LETTERS PATENT.

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

1923.

November 16

RAMNATH SARANGI

v.

GOBARDHAN PANDEY.*

Ejectment, Suit for—onus—gora lands, nature of, and quality of proof of possession.

In a suit for ejectment where the evidence of possession is weak on both sides the plaintiff is entitled to the presumption that possession follows title although the plaintiff would not be entitled to the benefit of the presumption where he has produced no evidence of possession at all.

The nature and quality of the proof required to satisfy the burden cast upon the plaintiff in a suit for ejectment varies in different classes of cases. Where the land is jungle land or lands under water, where no evidence of actual user in the ordinary sense can be expected, then the presumption that possession follows title may be called in aid to supplement the absence of evidence upon the question of possession. Similarly, in the case of *gora* lands, that is to say, lands which are not under regular cultivation but which are from time to time, once in four or five years, subject to cultivation of certain classes of crops, the evidence to be expected in proof or user is necessarily slighter than in the case of lands which are regularly cultivated, and should not necessarily be rejected merely on that account

Raja Shiva Prasad Singh v. *Hira Singh*(1), *Tian Sahu* v. *Mulchand Sahu*(2), referred to.

Appeal by the plaintiff.

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

P. K. Mukerji, for the appellant.

Abani Bhushan Mukerji, for the respondents.

DAWSON MILLER, C.J.—This is an appeal under the Letters Patent on behalf of the plaintiff in the suit from a decision of Ross, J., reversing the decree of the District Judge.

*Letters Patent Appeal No. 16 of 1923.

(1) (1921) 6 Pat. L. J. 478, F.B. (2) (1922) 3 Pat. L. T. 460.

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The suit out of which the appeal arises was a suit for declaration of title to and recovery of possession of certain lands specified in the plaint in schedules 3, 4 and 6. It is necessary to bear in mind at the outset that the lands in suit are what is known as *gora* lands, that is to say they are lands not brought under regular cultivation but which are from time to time, once in four or five years, subject to cultivation of certain classes of crops. The evidence, therefore, which might be adduced by either party of acts of user is not such as one might expect would be forthcoming in cases of lands under regular cultivation and therefore it is not surprising to find that the oral evidence upon this part of the case was, as has been pointed out by the learned District Judge, somewhat weak.

The Munsif before whom the case came for trial found in favour of the plaintiff and his decision was upheld on appeal to the District Judge.

From that decision the defendants appealed to this Court. In so far as the lands in schedule 3 of the plaint are concerned the appeal to this Court failed. In so far as the appeal related to the lands in schedules 4 and 6 the learned Judge over-ruled the decision of both the lower Courts and entered judgment in favour of the defendants.

From that decision the plaintiff has appealed to this Bench under the Letters Patent. The argument put forward before Ross, J., was based upon the assumption that the evidence of possession put forward by the plaintiff had not been accepted by the District Judge and although the evidence of the defendants in that respect had been equally rejected it was contended that in such circumstances no weight could be attached to the presumption that possession followed title. That argument was accepted by the learned Judge of this Court and he further appears to have been of opinion that if the evidence on both sides with regard to possession was weak then it must be taken that the trial Court and the Court of first appeal

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were not satisfied with that evidence and did not accept it as reliable and that in such a case there being no reliable evidence as to the plaintiff's possession within twelve years, even if there were no evidence of possession at all on behalf of the defendants within the same period, still the plaintiff must fail even though he could prove his title. In appeal before us it has been pointed out that the learned Judge was not justified in assuming that the evidence of possession adduced by the plaintiff was not accepted by the trial Court, and by the District Judge on appeal, and that the most that could be said was that the evidence in that respect was weak. I agree, as was decided by this Court in the Full Bench case of *Raja Shiva Prasad Singh* v. *Hira Singh* (1) in 1921, that the onus being upon the plaintiff in a suit for ejectment he must make out both that he had title to the land in suit and that he was in possession within twelve years of the date when the suit was instituted and if he fails to prove his possession then, notwithstanding his title, it being admitted that the defendant is in possession at the date of the suit, his suit must fail. But the nature and quality of the proof required to satisfy the burden thus cast upon the plaintiff may vary in different classes of cases. For example where the land is jungle land or land under water where no evidence of actual user in the ordinary sense can be expected to be adduced then no doubt the presumption that possession follows title may be called in aid to supplement the absence of evidence upon the question of possession because mere non-user does not in itself deprive a party of his title to his land. It is necessary both that he should have lost his possession and that somebody else should have come into possession and remain there adversely to him. In the case of lands such as those now in question, although proof of certain acts of user might reasonably be expected, the evidence upon this point must necessarily be more difficult to procure than in the case of lands continually

(1) (1921) 6 Pat. L. J. 478, F.B.

under cultivation and therefore, as I have already stated, it is not surprising that the evidence upon this question adduced by the plaintiff and indeed adduced by either party, was characterised by the learned District Judge as being weak. In approaching this case one must consider further exactly what the case put forward by the plaintiff and by the defendants was. The case of the plaintiff was that he had acquired an interest in the land many years ago but that shortly before the suit was instituted in the month of *Asar*, 1325 *B. S.*, in the case of the schedule 4 lands, and in the month of *Bhadra*, 1325 *B.S.*, in the ase of the schedule 6 lands, the defendants had rcibly ploughed up some of the land and sowed crops thereon and shortly afterwards had dispossessed the plaintiff. The case of the defendants on the other hand, was that they had a good title to the land and that they had been in possession all along. In approaching the question of the truth or falsity of these varying statements the learned Munsif, before whom the case came for trial, in dealing with the schedule 4 lands drew attention to the evidence of the plaintiff as to his title and he accepted that evidence and rejected the evidence of the defendants. With regard to possession the learned Munsif dealt with the case in this way. He said :

"The lessor of the plaintiff swears to his ownership of the plot and the plaintiff's *khas* possession of the land before dispossession."

Therefore there was direct evidence given on behalf of the plaintiff showing not merely his title but also his *khas* possession at the material time in question and in fact right up to the time of dispossession alleged by the plaintiff in his plaint. He then deals further with the evidence of the plaintiff's lessor and points out that he appears to be a frank and truthful witness. He then deals with the case put forward by the defendants. Their evidence he finds unsatisfactory and contradictory and he finds himself unable to accept it and having so criticised their evidence he concludes by saying :

"In this view I hold that the plaintiff's proof of title has not been negatived in any sense by the defendants' evidence of possession."

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It has been contended before us that that judgment although it may be destructive of the defendants' evidence is not in fact a clear finding that the plaintiff's evidence was accepted and therefore there is no finding of fact by the Munsif that the plaintiff ever was in possession during the twelve years immediately preceding the suit. I cannot accept this interpretation of the learned Munsif's judgment. It appears clear, to my mind, that having stated what the nature of the plaintiff's evidence on this part of the case was and having refrained from criticising it as being untrue he then dealt with the evidence of the defendants and came to the conclusion that he could not possibly accept it. Having arrived at that conclusion the only possible result must be that the evidence put forward on behalf of the plaintiff was reliable and that I think is what he meant when he said:

"In this view I hold that the plaintiff's proof of title has not been negatived in any sense by the defendants' evidence of possession."

Dealing subsequently with the schedule 6 lands the learned Munsif points out that the plaintiff's purchase, that is to say his title, was freely admitted by the defendants at the trial. It is not disputed before us that with regard to these lands evidence of possession was given both on behalf of the plaintiff and of the defendants but in dealing with this part of the case the learned Munsif confines himself rather to a criticism of the defendant's evidence than to any appreciation of the value of that of the plaintiff, but having arrived at the conclusion that the defendants were not in possession, or that at all events if they were in possession of a portion of the land upon which sugar-cane was cultivated that that possession was permissive only, concluded his judgment upon this part of the case in these words:

"Hence I hold that the plaintiff sufficiently proved his title to the schedule 6 land and the title is still a subsisting one, the evidence on the record does not justify me to hold that the plaintiff's title to the schedule 4 and schedule 6 land has been barred by limitation."

Although that method of dealing with the case may not be altogether satisfactory or very scientifically

expressed I have not the slightest doubt that what the learned Munsif meant was that the plaintiff had proved his title, that he had further proved by evidence that he was in possession and that the defendants' evidence to the contrary had not in any way shaken the plaintiff's evidence and therefore the plaintiff's title was as he said still a subsisting one. By that he must mean that he had not lost his title by being dispossessed until or shortly before the suit was instituted. I have dealt at some length with the evidence of the Munsif because when one comes to look at the judgment of the District Judge on appeal again the findings are perhaps not expressed with that lucidity which one might have desired but it is necessary to bear in mind that the judgment of the learned District Judge was a judgment of affirmance and rather confined to dealing with criticisms of the points put forward on behalf of the defendants who were the appellants before him in that appeal and perhaps he has not as clearly as might be wished expressed his concurrence in the findings of the Munsif on the question of the plaintiff's possession. His judgment upon this part of the case is short. He says, when speaking of the schedule 4 lands, that the plaintiff had title under his lease. He then states what the foundation of the defendant's title was. He then points out that *gora* land need not be subject to regular annual cultivation and actual possession is always difficult to prove over such lands as in the case of jungle land and that the presumption ordinarily is that possession follows title. He then deals shortly with certain criticisms of the defendants' evidence and says:

> "I agree with the Munsif that the plaintiff has made out his title and that it is not barred by limitation."

That finding certainly has the merit of being short and concise but it has been adversely criticised before us to-day on the ground that it is not a positive finding that the plaintiff's evidence on the question of possession was accepted. But as I have already pointed out it was a judgment of affirmance and it

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must be taken, I think, that he did accept the findings on the question of fact come to by the learned Munsif and this being so I do not think that it can successfully be contended that the learned District Judge was not satisfied with the evidence of possession put forward by the plaintiff.

Then with regard to the schedule 6 lands again, after dealing with the question of title, he points out that here also the land is *gora* and the evidence of possession on both sides is, and of necessity must be, weak:

> "So as the plaintiffs have an old title I must hold that the presumption in their favour has not been rebutted and the appeal therefore fails and I dismiss it with costs."

The same criticism was levelled against that part of the judgment as against the previous part dealing with the schedule 4 lands, but it must be pointed out that the learned District Judge nowhere states that he was not satisfied with the evidence given by the plaintiff. He states that the evidence is weak, and undoubtedly it may have been, but at the same time he does hold that the presumption in favour of the plaintiff has not been rebutted and by this I take it he means that evidence having been given on both sides and there being perhaps a difficulty in arriving at a conclusion as to exactly where the truth lies he is entitled to take into consideration the presumption which arises out of prior title. If that is so then I do not think the judgment is open to question. It was contended before us in the present appeal that where the evidence on both sides as to possession is weak then the plaintiff is not entitled to pray in aid the presumption which arises from his title. I cannot accept that contention. In fact the very point arose and was determined in the case of *Tian Sahu* v. *Mulchand Sahu* (1) decided in 1922 where the material facts were almost similar to those arising in the present case. In that case reliance was placed upon the earlier Full Bench case of *Raja Shiva Prasad Singh* v. *Hira Singh* (2) where it had

(1) (1922) 3 Pat. L. T. 460. (2) (1921) 6 Pat. L. J. 478, F.B.

been laid down that where there is no evidence at all of the plaintiff's possession then he cannot take advantage of the presumption arising from title and in the later case of *Tian Sahu* v. *Mulchand Sahu* (1) I find that in delivering our judgment I stated, "I think it would be extending the doctrine laid down in that case," that is the Full Bench case, "too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence or that he did not consider the evidence altogether satisfactory he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiff's title." It was, therefore, clearly laid down that not only in cases where the evidence was strong on both sides but in cases where the evidence is such as might be believed but is also weak, in both cases the Court having a difficulty in arriving at a satisfactory conclusion of where the truth lies may take into consideration the presumption arising from title as well as the other probabilities in the case. If, therefore, the learned Judge, from whose decision this appeal is brought, was of opinion that the presumption arising from title could not be called in aid in cases where the evidence is weak, but nevertheless credible, I must respectfully decline to agree with his view of the matter as it appears to me to be contrary entirely to the view taken in the case last cited. On the other hand if the learned Judge was of opinion that there had been no finding by either of the lower Courts that the plaintiff's evidence of possession was accepted then I think that his opinion was not justified upon a proper interpretation of those judgments. In these circumstances it seems to me that this appeal must be allowed and the decision of Ross, J., must be set aside and that of the District Judge restored. The plaintiff is entitled to his costs of this appeal and of the appeal before Ross, J., against the respondents who have appeared.

(1) (1922) 3 Pat. L. T. 460.

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MULLICK, J.

MULLICK, J.—I agree that the appeal should be decreed. In my opinion the judgment of the District Judge must be read together with the judgment of the trial Court and it is a reasonable interpretation of the judgment of the District Judge to say that having regard to the evidence of title given by the plaintiff and the evidence of possession given by both parties and having regard to the character of the land, the conclusion to be drawn is that the plaintiff was in possession of the land in suit within the statutory limit. That being so the learned District Judge was right in giving the plaintiff a decree for recovery of possession. In my opinion the facts of this case do not bring it within the rule laid down in the Full Bench case of *Raja Shiva Prasad Singh* v. *Hira Singh* (1). They come more nearly under the operation of the principles laid down by their Lordships of the Privy Council in *Kuthali Moothavar* v. *Peringati Kunharankutty* (2).

Appeal allowed.

LETTERS PATENT.

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

1923.

December 4.

TILAKDHARI SINGH

v.

CHATURGUN BIND.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 4(3), 5 *and* 48—*Occupancy holding*, zarpeshgi-*mortgage of*—*subsequently* kabulyat *executed by mortgagor in favour of mortgagee*—*status of mortgagor.*

Where a *raiyat* executes an usufructuary mortgage of his holding and then takes a lease of the holding from the mortgagee, he does not cease to be a *raiyat* holding under the proprietor and is not an under-*raiyat*.

(1) (1921) 6 Pat. L. J. 473, F.B.

(2) (1921) I. L. R. 44 Mad. 833; L. R. 48 I. A. 395.

*Letters Patent Appeal No. 18 of 1923.