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application. The Court who delivered the judgment in that case, consisting of the Chief Justice and Rafiq, J., refused to accept this contention and refused to apply the principle laid down in *Explanation* 4 to section 11 to cases of that nature. Again in Madras in the case of *Nityananda Gantayet* v. *Gajapati Vesudeva Devu* (1) the Court refused to apply the law of *res judicata* as laid down in *Explanation* 3 of section 13 of the Code of 1882, which is now *Explanation* 5 of the present Code, to a case where the plaintiff had been awarded by a decree possession of land together with mesne profits and applied in execution for delivery of the land and for mesne profits but was not awarded mesne profits by the executing Court. In fact that Court made no reference to it in its decision and when the plaintiffs subsequently applied for mesne profits they were met with the objection arising under what is now *Explanation* 5 of section 11, and the Madras High Court refused to entertain the argument based upon that *Explanation* in such a case. I see no reason to differ from the principles laid down in those cases and therefore on this ground also I think that this appeal should be dismissed. The respondents are entitled to their costs of this appeal.

ADAMI, J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller, C. J. and Adami, J.

1922.

April, 27.

QAYAMUDDIN KHAN

v.

RAMYAD SINGH.*

Co-Sharer Landlords—some in direct possession of bakasht *lands—Collectorate partition—whether co-sharers*

* Letters Patent Appeal Nos. 101 and 102 of 1921.

(1) (1901) I. L. R. 24 Mad. 681.

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formerly in possession of bakasht *lands entitled to retain possession—onus*

Where, before a Collectorate partition between co-sharer landlords, some of the co-sharers have been in actual possession of some of the *bakasht* lands on payment of part of the produce to the other co-sharers, the co-sharers to whose *takhtas* such lands are allotted by the partition are entitled to direct possession in the absence of any exception provided by law or of an agreement that the former holders of the lands shall continue to cultivate them. The onus of proving such an agreement lies on the person affirming it.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Susil Madhab Mullick and *H. P. Sinha*, for the appellants.

Kulwant Sahai and *S. N. Rai*, for the respondents.

DAWSON MILLER, C. J.—These are two appeals under the Letters Patent, from a decision of Mr. Justice Ross, dated the 27th of October last. There were two cases instituted by two co-sharer landlords, claiming in the one case 8 *bighas* of land and in the other case 22 *bighas*, 5 *kathas*, against the same defendant who previously had been a co-sharer with the plaintiffs. Both the suits raised exactly the same question for determination; they have been heard together and determined by one judgment.

The plaintiffs and the defendants were co-sharer landlords in *Mauza* Silarhi and in April 1918 effected a *batwara* partition whereby different parcels of the lands in suit fell into the *takhtas* of the plaintiffs respectively. It appears that before the *batwara* partition, the defendants had been in actual possession of the lands and had been cultivating them and giving a portion of the produce to their co-sharer landlords. After the partition, when the plaintiffs sought to get possession, they were resisted by the defendants and after certain proceedings under section 144 of the Criminal Procedure Code, the present suits were instituted in October, 1918, by the plaintiffs, claiming

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possession of the lands after eviction of the defendants. The case set up by the defendants in their written statement was that the lands in suit were their ancestral *kaimi raiyati* lands which they acquired before their acquisition of the proprietary interest and of course if that case could have been made out no doubt the defendants would have been entitled to remain in possession as *raiyats* notwithstanding the subsequent partition.

The case made by the plaintiffs was that the lands in question were not the defendants' *raiyati jote* at all but were the *maliks' bakasht* lands and that the defendants were in fact in possession before the *batwara* but were in possession as *maliks*, and it was not disputed that the distribution of the produce was as stated and as set out in the record-of-rights. A further defence was raised by the defendants to the effect that even if the disputed lands were the *maliks' bakasht* lands which they denied, then in that case also they were entitled to remain in possession notwithstanding the partition as there was no law or custom by which the defendants' *kasht* right in the disputed lands could after the *batwara* and demarcation of boundaries be extinguished. The record-of-rights described the lands as *bakasht* of the *maliks* and in a note in the survey *khatian* the manner in which the rent or produce was distributed was thus stated :

"After deducting the *raiyati* half share, from the remainder of the produce is again deducted landlords' share due to the co-sharer in possession and the residue is divided amongst the other *maliks* according to their shares with an addition of 1¼ *seers* in the maund for cess."

When the case came before the trial Court the defendants contended that this entry in the record-of-rights was consistent and consistent only with a *raiyati* interest in the defendants and they strongly relied upon that entry as supporting their claim which was also evidenced by some oral testimony and that they had many years ago and before they became proprietors acquired a *raiyati* interest in the land. That contention, however, failed. The learned Munsif came to

the conclusion that the defendants had never acquired a *raiyati* interest by purchase or otherwise from any tenant or from any one and he found that the entry in the record-of-rights was not inconsistent with that which in another part of the record was distinctly stated, namely, that the lands were *bakasht* lands of the *maliks*, and upon the whole of the evidence he arrived at the conclusion of fact upon that issue adverse to the defendants. He further came to the conclusion that as the defendants were neither *maliks* nor tenants of the *pattis* in which the disputed lands were situated, they were not entitled to remain in possession. That finding disposed of the point raised as an alternative point by the defendants that having been in possession of *bakasht* lands they were still after the *batwara* entitled to remain in possession upon payment of rent to their co-sharers. The case then went on appeal to the Subordinate Judge and he arrived at exactly the same conclusion of fact as that which the Munsif had come to and found that there was absolutely no documentary evidence to prove that the defendants had ever acquired any tenancy right prior to their acquisition of proprietary right in the village and that the oral evidence on their behalf was quite unreliable. Those findings of fact cannot be questioned in second appeal, but when the case came on second appeal to this Court it was contended before the learned Judge that notwithstanding the findings of fact the defendants had upon the facts found acquired an interest in the land which was not extinguished by reason of the *batwara* proceedings. This view of the case appears to have commended itself to the learned Judge because he allowed the appeal and dismissed the suits with costs. He was apparently influenced by the entry in the record-of-rights as to the manner in which the produce had been distributed between the defendants actually occupying the land and their co-sharers. He thought that this fact in itself negatived the suggestion that the lands were part of the *zerait* lands of all the proprietors held for the

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purpose of convenience by those particular proprietors, the defendants. If the learned Judge meant by that passage that the plaintiffs were contending that these were *zerait* lands and therefore that no rights of occupancy could be acquired in them, the learned Judge had not appreciated what the real issues in the case were. I think, however, it is only fair to the learned Judge to say that in using the words *zerait* lands there he was not using the term in the technical sense in which it is used in the Bengal Tenancy Act. He probably meant to use the expression merely to indicate lands in the direct possession of the *maliks* such as *bakasht* lands. It is possible, however, that he had in mind that unless the lands were *zerait* the defendants could not be dispossessed. However that may be, the conclusion he arrived at was that the plaintiffs even after the *batwara* could only become entitled to cultivating possession of the disputed lands as a result of partition if the right to cultivate itself was in hotchpot when the partition was made. It seems to me, with great respect to the learned Judge, that in expressing the matter as I have just stated he was somewhat misplacing the onus. Unless the defendants had acquired some right in the lands known to the law, some tenancy right or some right recognized by the law as creating an interest therein, other than the proprietary interest, the result of the partition would inevitably be that the co-sharers to whose *takhta* the land was allotted would get possession of the land, and direct possession unless there was some tenant already on the land. It was not necessary to prove affirmatively that it was the intention in the *batwara* proceedings that this land should be given into the direct cultivating possession of the landlords. It must be presumed that the right to cultivate was considered by the landlords at the time of the partition to have been as the learned Judge described it, itself in hotchpot. Apart altogether from any intention, it seems to me that it was in hotchpot and that the onus was upon the defendant to prove by some arrangement or by some

agreement between the proprietors when the *batwara* partition was effected that the right actually to cultivate was not in hotchpot. Two cases, however, have been relied upon by the learned Government Pleader on behalf of the respondents which he says support his contention. The first of those was Second Appeal No. 82 of 1919, to the judgment in which my learned Brother was a party, in which it was decided that a co-sharer who acquires an occupancy holding during the continuance of the joint estate of himself and his co-sharers does not lose his *raiyati* right by reason of a *batwara* partition. That decision, however, may be justified under section 22, sub-section (*2*), of the Bengal Tenancy Act. The case set up in the present appeal is admittedly not a case coming under section 22, sub-section (*2*), of that Act. It is not contended that the defendants acquired any occupancy right during the period that they were co-sharers with the plaintiffs. The other case is a decision of similar import. It is Letters Patent Appeal No. 117 of 1920. That was a decision of Jwala Prasad, Acting Chief Justice, and Das, J., and that again was a case where the right of the defendant was acquired in the circumstances contemplated in section 22, sub-section (*2*), of the Bengal Tenancy Act, and it is important to observe that in the course of the judgment after pointing out that one of the contentions was that the lands were the *bakasht* of the proprietors and as such the plaintiffs had no right to the same if they fell into the *pattis* of the defendants in the partition proceedings, it is stated, " This would be so if the land was the *bakasht* of the proprietors prior to the partition " : so that so far from this decision being an authority in favour of the respondents it seems to me an authority to the contrary.

The result of my opinion is that in all cases where you have a *batwara* partition between co-proprietors, if the lands are merely the *bakasht* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords

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themselves at the time of the *batwara*, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall. The only exceptions seem to me to be those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. But in the present case there is no law that I am aware of which provides that merely because a co-sharer has been in possession of *bakasht* lands belonging to himself and his co-sharers he is therefore entitled after a Collectorate partition to remain in possession of those lands when they are allotted to the *takhta* of one of his co-sharers.

In my opinion these appeals should be allowed with costs, the decision of the learned Judge set aside and the decree of the Subordinate Judge restored.

ADAMI, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Coutts and Das, J.J.

1922.

April, 27.

RAM LOCHAN MISRA

v.

PANDIT HARINATH MISRA.*

Evidence Act, 1872 (*Act I of* 1872), *sections* 63(3) *and* 64—*copy of document admitted without objection—whether objection may be taken in appellate court.*

Where a copy of a document has been admitted in evidence in the trial court without objection, its admissibility cannot be challenged in the appellate court.

* Appeal from Appellate Decree No. 1128 of 1920, from a decision of H. Foster, Esq., District Judge of Patna, dated the 16th April, 1920, reversing a decision of M. Muhammad Zahur, Subordinate Judge, Patna, dated the 4th June, 1919.