Court of first instance, and should not have been rejected by the lower Appellate Court.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The appellants are entitled to their costs in this Court, but there will be no order for costs before the Subordinate Judge.

This judgment will govern the other two cases, viz., S. A. 2501 and 2502 of 1912, in each of which a similar order will be drawn up.

L. R.

Appeals allowed.

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APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

SERAFAT ALI

v.

ISSAN ALI.*

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Contribution, suit for—Contract Act (IX of 1872) ss. 69, 70.

X, a mortgagee, obtained a decree against A, B and C as representatives in interest of his mortgagor. A satisfied the decree-holder in full, and instituted a suit for contribution against B and C for recovery of two-thirds of the money. B and C denied that A had any interest in the mortgaged property, and urged that his payment was voluntary. The Court of first instance found, on the evidence, that A had an interest in the property, but the lower Appellate Court dismissed the suit holding that A had none :

Held, that a payment in satisfaction of a decree, by a person who is a party to the decree and was bound thereby, was a payment made lawfully within the meaning of s. 70 of the Indian Contract Act.

Bindubashini Dasi v. Harendralal Roy (1), *Radha Madhub Samonta v. Sasti Ram Sen* (2) discussed.

* Appeal from Appellate Decree, No. 2587 of 1914, against the decree of Sarada Prasad Baksi, Subordinate Judge of Midnapore, dated June 4, 1914, reversing the decree of Nitai Charan Ghose, Munsif of Tamluk, dated Feb. 24, 1913.

(1) (1897) I. L. R. 25 Calc. 305. (2) (1899) I. L. R. 26 Calc. 826.