except for about a fortnight during the executive holidays, which commenced three months after the order of the Sessions Judge.

1928.

KELU PATRA v. ISWAR PARIDA.

MACPHERSON, J.

Thus no explanation is furnished for either of the delays, and the application must fail on account of the first of them, and if it did not, it would emphatically fail by reason of the second.

The rule must therefore be discharged.

We may add that on looking into the merits of the application in view of the special circumstances, we find that there was not only a likelihood of a breach of the peace at the time when the proceeding was drawn up on the 30th November, 1927, but also, as was held by the Magistrate after a further reference to the police for report subsequent to the compromise between the second party and the bhag tenants in direct possession which was evidenced by the petition filed on the 11th January, 1928, at the date when he pronounced his decision in May following, and that there are no merits in the application.

KULWANT SAHAY, J.—I agree.

S. A. K.

Application dismissed.

APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

SHIVA SHANKAR PRASAD PANDE

v.

KALI OJHA.*

1928.

Dec., 10.

Non-occupancy rights, whether can be acquired in zerat lands—lease for a term of years or from year to year—Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 116.

*Appeal from Appellate Decree no. 1180 of 1926, from a decision of Rai Bahadur J. Chatterji, District Judge of Shahabad, dated the 24th of May, 1926, modifying a decision of M. Shah Muhammad Khalilur Rahman, Munsif of Arrah, dated the 1st of May, 1926.

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SHIVA SHANKAR PRASAD PANDE v. KALI OJHA.

Non-occupancy rights can be acquired in zerat lands unless the land is held under a lease for a term of years or from year to year.

Sheonandan Roy v. *Ajodh Roy*(1), *Deo Nandan Pershad* v. *Meghu Mahton*(2), *Masudan Singh* v. *Goodar Nath Pandey*(3) and *Janki Singh* v. *Mahanth Jagarnath Das*(4), followed.

Mahanth Jagarnath Das v. Janki Singh(5) and *Raja Dhakeshwar Prasad Singh* v. *Gulab Kuer*(6), distinguished.

Ramji Ram v. *Bansi Raut*(7), *Dwarka Nath Chowdhuri* v. *Safazar Rahman Sarkar*(8), and *Narsingh Narain Singh* v. *Dharam Thakur*(9), referred to.

Appeal by the plaintiff.

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

S. N. Rai, for the appellant.

Pugh (with him *Sundar Lal*), for the respondents.

Ross, J.—The plaintiff appellant is the owner of 10-annas share in half of mauza Mahnaon, the remaining 6-annas of that half belonging to defendants nos. 11 and 12. The other half belongs in equal shares to the Dumraon Raj and to certain other persons. The plaint alleges that in this village there were 57 bighas of zerat nij-jote land of the landlords. The 8-annas in which the plaintiff was interested was, for a number of years, in the possession of certain ladies for their lives, and when the property came into the direct possession of the plaintiff he found that the defendants had been recorded in respect of 28 bighas 10 cottahs, which fell in his share of the village, as sarahmuaiyan (fixed rate) tenants in

(1) (1899) I. L. R. 26 Cal. 546.
(2) (1906-07) 11 Cal. W. N. 225.
(3) (1905) 1 Cal. L. J. 456.
(4) (1918) 3 Pat. L. J. 1, F. B.
(5) (1922) I. L. R. 1 Pat. 340, P. C.
(6) (1919) 53 Ind. A. 176.
(7) (1925) I. L. R. 4 Pat 105.
(8) (1915-16) 20 Cal. W. N. 1097.
(9) (1904-05) 9 Cal. W. N. 144.

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respect of 9.74 acres, and as kaemi (occupancy) tenants of the other 9.48 acres. He prayed for a declaration that the lands were the nij-jote of the landlords and for recovery of possession jointly with the defendants to the extent of his interest. The defence was that the land was not nij-jote of the landlords, but was transferable guzashta kasht land of the village which the contesting defendants nos. 3 to 10 had purchased from their predecessors, defendants 1 and 2.

The Munsif held that the land was zerat land and gave the plaintiff a decree. The learned District Judge on appeal affirmed the decision of the Munsif as to the land being zerat; but finding that the defendants had been in possession as tenants since 1913, he held that although they might not have acquired occupancy rights as the full twelve years had not expired, they were non-occupancy tenants and were not liable to be ejected; and he therefore dismissed the plaintiff's claim for possession.

On behalf of the appellant it is argued that non-occupancy rights cannot be acquired in zerat lands. Reference was made to the decision in *Dwarka Nath Chowdhuri* v. *Safazar Rahman Sarkar*(1) and to the decision of the Privy Council in *Mahanth Jagarnath Das* v. *Janki Singh*(2) reversing a decision of the Full Bench of this Court in *Janki Singh* v. *Mahanth Jagarnath Das*(3) and it was argued that in this case the ordinary rule must apply, that where the owner of the land seeks to recover possession on the allegation that the party in possession had no right to continue in it and his title to possession is proved or admitted, he can claim a decree unless the party in possession proves the existence of a tenancy which entitles him to retain possession [*Narsing Narain Singh* v. *Dharam Thakur*(4)]. Now the cases to which I have referred

(1) (1915-16) 20 Cal. W. N. 1097.
(2) (1922) I. L. R. 1 Pat. 340.
(3) (1918) 3 Pat. L. J. 1, F. B.
(4) (1904-05) 9 Cal. W. N. 144.

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were cases on the question of limitation and they were cases of tenants who had held under a lease for a term of years. In the decision of the Full Bench of this Court the majority expressed the opinion that non-occupancy rights could be acquired in zerat lands. The decision on the point of limitation was reversed by the Judicial Committee on the facts of the case, because it was a case of a lease for a term of years and was, therefore, within the express terms of section 116 of the Bengal Tenancy Act. The plain construction of section 116 is that when the landlord desires to protect himself against the accrual of occupancy or non-occupancy rights in his private land, he can do so by letting the land either on a lease for a term of years or on a lease from year to year; and this is the view of the meaning of the section which has been consistently taken. Thus in *Sheo Nandan Roy* v. *Ajodh Roy* (1) Banerjee and Rampini, JJ. said, "As we understand the section, its object is evidently to exclude the proprietor's private lands from the operation of Chapters V and VI of the Bengal Tenancy Act, provided that the proprietor has taken a certain precaution which is indicated by the concluding words of the section, where any such land is held under a lease for a term of years or under a lease from year to year." This case was followed in *Deo Nandan Prashad* v. *Meghu Mahton*(2), and there is another decision to the same effect in *Masudan Singh* v. *Goodar Nath Pandey*(3), also referred to in *Deonandan's* case(2). There is a case in this Court (although it was not referred to or relied upon by the learned Advocate for the appellant) *Ramji Ram* v *Bansi Raut*(4) where Jwala Prasad, J. expressed the opinion that although the trend of the authorities was, as has been stated above, the correctness of these authorities was in doubt. On the facts found in that case the opinion was obiter dictum as it was a case of a lease for a term of years and the

(1) (1899) I. L. R. 26 Cal. 546.
(2) (1906-07) 11 Cal. W. N. 225.
(3) (1905) 1 Cal. L. J. 456.
(4) (1925) I. L. R. 4 Pat. 105.

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learned Judge who was sitting with his Lordship apparently did not agree in the opinion. The view expressed in the Full Bench decision in this Court is the same as that in the Calcutta decisions; and it must be held that, unless the proper safeguard is taken by the landlord, there is nothing to prevent the accrual of either occupancy or non-occupancy rights in zerat land. The decision of the Judicial Committee in *Raja Dhakeshwar Prasad Narain Singh* v. *Gulab Kuer*(1) was also referred to by the appellant. It is true that in that decision it was said, with reference to the private lands of the zemindar, that " in these lands the raiyat cannot acquire a right of occupancy." This statement occurs when the broad distinction is being made between raiyati land and the private lands of the zemindar; but their Lordships went on to deal in detail with the question of private lands and reproduced section 116 in extenso with the condition therein stated as to a lease for a term of years or from year to year. This decision therefore cannot be read as laying down the proposition which it is being used to support. In my opinion, therefore, the learned Judge made no error of law in his decision in this case. He accepted the evidence of a judgment and a decree in a contested rent suit brought by one of the tenants for life against one of these defendants under which arrears of rent for 1321 and 1322 were recovered. This is clearly proof of an existing tenancy, apart altogether from the other evidence to which the learned District Judge has referred. This tenancy was not created by a lease for a term of years nor by a lease from year to year. There is nothing to show that this tenancy was ever terminated and it must be taken still to exist and that the landlord is not entitled to re-enter so long as the tenancy does exist.

The other point taken in appeal was that the plaintiff is not bound by this tenancy created by the tenant for life, because the instrument under which

(1) (1919) L. R. 56 I. A. 176.

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ROSE, J.

the ladies held the land for their lives prohibited "any transfer, mortgage, gift or mukarrari, etc." of the land. This is, however, a settlement of zerat land in the ordinary course of management. The ladies were resident on the other side of the Ganges and the learned Subordinate Judge has found that all the other co-sharers of this village have let out this zerat land to tenants—the plaintiff's own co-sharers, as well as the Dumraon Raj and the other persons interested in the other 8-annas share. There is nothing to indicate that this was not an ordinary act of management and that would not be excluded by the terms of the deed creating the life interest. The reversioner is in my opinion bound by such an act as this of the tenant for life.

It was contended on behalf of the respondents that there was no legal proof of the zerat character of this land; but in my opinion there is a finding of fact based upon evidence which, whether sufficient or not, was not suggested to be inadmissible in proof of the zerat character of the land; and this part of the case is therefore concluded by the finding of fact.

The result is that the appeal must be dismissed with costs. The contesting defendants 3 to 10 are entitled to their costs throughout and the cross-appeal is allowed to this extent.

CHATTERJI, J.—I agree with the finding of the lower appellate Court on the question that the defendants were at least non-occupancy raiyats. As the suit was by the last female owner against them for recovery of arrears of rent, it is argued on behalf of the plaintiff-appellant, that she has no right to create a tenancy because of a certain agreement entered into between her and the other widows on the one side and the plaintiff and the ancestors of defendants 11 and 12 on the other side. The agreement provides that they would not be authorized to make any transfer, sale or gift or grant in mukarrari or permanent settlement relating to the mahal which includes the land in suit:

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but this, in my opinion, cannot militate against the widows' right in the ordinary course of management, to settle the lands temporarily or to recognize tenancy or to sue the tenants for rent. The judgment in the rent suit shows that the suit was decreed on contest on a consideration of the plea of payment. This proceeding was not attacked on the ground of collusion and in fact there is nothing to suggest that the suit was brought and fought collusively for the purpose of conferring on the defendants the right of tenancy at the expense of the estate. A reversioner is bound by the result of litigation carried on bona fide by the last female holder. The finding of fact of the final Court of appeal is therefore supported by legal evidence.

It is further urged on behalf of the plaintiff that the land being zerat, the tenants cannot acquire any right of occupancy or the status of non-occupancy raiyats and reference was made to certain rulings which have been dealt with by my learned brother. Section 116 of the Bengal Tenancy Act debars the acquisition of the right of occupancy or the right of a non-occupancy raiyat in respect of the proprietor's private lands *only* when such lands are held under a lease for a term of years or under a lease from year to year. In the present case the tenancy is not held on any such condition. On a plain finding of the section itself, there can be no bar to the accrual of the status of non-occupancy raiyats. The rulings referred to have no application to the facts of the present case. They deal with the question of the applicability of Article 1(*a*) of schedule 2 of the Bengal Tenancy Act to suits for recovery of possession from persons who had held zerat lands under a lease after the expiry of the term thereof. The Privy Council ruling of *Jagarnath* v. *Janki Singh*(1) dealt with a person who had held zerat land under a lease for nine years and was sued on the expiration of the term of the lease.

(1) (1922) I. L. R. 1 Pat. 340, P. C.

1928.

SHIVA SHANKAR PRASAD PANDE v. KALI OJHA.

CHATTERJI, J.

Such a person was not treated as a tenant after the term of the lease. The position therefore is quite different from the position in the present case. As to the observations in the case of *Ramji Ram* v. *Bansi Raut*(1) it must be remembered that the facts were quite different and it will be a manifest abuse of judicial precedents to apply isolated dicta from a judgment to a case where the facts are in essential particulars different.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, JJ.

1928.

Dec., 11.

JAGDISH NARAIN SINGH

v.

MUSSAMMAT RAMSAKAL KUER.*

Provincial Insolvency Act, 1920 (*Act V of* 1920), *section* 28(4)—*after-acquired property, whether insolvent can deal with, before intervention of Receiver.*

Section 28(4), Provincial Insolvency Act, 1920, provides :

" All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver, and the provisions of sub-section (2) shall apply in respect thereof."

Held, that the section is subject to the proviso that after-acquired property can be dealt with by the insolvent before the intervention of the Receiver in insolvency.

Ali Mahamad Abdul Hussain Vohora v. *Vadi Lal Devchand Parikh*(2), *Chhote Lal* v. *Kedar Nath* (3), and *Cohen* v. *Mitchell*(4), followed.

Ma Phaw v. *Maung Ba Thaw*(5), not followed.

*Appeal from Original Order no. 247 of 1927, from an order of Rai Bahadur Amrita Nath Mitra, District Judge of Gaya, dated the 16th of August, 1927.

(1) (1925) I. L. R. 4 Pat. 105.
(2) (1919) I. L. R. 43 Bom. 890.
(3) (1924) I. L. R. 46 All. 565.
(4) (1890) 25 Q. B. D. 262.
(5) (1926) I. L. R. 4 Rang. 125.