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and that of the Subordinate Judge restored and that the Respondent should pay to the Appellant, Thakur Ashutosh Deo Ghatwal, his costs of this appeal and in the High Court at Patna and in the Court of the Subordinate Judge, and so they will humbly advise His Majesty.

Solicitor for first appellant: *H. S. L. Polak.*

Solicitor for second appellant: *Solicitor, India Office.*

Solicitor for respondent: *Watkins* and *Hunter.*

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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April. 24.

TIKAIT KRISHNA PRASAD SINGH

v.

BUDHAN MANJHI.*

Chota Nagpur Tenancy Act, 1908 (*Ben. Act VI of* 1908)—"*Thika dawami*" *incidents of—cultivating tenancy, nature of—non-permanency, presumption of, whether attaches—*"*thika,*" *meaning of.*

The name "thika dawami" in the record-of-rights in Chota Nagpur is given to a cultivating tenancy which partakes largely in its origin and development of a raiyati character, and is in fact a raiyati tenancy which has grown into a tenure.

Where it is not proved that the tenure is not a cultivating tenancy in which dawami rights might arise (or where it is proved affirmatively that it is such a tenancy) not only is there no presumption that it is non-permanent and resumable like a tenure of the farming class, but the onus is upon the plaintiff to rebut by evidence the entry of permanency in the record-of-rights.

* *Appeal from Appellate Decree no. 1400 of 1925, from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Ranchi, dated the 11th May, 1925, confirming a decision of Babu Pramatha Nath Bhattacharji, Subordinate Judge of Hazaribagh, dated the 30th September, 1920.

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The term " thika " in Chota Nagpur does not necessarily or even usually connote a non-permanent tenancy.

Tikait Harnarain Singh v. *Darsan Deo* (1), *Bulaki Mian* v. *Tikaitni Kosilya Kuari* (2), *Thakurain Jagarnath Kuari* v. *Latu Choudhri* (3), distinguished.

Lochan Pathak v. *Mohammad Kasim* (4), referred to.

Appeal by the plaintiff.

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

P. K. Sen (with him *Harihar Prasad*), for the appellant.

C. C. Das (with him *S. Dayal* and *Bindeswari Prasad*), for the respondent.

MACPHERSON, J.—This appeal is preferred against the decision of the Judicial Commissioner of Chota Nagpur affirming the dismissal by the Subordinate Judge of Hazaribagh of the appellant's suit for a declaration that khewat entry ' non-resumable doami thika ' in respect of the tenancy of defendant no. 1 and defendant no. 2 in village Barhaipat of Gadi Ganwan of which he is proprietor is wrong and that the tenancy is held from year to year and is resumable.

The trial Court held that the plaintiff had failed to substantiate his claim that the defendants were yearly tenants. His view was that " the settlement entry is not incorrect and that the defendants have acquired occupancy rights in their tenure of the village and cannot be ejected from it upon notice." The officiating Judicial Commissioner in appeal held that as the tenancy was a tenure and was originally created for a definite number of years the entry was incorrect and he accordingly decreed the suit. On second appeal his decision was set aside and the appeal remanded for hearing. In delivering

(1) F. A. 148 of 1916.
(2) F. A. 183 of 1919.
(3) F. A. 66 of 1921.
(4) S. A. 27 of 1921.

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the judgment of the Court Dawson Miller, C.J., observed that the appellate Court had failed to consider Mr. Sifton's Settlement Report of the Hazaribagh district which deals with 'cultivating tenancies' including thika doami, which does "in fact partake partly of the nature of a cultivating raiyati interest and to some extent of the nature of a tenure," and that Mr. Sifton points out very clearly that whatever its exact nature and origin it is undoubtedly permanent and non-resumable and that the term "thika" in Chota Nagpur does not necessarily connote a non-permanent tenancy. The learned Chief Justice proceeded—

> "It seems to me that apart from failing to consider the evidence in the case, the learned Judge has also assumed that because this tenancy may be a tenure it is therefore non-permanent and resumable. He has failed altogether to consider whether even supposing it is to be called a tenure it is not nevertheless permanent..... If of course it should turn out on a consideration of that evidence that this land was taken originally by the defendants' ancestors not for cultivating themselves but merely for the purpose of settling tenants upon the land or for collecting the rents of tenants already there, then no doubt the tenancy would not be a dawami thika at all but would come within the definition of section 5 of the Chota Nagpur Tenancy Act and they would be tenure-holders as therein described."

The learned Judicial Commissioner on remand upheld the defendants' contention that they came on the land as cultivators and not as rent-receivers, that is, for the purpose of cultivation and reclaiming and have permanent rights of occupancy. Finding not only that the plaintiff had failed to prove the incorrectness of the record-of-rights but that the record is in fact correct, he dismissed the appeal.

In second appeal Mr. P. K. Sen contends that even on these findings of fact the entry in the record-of-rights is wrong. He urges that in 1859 the original holder Dudgu Manjhi described his tenancy as a 'thika' and that in 1882 he made an application for a thika for five years on the ground that his existing thika had terminated and he and the defendants have been holding ever since the settlement then made with him.

The onus was on the plaintiff to show by evidence that the entry in the record-of-rights was incorrect. It could be discharged by proving either that the tenancy was not in its inception a cultivating tenancy or that even if it was, it was not permanent. As pointed out by the learned Chief Justice, the plaintiff would not rebut the correctness of the entry merely by proof that the tenancy is a tenure. The name thika doami is given in the record-of-rights to a cultivating tenancy which has arisen after the desertion of a village or part of a village by a khuntkatti founder's family. When a family settles down on a deserted village site and carries on reclamation on land already cleared or partiallly cleared of jungle a tenancy arises which will not be within the definition of khuntkatti but which will be permanent and non-resumable. Such tenancies partake so much of a raiyati type, in being reclaiming tenancies, that in some old judgments the holders have been held to possess a right of occupancy in their tenure and indeed that expression is used by the trial Court in the present case. The tenant is in no sense a thikadar in the sense of a farmer of rents. In paragraph 195 of the Hazaribagh Settlement Report, in describing how the headmanship of the founder merges into thika doami, Mr. Sifton writes—

> "The status of doami in the record-of-rights has been restricted (with a few exceptions 'not here material') to cultivating tenancies, which though they now must be interpreted as tenures, partook largely in their origin and development of a raiyati character. They are in fact raiyati tenancies which have grown into tenures."

But while by their nature and by custom they are permanent, neither permanency of rent nor transferability (early partnership is not understood as transfer) is an inherent characteristic of the tenancies: periodical settlements of rent are made between landlord and tenant on the basis of the permanency of the tenancy.

The finding of both Courts is that the tenancy was in its inception the cultivating and reclaiming

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tenancy of defendant no. 1 who took as partner defendant no. 2. The facts found are that in the tenancy which covers 168 acres out of a total village area of 586 acres, the rest being jungle, 44 acres are in possession of the defendants who cultivate the area with their own ploughs and the remainder is held by raiyats who pay them rent, that the founder of the tenancy, a Santal, brought eight diku (non-aboriginal) raiyats to whom he leased out lands reclaimed by himself and then his son and grandson (defendant no. 1) brought Santals who reclaimed lands for themselves within the area. There is clearly no mistake of law in the conclusion drawn by the Courts below that the plaintiff has failed to show that the tenancy in controversy is not a cultivating raiyati tenancy which has grown into a tenure as described by the Settlement Officer.

The finding that the tenancy is permanent is as already mentioned, assailed on the grounds (1) that the original tenant described it as 'thika' and (2) that in 1882 the original tenant admitted that the term of his thika had expired and asked for a fresh settlement for five years. But it is a commonplace that in Chota Nagpur the terms 'thika' and 'thikadar' when applied to a tenancy do not necessarily or indeed, at least in tenancies originating before this century, even usually connote that the tenancy is not permanent. Mr. Sifton's remarks in Chapter VI of the Report cited put the facts correctly in this regard. And palpably the application for bandobast or settlement in 1882 being just as consistent with the periodical settlement of the rent of a permanent tenure as with the fresh grant of the tenancy when the tenant's right to hold it had expired, would not rebut the entry which the appellant contests. The Court below have held that the evidence cited does not prove that the tenancy was not permanent and manifestly there is no error in law in the finding.

It was urged by Mr. P. K. Sen against the judgment in appeal that it does not, as there stated, necessarily follow from the judgment of the Hon'ble the Chief Justice remanding the appeal that if the tenancy was taken originally by the defendants' ancestors for cultivation and not for settlement of or collection of rents from tenants, that the tenancy which at present is a tenure was permanent. But what is meant is that where it is not proved that the tenure is not a cultivating tenancy in which doami right may arise (or where it is proved affirmatively that it is such a tenancy) there is no presumption that it is non-permanent and resumable like a tenure of the 'farming' class, and the onus will of course be upon the plaintiff to rebut by evidence the entry of permanency in the record-of-rights. What the learned Chief Justice indicated was that if the original tenancy was not a cultivating one, it could not be doami, while on the other hand the mere fact that it is a tenure will not show that it is not doami.

Several unreported decisions have been referred to, but they are not of assistance in the present case. In *Tikait Harnarain Singh* v. *Darsan Deo* (1) the facts are distinguishable, because there the tenancy was held on a written lease and it was found on the construction of the document that there was no covenant for permanence. The question whether the nature of the tenure as a cultivating tenancy was such that an occupancy right attached to it independently of any specific contract does not appear to have been explored. In *Bulaki Mian* v. *Tikaitni Kosilya Kuari* (2) it was found that the tenancy could not be doami inasmuch as one of the incidents of such tenancy, namely, non-transferability, did not exist and in fact no portion of the cultivated land had been reclaimed by the ancestors of the tenants-defendants. Here neither of these grounds is

(1) (1926) 6 Pat. L. T. 315. (2) F. A. 168 of 1919 (unreported).

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present to assist the appellant. In *Thakurain Jagarnath Kuari* v. *Latu Choudhri* (1) it was held on a construction of the sanads that they did not confer any permanent right. It was either not set up or not established by the evidence that the tenancy was in origin a cultivating or reclaiming tenancy in which occupancy rights would be inherent. These decisions, it is to be observed, were all given in first appeal where the facts were open to the Appellate Court. In *Lochan Pathak* v. *Mohammad Kasim* (2) the order of remand indicates that when a claim is raised that occupancy rights accrue by operation of law, it has to be met by the plaintiff who seeks a declaration that the entry is wrong.

This appeal is without merits and I would dismiss it with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Tarrell, C. J. and Adami, J.

1928.

April, 25.

BHONDU DAS

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 34, 146, 149 *and* 326—*charge under section* 326 *read with section* 149—*conviction under section* 326 *read with section* 34, *whether bad in law.*

Where the accused persons were charged and convicted by a Magistrate for an offence under section 326 of the Penal Code read with section 149, but on appeal the Sessions Judge altered the conviction to one under section 326 read with section 34,

*Criminal Revision no. 146 of 1928, against a decision of F. F. Madan, Esq., I.C.S., Sessions Judge of Patna, dated the 31st January, 1928, modifying an order of Babu Pandey Ramchander Sahay, Deputy Magistrate of Behar, dated the 5th January, 1928.

(1) F. A. 66 of 1921 (unreported). (2) S. A. 27 of 1921 (unreported).