1907
November 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

DHANKA (PLAINTIFF) *v.* UMRAO SINGH (DEFENDANT).*

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

Held that the presumption enjoined by section 201, clause (3) of the Agra Tenancy Act, 1901, is not conclusive, but may be rebutted by evidence offered to the contrary. *Banwari Lal* v. *Niadar* (1) referred to.

THIS was a suit for profits brought by a plaintiff, who was recorded in the khewat as the owner of one-third of the property in respect of which the claim was brought. The plaintiff was the widow of Beni Ram, who predeceased his father Ram Prasad. The defendant Umrao Singh was a surviving son of Ram Prasad. The plaintiff appears to have been in possession and in receipt of the profits without objection on the part of the persons legally entitled down to the year 1900. In that year, however, Umrao Singh brought a suit against the plaintiff for a declaration that she was not entitled to a share of the profits of this property. This suit resulted in a compromise, by which Umrao Singh agreed to pay Musammat Dhanka Rs. 10 per mensem and undertook not to alienate the property during Dhanka's life-time. The compromise, however, does not appear to have been acted upon, for even after it was entered into Musammat Dhanka sued for and obtained decrees for profits, nor was the khewat amended in accordance with the terms of the compromise. The present suit was decreed in part by the court of first instance (Assistant Collector), but on appeal the lower appellate court (District Judge of Bareilly) finding on the evidence that the plaintiff's name was recorded merely *solatü causâ*, and that she was not in fact a co-sharer, allowed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court. This appeal came before a Division Bench, the members of which differed as to the effect to be given to section 201, cl. (3), of the Agra Tenancy Act, 1901, and the decree accordingly followed the judgment of Knox, J., who agreed with the court below (*See* Weekly Notes, 1907, page 43). The plaintiff thereupon appealed under section 10 of the Letters Patent.

* Appeal No. 18 of 1907 under section 10 of the Letters Patent, from the judgment of Knox, J, dated the 8th January 1907, in S. A. No. 1090 of 1905.

(1) (1906) I. L. R., 29 All., 158.

Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The question in this appeal is whether the words "shall presume," in sub-section (3) of section 201 of the Tenancy Act, No. II of 1901, should be construed in their ordinary sense or as meaning "shall conclusively presume." If the latter meaning is to be put upon the language, a plaintiff who is recorded proprietor would be entitled to a decree in the Revenue Court as a matter of course. The question is by no means free from difficulty. A presumption of law is merely an arbitrary inference which the law directs a Judge to draw from particular facts, and which may be either conclusive or rebuttable. It is ordinarily rebuttable. The words "shall presume" when used in the Evidence Act mean that the Court shall regard a fact as proved unless and until it is disproved. On the other hand, when one fact is declared by that Act to be conclusive proof of another, on proof of the one fact the Court is to regard the other as proved and must not allow evidence to be given for the purpose of disproving it (section 4). If the words "shall presume" bear the same meaning in the Tenancy Act, as they do in the Evidence Act, then the fact that a plaintiff is the recorded owner is only *primâ facie* proof which shifts the burden of proof to the defendant, who may, if he can, by evidence overbear the *primâ facie* proof. Is there any grave reason for interpreting the words "shall presume" as equivalent to the words "shall conclusively presume?" It appears to us that there is no such reason either on the ground of convenience or any like matter to attach to them any other than their ordinary meaning. Indeed to do so might create much inconvenience: for example, in this Province on the death of a proprietor leaving a widow and a son or sons, the widow is very commonly recorded as owner for the sake, as it is said, of consolation. In such a case it would be highly inconvenient if the Revenue Court were not allowed to go behind the record and ascertain the true state of the case. If the Legislature had intended that the presumption should be conclusive, it could easily have so provided. We find in section 19 of the Act that when the Legislature desired to provide that an entry in the khewat

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should be considered conclusive proof of the correctness of that entry it was careful to make a provision to that effect. On the whole we see no reason for giving conclusiveness to a presumption where the Legislature has not in express terms done so. We are supported in this view by the ruling in the case of *Banwari Lal* v. *Niadar* (1). We therefore, agreeing with our brother Knox, dismiss the appeal with costs.

Appeal dismissed.

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December 2

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR *v.* KASHI NATH AND ANOTHER. *

Act No. III of 1867 *(Gambling Act), sections* 5 *and* 6—*Warrant for search of suspected house—"Credible information"—Procedure—Endorsement of warrant by officer to whom it was issued.*

Warrants issued under Act No. III of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and execution of warrants in general: there is, therefore, no objection to the officer to whom such a warrant is originally issued endorsing it to another officer, provided that the latter is an officer to whom such warrant could be legally issued in the first instance.

IN this case a Magistrate of the district of Benares, having before him information of various kinds tending to the conclusion that a certain house in the city of Benares was used as a common gaming house by two persons named Kashi Nath and Raj Nath, issued a warrant under section 5 of Act No. III of 1867 for the search of the suspected house. The warrant was addressed to the Kotwal of Benares. The Kotwal endorsed it over to the Sub-Inspector of the Chauk thana for execution, and it was executed by that officer. On entering the house a large collection of persons of very various castes was found there, apparently gambling, and in front of Kashi Nath and Raj Nath was a box containing money. Kashi Nath and Raj Nath were convicted under section 3 of Act No. III of 1867, and sentenced to three months' rigorous imprisonment each. Against their convictions and sentences they applied in revision to the High Court.

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* Criminal Revision No. 622 of 1907, against the order of Baij Nath, Sessions Judge of Benares, dated the 17th of September, 1907.

(1) (1906) I. L. R., 29 All., 158.