1923.

BHAGWAT PRASHAD SINGH v. DWARKA PRASHAD SINGH.

DAWSON MILLER, C. J.

where there are a number of decree-holders some of them are not acquainted with the facts of the case, and all the law requires is that the application should be verified by some person proved, to the satisfaction of the Court, to be acquainted with the facts of the case. I think it would be straining the language of the rule too far to say that where there are more applicants than one the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more are acquainted with the facts of the case their verification is not sufficient. In my opinion this appeal fails and should be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

1923.

June, 18.

CHAND RAY

v.

BHAGWATI CHARAN GOSWAMI.*

Record-of-rights—Presumption as to correctness of, rebuttal of—Evidence of rebuttal, whether proceedings which led up to the final record are admissible—draft record-of-rights, admissibility of—Chota Nagpur Tenancy Act, 1908 (*Ben. Act VI of* 1908), *section* 83—*Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 103B.

For the purpose of rebutting the presumption arising from an entry in a finally published record-of-rights the proceedings which led up to the finally-published record are admissible in evidence.

Where an entry in the record-of-rights is challenged the Court is entitled to take into consideration what took place

* Second Appeal No. 7979 of 1921, from a decision of H. Foster, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 16th March, 1921, modifying a decision of Babu Pramatha Nath Bhattacharji, Additional Subordinate Judge of Hazaribagh, dated the 8th December, 1919.

1923.

CHAND RAY v. BHAGWATI CHARAN GOSWAMI.

at the *khanapuri* and attestation stage of the preparation of the record-of-rights, and the decision of the Settlement Officer at the attestation stage.

Although the presumption which arises from an entry in the record-of-rights arises only in the case of a finally published record, a draft record-of-rights is also admissible in evidence, but no presumption arises in favour of the entries in it.

Sarup Rai v. *Srikant Prasad*(1) and *Mussammat Golab Koer* v. *Ramratan Pandey*(2), distinguished.

Appeal by the defendants.

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

Gour Chandra Pal, for the appellants.

Bankim Chandra De, for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of the plaintiffs from a decision of the Judicial Commissioner of Chota Nagpur over-ruling a decision of the Additional Subordinate Judge of Hazaribagh.

The plaintiffs who are the respondents in this appeal are the landlords of certain lands of which the defendants, who are the appellants before us, are the *raiyats*. These lands included certain tanks and embankments which are the subject-matter of the suit. The tanks and embankments were entered in the finally published record-of-rights in the name of the defendants and as part of their *raiyati* holding. The plaintiffs instituted the present suit claiming a declaration that the tanks and embankments formed part of their *gair mazrua* lands and that the defendants had no right or title therein. In the alternative they claimed that if the Court should consider the defendants to be entitled to keep possession it might be adjudicated that the plaintiffs were entitled to get yearly four *maunds* of fish from the defendants by way of rent. The plaintiffs' case was, as appears from the judgments of the trial Court and the lower appellate Court, that these tanks had been built by their predecessors in

(1) (1920) 55 Ind. Cas. 922. (2) (1913-14) 18 Cal. W. N. 896.

1923.

CHAND RAY v. BHAGWATI CHARAN GOSWAMI.

DAWSON MILLER, C. J.

interest and that they had never formed part of the *raiyati* holding of any tenant. They had been used for the purpose of irrigation and the tenants had with their permission used the water for that purpose but that the right in the tanks and embankments always remained with the landlords and had not passed to the tenants as part of their *raiyati* holding. They further contended that in the year 1908 they had leased out these tanks to the defendants at a yearly rental of four *maunds* of fish. After the final publication of the record-of-rights, which described the tanks as part of the defendants' *raiyati* holding they had ceased to pay their four *maunds* of fish yearly to the plaintiffs and hence this suit was brought.

The learned Additional Subordinate Judge before whom the case came for trial dealt at length with the evidence and criticized very minutely the evidence given on behalf of the plaintiffs and eventually came to the conclusion that they had failed to make out their case and that the presumption arising from the record-of-rights had not been rebutted.

The learned Judicial Commissioner on appeal also considered the evidence and came to the conclusion that the Additional Subordinate Judge had been hypercritical in his method of estimating the value of the plaintiffs' evidence and considered that the evidence given on behalf of the plaintiffs was sufficient to rebut the presumption arising from the record-of-rights. He accordingly varied the decree of the trial Court and having found that the tanks in question had in fact been let to the *raiyats* upon the terms of paying four *maunds* of fish *per annum* he passed a decree in favour of the plaintiffs to the effect that the tanks were to remain in the possession of the defendants but that they were liable to pay the agreed rent of four *maunds* of fish to the plaintiffs.

From that decision the defendants have appealed and they contend that the learned Judge was wrong in law in coming to the decision at which he arrived.

If the matter rested there there could be no question but that this appeal could not possibly succeed. The questions which the learned Judge had to determine on appeal were purely questions of fact and we are bound by his findings of fact. But it is contended on behalf of the appellants that the learned Judge went wrong in considering at all what had taken place at the *khanapuri* and attestation stage of the preparation of the record-of-rights and in admitting as evidence for any purpose the decision of the Settlement Officer at the attestation stage. It is contended that having improperly admitted this evidence and having been influenced by it in his judgment his judgment cannot stand and that the case ought to go back again for re-hearing by the learned Judicial Commissioner. In support of his contention the learned Vakil for the appellants has relied upon certain cases [*Sarup Rai* v. *Srikant Prasad* (1) and *Mussammat Gulab Koer* v. *Ramratan Pande* (2) and other similar cases] in which it would appear to have been held that the draft record-of-rights referred to in section 103B of the Bengal Tenancy Act is not admissible in evidence at all. The corresponding section of the Chota Nagpur Tenancy Act with which we are concerned in this appeal is section 83. The proposition thus broadly stated, I think, goes further than is warranted. It is quite true that no presumption arises in favour of the correctness of the draft record-of-rights. Such a presumption only arises in favour of the finally published record, and where it is necessary to prove a fact such as the rent payable for a particular holding or any other fact recorded in the record-of-rights it is not sufficient to put in and rely upon the draft record as it is only the finally-published record that carries any presumption with it, and so it has been held that in order to prove facts of that nature the draft record-of-rights is not admissible for that purpose. This, however, seems to me to go very far short of holding that the draft record-of-rights prepared under the Bengal

(1) (1920) 55 Ind. Cas. 922. (2) (1913-14) 18 Cal. W. N. 896.

1923.

CHAND RAY v. BHAGWATI CHARAN GOSWAMI.

DAWSON MILLER, C. J.

Tenancy Act or under the corresponding section of the Chota Nagpur Tenancy Act is totally inadmissible in evidence for any purpose. The presumption arising from the record-of-rights as finally published is a presumption which may be rebutted and, to my mind, it is perfectly legitimate to put in evidence the proceedings which led up to the finally-published record. In the present case it appears that there were disputes between the parties both at the *khanapuri* and at the attestation stage of the preparation of the record, and after those disputes the Settlement Officer made certain entries which appear in the draft record-of-rights. There is nothing in the case to show that after that record was prepared there was any further dispute between the parties, upon the question in issue in this case under section 83 of the Chota Nagpur Tenancy Act, and the argument is that the record-of-rights as finally published in fact contains an inaccurate entry of the actual rights of the *raiyats*. It appears from the evidence that at the attestation stage as the learned Judicial Commissioner has stated in his judgment, the attestation officer commenced his order by stating that the tanks had been recently settled with Chandrai and Chandrai had admitted payment of money to the landlords for the tanks. He therefore directed that the tanks should be entered in the name of Chandrai and there is apparently a note upon the draft record to the effect that this appears to have been a recent settlement. From the evidence in the case and from a consideration of what took place during the preparation of the record-of-rights the learned Judicial Commissioner came to the conclusion that the plaintiffs had established their case and that the evidence was sufficient to rebut the presumption arising from the finally published record and having regard to what had actually taken place he considered that a slip had been made or that some misapprehension had occurred in the mind of the officer who entered up the record-of-rights as finally published and that it had not been

fully appreciated what the attestation officer had in fact decided upon the evidence before him. It is true that the attestation officer had ordered that the tanks should be entered in the name of Chandrai but had his intention been carried out they would only have been entered in the name of Chandrai not as part of his *raiyati* holding but as held by him under the lease granted in 1908. In these circumstances it seems to me that the learned Judicial Commissioner was quite justified in considering from the verbal evidence in the case, coupled with the evidence of the attestation proceedings, that the plaintiffs' case had been made out and that the record-of-rights was wrong. I also think that he was perfectly justified in looking at the draft record which, as he pointed out, entirely corroborated the plaintiffs' case. For these reasons I think that this appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

KANIZ ZOHRA

v.

SAIYID MUZTABA HUSAIN.*

1923.

June, 19.

Muhammadan Law—Endowments —waqf—Mutwalli, *successor to, where office appertains to* sajjadanashin—*woman or minor, right of, to succeed.*

Where the *mutwallíship* of endowed property goes with the office of *sajjadanashin* a woman cannot succeed to the *mutwallíship* either solely or jointly with another, inasmuch as the *sajjadanashini* is a priestly office involving the performance of spiritual and religious duties which, according to the Muhammadan Law, cannot be performed by a woman.

* Second Appeal No. 859 of 1921, from a decision of N. F. Peck, Esq., District Judge of Bhagalpur, dated the 7th February, 1921, affirming a decision of Babu Amar Nath Chatterji, Subordinate Judge of Bhagalpur dated the 20th February, 1920.