1925.

RAMGULAM SAHU v. CHINTAMAN SINGH.

JWALA PRASAD, J.

His liability to pay court-fee, therefore, does not cease, because in the suit for possession he was permitted for the sake of convenience and to avoid multiplicity of suits, to include in one suit a claim for past and future mesne profits. The real distinction seems to be that no court-fee is payable upon future mesne profits until they are ascertained, but when ascertained they are chargeable with duty under section 11, the failure to pay which causes the penalty imposed by that section. This view is supported by the case of *Dwarka Nath Biswas* v. *Debendra Nath Tagore* (1).

The answers which I have given above to the questions referred to this bench for decision lead to the conclusion that the defendant's application should be dismissed and the rule discharged.

As regards costs, I agree to the order proposed by the Chief Justice.

DAS, J.—I agree with my Lord the Chief Justice.

FOSTER, J.—I agree generally; but in particular I wish to express my agreement with the view propounded in the judgment of my learned brother Jwala Prasad, J., as to the applicability of the second clause of section 11 of the Court-fees Act to the provisions of the present Civil Procedure Code in respect of suits for recovery of land and for ascertainment of mesne profits.

APPELLATE CIVIL.

Before Das and Foster, J.J.

MAHANTH RAM LOCHAN DAS

v.

NANDI JHA.*

1926.

Jan., 3.

Record-of-Rights—holding recorded occupancy holding—Landlord's claim to it as malik's zerait—presumption—burden

* Appeal from Original Decree no. 212 of 1923, from a decision of B. Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 24th July, 1923.

(1) (1906) I. L. R. 33 Cal. 1232.

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of proof—Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 103B.

In a suit for partition the plaintiff claimed certain land to be the malik's zerait, while the defendants contended that it was their occupancy holding; the record-of-rights supported the defendants. The plaintiff contended that the presumption arising from the entry in the record-of-rights was rebutted by the fact of the disputed land falling within the ambit of the plaintiff's zamindari.

Held, that the plaintiff had no presumptive right generally to possession of raiyati holdings and that, therefore, there being no conflict of presumptions, the burden of proof lay on the plaintiff.

Jagdeo Narain Singh v. *Baldeo Singh* (1), distinguished.

Sri Nath Rai v. *Pratap Uday Nath Sahi Deo* (2), referred to.

Appeal by the plaintiff.

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

Murari Prasad, for the appellant.

B. N. Mitter and *N. N. Sinha*, for the respondents.

FOSTER, J.—The plaintiff has proprietary interest to the extent of 11 annas odd in Mauza Biaspur and the defendants are proprietors of the residue. The plaintiff's suit is for partition. The only point which is in dispute between them is whether the lands described in Schedules A and B of the plaint are zerat land of the village or the occupancy holding of the defendants. The learned Subordinate Judge heard the defendants' evidence first and then that of the plaintiff. In his judgment he first examined the defendants' evidence. He pointed out that the record-of-rights was entirely in favour of the defendants. As against this the plaintiff contended that it was brought about by the fraud of the defendants. The date of final publication was the 13th October, 1899, and from 1883 to 1920 the defendants' ances-

(1) (1923) I. L. R. 2 Pat. 38, P. C.
(2) (1923-24) 28 Cal. W. N. 145, P. C.

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FOSTER, J.

tors held the plaintiff's share in thika. So, it is urged, they had every chance of obtaining a fraudulent entry in the record. It is also urged that as the lands in dispute fell within the ambit of the plaintiff co-sharers' zamindari then under the ruling in *Jagdeo Narain Singh* v. *Baldeo Singh*(1) the record-of-rights must be considered to be rebutted. This is how the case is stated; I shall have more to say on this point later. The learned Subordinate Judge examined the oral evidence and came to a finding that the plaintiff's agents attended at the time of the survey and settlement operations. He remarked upon the uncertainty of the plaintiff's claim: though the suit was instituted in June 1922 the identity of the property claimed to be zerat was not established till June, 1923. when the plaint was extensively amended and the claim largely reduced. After noting that it lay upon the plaintiff to prove what is zerat and what is kasht of the defendants, he points out that the plaintiff has not discharged the onus. The defendants produced old rent receipts which he found to be genuine, and he deduced from these documents the conclusion that the defendants, from the time of very remote ancestors, have been raiyats of this village. He examined the two pattas granted to the ancestors of the defendants in 1883 and 1908 and pointed out that in the first one there is no mention of any zerat at all, and laid great stress upon the second patta which mentions only 7 bighas and odd as zerat. He remarked that the defendants do not for a moment claim those lands, described in the second patta, to be part of their holding. Then he examined the road-cess returns of 1919, and pointed out that the lands in dispute are shown there as raiyati kasht of the defendants and that these returns are signed by the plaintiff's manager and attorney. As to these documents, the plaintiff pointed to the fact that they were drawn up on information provided by the defendants who were in possession as thikadars. Proceeding to the evidence of the plaintiff, the learned Subordinate

(1) (1923) I. L. R. 2 Pat. 38, P. C.

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Judge examined the kabuliat of 1869 executed by an indigo factory manager in favour of the plaintiff's predecessor in interest. In that document there is mention of zerat but without specification. The learned Subordinate Judge thought that this must be a mere formality copied from precedents. It should be noted however that one at least of the plaintiff's witnesses, an old man of 75 years, Somedat Thakur, deposed

> "Kuthi grew indigo in the land and so I called it zerat."

He also stated that during the time of the factory there were 30 or 40 bighas of zerat in the factory's possession. Now looking at the terij jamabandi of 1875 (Exhibit 2), I see that within each tenant's holding there was some area appropriated to the cultivation of indigo; in the total it must amount to a considerable area. Each tenant's rent was at certain rates according to the classes of land comprised within the holding, and a deduction of 10 annas per bigha was made upon the total area in consideration of the cultivation of indigo. The learned Subordinate Judge then examined khasras for the period 1875 to 1879. These are partly lists of trees subject to danabandi (appraisement), and there are several khasra danabandi (accounts of appraisement). The learned Subordinate Judge is not correct in saying that these do not show what village they refer to. They refer to Biaspur and the names of the Brahmin tenants include several persons who we know were ancestors of the defendants. The learned Subordinate Judge found that in the plaintiff's oral evidence there is no precise statement found as to the identity of the zerat lands. So he decided this issue against the plaintiff, who is now appealing.

The onus of proof rests upon the plaintiff, not only because he is plaintiff but because he has the record-of-rights against him. In my opinion the case of *Jagdeo Narain Singh* v. *Baldeo Singh*(1), which has been quoted on the plaintiff's side, has no applica-

(1) (1923) I. L. R. 2 Pat. 38, P. C.

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tion to the present discussion. The right of the zamindar to rent is so universal as to be a presumptive right; section 114 of the Evidence Act would raise the presumption. It is a right all the more enforceable because the zamindar has to pass on a share of the collection to Government in the form of revenue. But the zamindar has no right generally to possession of the raiyati holdings. The raiyat existed before the zamindar came, and in the permanent settlement it was laid down that the raiyats are to be protected in their possession. That policy is carried out in the Bengal Tenancy Act. It is a mere truism to say that the zamindar has a right to all lands not held by tenants, and the proposition appears to be irrelevant, until the record-of-rights, prepared under the Bengal Tenancy Act, is rebutted. There is here no conflict of presumptions. In *Jagdeo Narain Singh* v. *Baldeo Singh*(1) the fact that the land of the tenants fell within the ambit of the plaintiff's zamindari was sufficient to rebut the entry in the record-of-rights showing the defendants' land to be free of rent; and the defendant had the duty of showing by some grant or such like evidence, that he in particular was relieved from the universal duty of paying rent. In the case of *Sri Nath Rai* v. *Pratap Uday Nath Sahi Deo* (2) the plaintiff was purchaser of the pargana which in the judgment of their Lordships of the Privy Council is found to have been a rent-paying jagir within the ambit of the zamindari of Chota Nagpur. The plaintiff's vendor purported to be an independent talukdar of the pargana, and the defendant, the zamindar of Chota Nagpur, contended that the pargana had been resumed on failure of male issue in the line of dependant talukdars. The plaintiff urged that the pargana was not resumable. The record-of-rights showed it to be resumable; and their Lordships laid great stress on the presumption prescribed in section 103B of the Tenancy Act. This case appears to me to establish my argument as to the burden of proof. Had the

(1) (1923) I. L. R. 2 Pat. 38, P. C.
(2) (1923-24) 28 Cal. W. N. 145, P. C.

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entry been "non-resumable", the same presumptive weight would have attached to it, and the burden would have rested on the defendant zamindar: here also the zamindar has the duty of proving his claim, in face of the record-of-rights.

I have examined the oral evidence in this case. *In my opinion the judgment of the learned Subordinate Judge is careful and well founded.* [His Lordship then proceeded to analyse the plaintiff's oral evidence, and proceeded as follows.]

It may be mentioned here that it is not seriously contended that the term zerat as applied to the land in dispute is accurate; it should be probably bakast malik or ghairmazrua malik, according to its condition.

I would dismiss this appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Das and Ross, J.J.

1926.

Jan., 4, 5.

MUHAMMAD IBRAHIM

v.

CHHATTOO LAL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 41—*Court to which a decree has been sent for execution, jurisdiction of, when ceases.*

The jurisdiction of the court to which a decree has been sent for execution ceases as soon as the court takes action under section 41, Code of Civil Procedure, and certifies to the court which passed the decree the circumstances attending the failure on the part of the transferee court to execute the decree.

J. G. Bagram v. *J. P. Wise* (1), distinguished.

Manorath Das v. *Ambika Kant Bose* (2), followed.

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* Civil Revision no. 328 of 1925, from an order of the Munsif of Muzaffarpur, dated the 29th June, 1925.

(1) (1868) 10 W. R. 46, F. B. (2) (1908-09) 13 Cal. W. N. 533.