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motive for coming to the agreement was that prosecution may not be launched in the case, but as Mr. Justice Chapman says "the distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view."

On a careful consideration of the matter, I am unable to distinguish this case from the case upon which the respondents rely.

I must dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

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December, 2.

RAGHUNATH MISRA

v.

RAM BEHERA.*

*Record-of-Rights—presumption, rebuttal of—evidence of documentary evidence prior to publication of Record, admissibility of—Occupancy rights, whether can be acquired by under-raiyat—Orissa Tenancy Act 1913, (B. & O. Act II of 1913), sections 237, 57 and 117—*Rafa-tankidars, *status of—Provincial Settlement records evidentiary value of.*

Where the plaintiffs were recorded as *rafa-tankidars* in the Provincial Settlement records and as *tankidars* in the records of the Revisional Settlement, *held*, that the entry in the Provincial Settlement records was sufficient to rebut the presumption arising from the entry in the records of the Revisional Settlement inasmuch as there was no procedure by which the status of the plaintiffs could have been changed from that of *rafa-tankidars* to that of *tankidars* in the interval between the two settlements.

Sheonandan Prasad Shukul v. *Bacha Raut* (1), approved.

*Circuit Court, Cuttack. Appeal from Appellate Decree No. 35 of 1921 from a decision of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 9th May, 1921, confirming decision of Babu Ramadeb Choudhury, Deputy Collector of Khurda, dated the 23rd January, 1921.

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Although, under-*raiyats* may, by custom, acquire certain privileges which are possessed by occupancy *raiyats* they cannot acquire the status of *raiyats*, and, therefore, the mere fact that they have been recorded as occupancy *raiyats* in the Revisional Settlement does not confer that status upon them.

Semble, that an under-*raiyat* can by custom acquire a privilege rendering him not liable to ejectment merely on notice to quit under section 57 of the Orissa Tenancy Act, 1913.

Rafa-tankidars are occupancy *raiyats*.

Harayan Patnaik v. *Raghunath Patnaik* (1), followed.

The Provincial Settlement records are of very high value in determining the status of tenants.

The facts of the case material to this report were as follows:—

In the Provincial Settlement records the plaintiffs were recorded as *rafa-tankidars*. In the Revisional Settlement they were recorded as *tankidars* and the defendants were recorded as occupancy-*raiyats*.

The plaintiffs instituted the present suit to eject the defendants from 4·582 acres of land in Khurda. In the plaint they described themselves as *rafa-tankidars* and the defendants as *shikmi raiyats*, *i. e.*, under-*raiyats*, and alleged that notice had been served on the defendants under section 57 of the Orissa Tenancy Act, 1913.

The trial court held that the plaintiffs were *tankidars* and that no notice under section 57 had been served on the defendants. The suit was accordingly dismissed. The plaintiffs appealed to the District Judge who held that notice had been served on the defendants under section 57 but that the entry in the Provincial Settlement records as to the status of the tenants was not sufficient to rebut the presumption arising under section 117 from the entry in the Revisional Settlement records. He referred to sections 298 and 248 of Mr. W. C. Taylor's Report of 1857 on the Settlement of the Khurda Estate but did not consider that they were sufficient to establish the plaintiffs' status as *raiyats*. He further held that under section 237

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of the Orissa Tenancy Act under-*raiyats* are competent to acquire to occupancy rights by custom. He dismissed the appeal.

The plaintiffs appealed to the High Court.

J. N. Bose and *Satindra Narayan Roy*, for the appellants.

A. Manan and *Bichitranand Das*, for the respondents.

DAS, J.—This appeal arises out of a suit instituted by the plaintiffs for ejectment of the defendants from 4·582 acres of land in Khurda. The plaintiffs describe themselves as *raja-tankidars* and it is their case that the defendants are *shikmi raiyats*, that is to say, under-*raiyats*. The Provincial Settlement records the plaintiffs as *raja-tankidars* but the Revisional Settlement describes them as *tankidars* and the defendants as having rights of occupancy in the land in dispute.

The learned Judge has come to the conclusion that the entry in the Revisional Settlement record must be presumed to be correct until it is shown to be incorrect, and his view is that the Provincial Settlement is by itself insufficient to rebut the presumption that the Revisional Settlement record is correct. Now in my opinion this is not a very correct way of stating the position. As was held in the case of *Sheonandan Prasad Shukul* v. *Bacha Raut* (1), evidence of facts documentary and oral of a date prior to that of the publication of the Record-of-Rights is admissible and should be taken into consideration in determining whether the presumption under section 103B of the Bengal Tenancy Act, as amended, has been rebutted or not.

Now, as I understand the position, in the year 1839 the Government agreed to a compromise with *tankidars* or holders of land on quit rent to the effect that on condition of their agreeing to pay rent at certain rates fixed by Government no enquiries would be made into the liability of their holding on resumption. I understand that the quit rates so fixed were termed *rajatanki* or terms at fixed rates and the holders of the

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land were known as *rafa-tankidars*. If in fact the plaintiffs were *rafa-tankidars* at the time of the Provincial Settlement there is no procedure by which they became *tankidars* at the time of the Revisional Settlement. The Provincial Settlement records must be considered of very high value in determining the status of tenants and in my opinion the Provincial Settlement record is sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement records in this case because it is conceded that there is no oral evidence in the case on the point.

The next question is, if the position of the plaintiffs be that of *rafa-tankidars* are they entitled to eject the defendants? The learned Judge in the court below says that Mr. Taylor's opinion on the point is not entitled to much weight. There is, however, a decision of this court in the case of *Harayan Patnaik* vs. *Raghunath Patnaik* (2), which concludes the matter. That decision is in favour of the appellants. It decides that *rafa-tankidars* are occupancy *raiyats* and not tenure-holders. If that be so they are entitled to eject the defendants unless it be that the defendants have acquired certain rights by custom. The learned Judge says that under section 237 of the Orissa Tenancy Act, "under-*raiyats* can acquire occupancy rights by custom". With all respect I am unable to agree with this view. Section 237 provides—

"Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by its provisions."

I can quite understand an under-*raiyat* acquiring by custom certain privileges which are possessed by occupancy tenants but it is one thing to say that a person may by custom acquire certain rights which are incident to rights of occupancy in land but it is quite another thing to say that by custom an under-*raiyat* may become a *raiyat*. There would, in my opinion, be a contradiction in terms if the view of the learned Judge in the court below be accepted. It may of course be that the defendants by custom may acquire certain

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privileges of occupancy tenants and it may be that one of these privileges is that he is not entitled to be ejected merely on notice under section 57 of the Orissa Tenancy Act. But no custom has been alleged in the written statement and none could have been investigated by the learned Judge in the court below. His view is that as they are recorded in the Record-of-Rights as occupancy tenants it must be held that they have acquired those rights by custom; but I hold that the defendants could not by custom acquire the status of occupancy tenants. That being so, if they did rely upon any custom as a bar to the plaintiffs' suit, it was for them to allege and prove that custom.

I must allow the appeal, set aside the judgment and decree of the court below and give the plaintiffs a decree for possession. The appellants are entitled to their costs of this appeal.

ADAMI, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Ross, JJ.

DHANUKDHARI SINGH

1921

December, 8.

v.

RAMBIRICH SINGH*

Hindu Law—Mitakshara, *Chapter I, section 1, para 28—Joint family*—karta *in jail—junior members charged with criminal offence—bond executed to meet expenses of trial, whether binds family property.*

Where a joint Hindu family consisted of the *karta* and 15 other members, and 4 of the latter executed a bond charging the joint family property in order to raise money to meet the expenses of a criminal case which had been brought against them, the *karta* being in jail at the time, *held*, that the family property was bound by the charge.

*Appeal from Appellate Decree No. 831 of 1920 from a decision of B. Jatindra Nath Basu, Subordinate Judge of Gaya, dated the 26th, February, 1920, reversing a decision of M. Md. Ibrahim, Munsif of Gaya dated the 10th, September, 1919.