1906
November 21.

Before Mr. Justice Sir George Knox.

DIL KUNWAR (PLAINTIFF) *v.* UDAI RAM AND OTHERS (DEFENDANTS).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 201—*Act No. I of* 1872 (*Indian Evidence Act*), *section* 4—*Evidence—Record of plaintiff's name as co-sharer—Presumption.*

The presumption enjoined by clause (3) of section 201 of the Agra Tenancy Act is not conclusive, even in a Revenue Court, but may be rebutted, as, for instance, by evidence showing that the plaintiff has not been in possession of the property in respect of which profits are claimed for more than twelve years before suit, and the defendants have openly denied the plaintiff's title for more than that period. *Niaz Ali Khan* v. *Gobind Ram* (1) distinguished.

THIS was a suit for profits brought by one Musammat Dil Kunwar. The plaintiff alleged herself to be owner and sharer in the mahal. She did not specifically state in her plaint that she was a recorded co-sharer; but the defendants in their written statement admitted that the plaintiff's name had been entered in respect of the land in question about 22 years previously, although at the same time stating that she had never been in possession. The Court of first instance (Assistant Collector, Meerut) decreed the plaintiff's claim in part. On appeal the additional District Judge of Meerut found that the plaintiff's suit was barred by limitation and dismissed it. The plaintiff appealed to the High Court. There, on an issue remitted it was found that the plaintiff had not been in possession for more than 12 years and that the respondents had before that period denied openly her title.

Dr. *Satish Chandra Banerji* and Munshi *Gokul Prasad*, for the appellants.

Pandit *Mohan Lal Nehru*, for the respondents.

KNOX, J.—This appeal arises out of a suit brought by one Musammat Dil Kunwar in one of the Revenue Courts of Meerut against Udai Ram and others, respondents to the present appeal. The plaintiff alleges herself to be owner and sharer in a mahal. She does not in her plaint specifically say that she is a recorded co-sharer, but in the written statement filed by the respondents

* Second Appeal No. 171 of 1905 from a decree of E. A. Kendall, Esq., Additional District Judge of Meerut, dated the 24th of November 1904, modifying a decree of Munshi Asghar Ali, Assistant Collector of the first class of Meerut, dated the 6th of December 1902.

(1) F. A. f. O. No. 70 of 1904, decided May 22, 1905.

I find the following :—"The plaintiff's name was entered in respect of the land in question about twenty-two years ago, but since then the plaintiff has not at all come in possession of any sort up to this moment." This may fairly be interpreted as meaning that the plaintiff is recorded as having proprietary right in the mahal. The Court of first instance gave the appellant a decree for part only of the profits claimed. In appeal the Court below held that the plaintiff's claim was barred by lapse of time. Exception was taken to this finding in the memorandum of appeal filed in this Court, *vide* plea No. 1, and when that plea came to be argued I returned the appeal for a precise finding upon the issue whether or not the plaintiff had been in possession at any time within the 12 years immediately preceding the institution of the suit. The return made by the Court below is to the effect that the plaintiff has not been in possession of her share for many more than 12 years and the respondents have openly denied her right for more than the statutory period. To this finding no objection has been taken. But my attention to-day was drawn to the second plea in the memorandum of appeal. This plea is to the effect that under section 201 of the North-Western Provinces Tenancy Act, the plaintiff's name being recorded as a co-sharer, the Court was bound to presume that she was one, and the suit for profits should have been decreed, the defendant being left to his remedy by a Civil suit. In support of this plea the provisions of section 201 of the Tenancy Act, 1901, were put forward, as also an unreported judgment of this Court, *Niaz Ali Khan* v. *Gobind Ram*(1). On the strength of these two authorities it was contended that this Court had no alternative but to find that the plaintiff being recorded as having a proprietary right had such right, and that the only opportunity of that right being contested was by a suit in the Civil Court. Section 201, sub-section (3), enacts as follows :—"If the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it, but nothing in this sub-section shall affect the right of any person to establish by suit in the Civil Court that the plaintiff has not such proprietary right." I do not find any definition of the words 'shall presume' in the Tenancy Act, but the words 'shall presume' are defined in the

(1) F. A. F. O. No. 70 of 1905 decided on 22nd May 1905.

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Indian Evidence Act, 1872. The legal meaning assigned to those words in the last named Act is that when it is directed that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. I cannot conceive that in the Tenancy Act these particular words have any higher force than the similar words contained in the Evidence Act. On the other hand, it is easy to conceive a case in which to hold that when the Court has a record before it, it is compelled to accept blindly a fact in the teeth of rebutting evidence, would lead to an unnecessary multiplication of suits. For instance, a Court might have before it a village record in which it was recorded for one particular year that the plaintiff had proprietary right, and for the year immediately preceding and immediately following he was not so recorded, and the patwari who had the record made might swear that the matter recorded was a clerical error, or some other overwhelming evidence might be put forward showing that it was a clerical error; is the Court to go on to decree profits to the recorded proprietor and to refer the other side to a civil suit to establish that the recorded proprietor had no proprietary right? In this case the fact that the plaintiff has proprietary right has been disproved and the presumption falls to the ground. With regard to the case of *Niaz Ali Khan* v. *Gobind Ram*, as I understand that case the plaint did not set out that the plaintiff was a recorded co-sharer. The defence made no allusion to any record and no record was put before the Court of first instance. In appeal the lower appellate Court permitted such record to be put in evidence and upon that record found that the appellant was entitled to receive profits on the share recorded in his name. In appeal in this Court the record was attacked as being not admissible in evidence and it was ruled that it was a record having force under sub-section (3) of section 201 of the Tenancy Act, and I take the decision of this Court to go no further than to say that the lower appellate Court was right in presuming upon the record that the plaintiff had a proprietary right. In other words, the fact was recorded as proved because it had not been disproved. The appeal fails and is dismissed with costs.

Appeal dismissed.