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basis of facts. Such a result would lead to continuous disastrous enhancement until the rents had reached the maximum. The revenue officer who has made the report has clearly demonstrated that there is no prevailing rate in the village; but the direction of the learned Subordinate Judge that he should ascertain whether there is any prevailing rate in adjoining villages has still to be carried out. This appeal must accordingly be dismissed with costs. The case must be remanded, as directed by the learned Judge of this Court, but with this modification, that the commissioner will be directed only to ascertain whether there is in neighbouring villages a definite prevailing rate of the kind which has been described above. If no such rate is found to exist, the plaintiff's claim for enhancement under section 30(*a*) must necessarily fail. It must be made clear that the commissioner is not to be required to find anything more than this. He is not required to find what may be the lowest rate paid by a considerable number of raiyats for land with similar advantages, nor is he to ascertain any average rates of rent, by the application of the principles laid down in section 31A or in any other way.

JAMES, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

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February, 2, 3. March, 7.

Before Adami and Scroope, JJ.

ACHAMBIT MAHATA

v.

RAJ KUMAR TEKAIT MAN MOHAN SINGH.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 51*A*(5) *and* 81(*b*)—*record-of-rights for Manbhum—entry "occupancy raiyat with rent subject to enhancement"*,

* Appeals from Appellate Decrees nos. 1581, 1608 and 1609 of 1925, from a decision of J. A. Saunders, Esq., I.C.S., District Judge of Manbhum, dated the 7th July, 1925, reversing a decision of Maulavi Najabat Hussain, Subordinate Judge of Purulia, dated the 14th May, 1924.

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whether a particular mentioned in section 81(*b*)—*section* 51*A*(5) *whether applies—Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 50(2), *presumption arising under, whether applies after final publication of record-of-rights.*

Section 81, Chota Nagpur Tenancy Act, 1908, lays down :

" Where an order is made under section 80, the particulars to be recorded shall be specified in the order, and may include, either without or in addition to other particulars, some or all of the following, namely.....

(*b*) the class to which each tenant belongs, that is to say, whether he is a tenure-holder, mundari khuntkattidar, settled raiyat, occupancy raiyat, non-occupancy raiyat, raiyat having khuntkatti rights, or under-raiyat, and, if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure; ....."

Held, (*i*) that an entry " occupancy raiyat with rent subject to enhancement " in the record-of-rights for Manbhum is not a particular mentioned in section 81(*b*) and, therefore, does not attract the operation of section 51A(5) of that Act;

(*ii*) that section 81(*b*) clearly contemplates such a particular in the case of a tenure but not in the case of an occupancy holding; and

(*iii*) that the contrast between a " raiyat holding at fixed rates " and an " occupancy raiyat " does not exist at all in Manbhum.

When a record-of-rights has been finally published under the Bengal Tenancy Act, 1885, the presumption arising under section 50(2) of the Act does not aopply.

Pirthichand Lal Chowdhry v. *Basarat Ali*(1), *Prasanna Kumar Sen* v. *Durga Charan Chakraverty*(2), *Maharaja Bahadur Kesho Prasad Singh* v. *Ramjas Pande*(3) and *Gobind Lal Sijuar* v. *Ramsaran Lal*(4), followed.

Secretary of State for India in Council v. *Kajimuddi*(5) and *Maharaja Radh Kishore Manikya Bahadur* v. *Umed Ali*(6), not followed.

(1) (1909) I. L. R. 37 Cal. 30. F. B.
(2) (1922) I. L. R. 49 Cal. 919.
(3) (1922) I. L. R. 2 Pat. 92.
(4) (1921) 2 Pat. L. T. 642.
(5) (1899) I. L. R. 26 Cal. 617.
(6) (1908) 12 Cal. W. N. 904.

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Appeal by the plaintiffs.

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

S. C. Mazumdar, for the appellants.

A. B. Mukherji and *B. B. Mukherji*, for the respondent.

SCROOPE, J.—The suits out of which these three appeals arise were brought for a declaration that the plaintiffs held permanent and heritable tenures under the defendant at rents fixed in perpetuity. In the finally published record-of-rights the plaintiff in one of the suits (suit no. 86) has been shown as a tenure-holder and the plaintiffs in the other two suits have been recorded as occupancy raiyats. In the three cases the rents were recorded as liable to be enhanced. It was originally a single tenancy held by the ancestor of the plaintiffs among whom it was divided according to their shares in the family property. The Subordinate Judge of Purulia decreed the suits. Although the defendant appealed to the District Judge against the entire decrees, the appeals were not pressed against the finding of the lower court that the plaintiffs are not raiyats but permanent tenure-holders. The appeals were pressed against the finding that the rents were fixed and the learned District Judge of Manbhum-Sambalpur allowed the appeals on this point, holding that the presumption attached to the record-of-rights has not been rebutted and that the rents are liable to enhancement.

The plaintiffs filed rent receipts showing that they have been paying a uniform rent which has not been changed since at least 1274 B. S. and the first contention advanced in appeal to this Court was that this raised a presumption in favour of fixity of rent and that the learned District Judge was wrong in applying clause (5) of section 51A of the Chota Nagpur Tenancy Act, as these were in fact suits challenging the record-of-rights. The answer to this

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contention is that a suit for that purpose has to be brought under section 87 of the Chota Nagpur Tenancy Act in the Court of the Revenue officer and admittedly also such a suit was barred at the time when these suits were instituted. The case of the *Secretary of State for India in Council* v. *Kajimuddi*(1) is relied on by the learned advocate in this connection and also in support of his second contention that there is a natural presumption in favour of fixity of rent arising from the fact of a uniform rate for over 50 years and that this would override clause (*5*) of section 51A of the Chota Nagpur Tenancy Act. He also relies on *Gulab Misser* v. *Kumar Kalanand Singh*(2) and *Monmotha Nath Kar* v. *Probodh Chandra Ratarhi*(3). It is now settled law that when a record-of-rights has been finally published under the Bengal Tenancy Act the presumption under section 50(*2*) does not apply [see *Pirthichand Lal Chowdhury* v. *Basarat Ali*(4) and *Prasanna Kumar Sen* v. *Durga Charan*(5) and two cases of this Court—*Maharaja Bahadur Kesho Prasad* v. *Ramjas Pande*(6) and *Gobind Lal Sijuar* v. *Ramsaran Lal*(7)]. The authority of the two cases strongly relied on by the learned advocate for the appellant, namely, the *Secretary of State for India in Council* v. *Kajimuddi*(1) and *Maharaja Radh Kishore Manikya Bahadur* v. *Umed Ali*(8) has not been accepted in these later cases which accordingly must be held to be no longer good law. These cases are, however, under the Bengal Tenancy Act and the learned advocate was on much stronger ground when he contended that the entry "occupancy raiyat with rent subject to enhancement" in the two cases where plaintiffs were so entered was anyhow not a particular mentioned in section 81(*b*) of the Chota Nagpur Tenancy Act and did not, therefore, attract the

(1) (1899) I. L. R. 26 Cal. 617.
(2) (1910) 12 Cal. L. J. 107.
(3) (1922) 73 Ind. Cas. 416.
(4) (1909 I. L. R. 37 Cal. 30, F. B.
(5) (1922) I. L. R. 49 Cal. 919.
(6) (1922) I. L. R. 2 Pat. 92.
(7) (1921) 2 Pat. L. T. 642.
(8) (1908) 12 Cal. W. N. 904.

operation of section 51A(5) of that Act. In my opinion this contention is well-founded as a comparison of the sections will show:—

Section 81(b) of the Chota Nagpur Tenancy Act (Bengal Act VI of 1908).	*Section 102(b) of the Bengal Tenancy Act (Act VIII of 1885).*
"The class to which each tenant belongs, that is to say, whether he is a tenure-holder, Mundari khuntkattidar, settled raiyat, occupancy raiyat, non-occupancy raiyat, raiyat having khuntkatti rights, under-raiyat, and if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure."	"The class to which each tenant belongs, that is to say, whether he is a tenure-holder, raiyat holding at fixed rates, settled raiyat, occupancy raiyat, non-occupancy raiyat or under-raiyat, and, if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure."

Section 81(*b*) clearly contemplates such a particular in the case of a tenure but not in the case of an occupancy holding. It was sought to get over the difficulty by the following argument: If the entry was merely "occupancy holding", section 51A (*5*) would apply on the authority of the Bengal cases already cited; *a fortiori* section 51A (*5*) applies when the entry is "occupancy holding—rent liable to enhancement", this last being only "other particulars" of the kind referred to in the opening words of section 81. Section 102(*b*) of the Bengal Tenancy Act mentions raiyats holding at fixed rates whereas this class of raiyat is not mentioned at all in the corresponding section of the Chota Nagpur Tenancy Act: in the four districts to which the Chota Nagpur Tenancy Act first applied, the Mundari khuntkattidar and raiyats having khuntkatti rights take the place of raiyats holding at fixed rates in the Bengal Tenancy Act; so if we find in a record-of-rights finally published for these areas under the Chota Nagpur Tenancy Act a person entered as an occupancy raiyat and not as a Mundari khuntkattidar or raiyat having khuntkatti right, the presumption is just as strong that he is not a raiyat holding at fixed rates as it is in the case of such an entry under the Bengal Tenancy Act. The case is different with

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Manbhum where these cases come from and which approximates more to Bengal conditions and the Act was extended in 1910 to that district. Section 4 of Act X of 1859 which was in force in Manbhum up to 1910 laid down that on proof in a suit under that Act that a raiyat's rent had not been changed for a period of twenty years before the commencement of the Act it should be presumed until the contrary was shown that such rent had remained unchanged since the Permanent Settlement. Hence it was necessary to make special provision for raiyats holding at fixed rents in Manbhum, when the Act was extended and accordingly the Act was amended by a new section 51A. But strangely enough no corresponding amendment was made in section 81(*b*). Thus in a record-of-rights for Manbhum whence these three cases come, the entry "occupancy holding" alone carries us no further as regards the question of enhancibility as it is not contrasted with raiyat holding at fixed rates as it is in Bengal; in fact the contrast between a "raiyat holding at fixed rates" and an "occupancy raiyat" which ought to be the foundation for the application of section 115 of the Bengal Tenancy Act does not exist at all here. Enhancibility is an ordinary incident of an occupancy holding, yet there is nothing incompatible between the nature of an occupancy holding and fixity of rent under the Chota Nagpur Tenancy Act as it stands at present for Manbhum. Hence this method of meeting the contention fails, and I do not see any answer to it. In my opinion, therefore, section 51A (*5*) does not apply to the two cases in which this entry occurs. Another aspect of the matter is this: the entries now in question that the rents of these occupancy holdings are liable to enhancement are certainly unusual, as enhancibility of rent under certain statutory conditions is, as I have already indicated, a most ordinary incident of an occupancy holding, and the entries as to enhancibility are clearly pure surplusage. What probably occurred was that all these tenancies were originally shown in the draft

record-of-rights as tenures with rent liable to enhancement and tenure-holder was at a later stage altered to occupancy raiyat without removing the words " rent liable to enhancement " which are not in the case of occupancy raiyats appropriate to section 81(*b*). However, this is only surmise, but the point I wish to emphasize is that in these particular cases the words occupancy raiyat do not carry the weight they would in a record framed under the Bengal Tenancy Act or in a record for one of the four districts of Ranchi, Hazaribagh, Palamau or Singhbhum, and the entry of the ordinary incident of enhancibility makes the case no stronger. Holding as I do that section 51A (*5*) of the Chota Nagpur Tenancy Act does not apply to the case, the question as to fixity of rents has to be decided on the evidence; admittedly there has been uniform payment of rent for more than fifty years, and section 51A (*5*) not applying, this is sufficient to raise a natural presumption of fixity of rent in favour of the appellants. The landlord twice in 1891 and 1903 tried to enhance the rents by suit and failed; the judgment of the appellate Court, Exhibit 3, shows that it was there found that the present plaintiffs were tenure-holders and held on fixed rent. That judgment is clearly a very strong piece of evidence in plaintiffs' favour, though it is not *res judicata* as apparently the enhancement suits were finally dismissed because notice was not properly served and, this being the position of the evidence, I would hold that the presumption of correctness attaching to the record-of-rights is adequately rebutted and that the plaintiffs in these two cases are entitled to the declarations sought.

There remains the third case: now in this case section 51A (*5*) applies, as the plaintiffs are recorded as tenure-holders; admittedly the three holdings in the suit are portions of one parent tenure, and it is obvious that this cannot now be represented by one tenure and two occupancy holdings. Clearly there is inconsistency in the record; it is palpably wrong in

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this particular, and it is common ground also, as I stated above, that the holdings are tenures. This considerably diminishes the value of the record, and is a point which the learned District Judge has overlooked. It would be equally inconsistent to have two of the holdings, into which the parent tenure is now divided, held on fixed rents and the third on a rent liable to enhancement. Clearly the incidents of the holdings are the same in each case, and, having regard to the findings already arrived at in respect of the two cases, to the admitted payment at uniform rates for more than fifty years, to the judgment, Exhibit 3, and the manifest incorrectness of the record-of-rights as regards the nature of the holdings in suit, I am of opinion that the plaintiffs in this case also have rebutted the presumption and are entitled to the relief sought. I would, therefore, restore the decision of the learned Subordinate Judge and decree these three appeals with costs throughout.

ADAMI, J.—I agree.

Appeals decreed.

APPELLATE CIVIL.

1930.

February, 19, 20, 21. March, 5, 10.

Before Jwala Prasad and Ross, JJ.

BRIJMOHAN SINGH

v.

DUKHAN SINGH.*

Mortgage—subrogation, principles of—lessee, executing zamanatnama for the due performance of the engagement for payment of rent—whether a first mortgage—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 79—*volunteer, whether entitled to subrogate—puisne mortgagee, failure of, to assert his priority—effect of failure—principles governing such cases.*

*Appeal from Original Decree no. 138 of 1927, from a decision of Babu Rambilas Sinha, Subordinate Judge of Shahabad, dated the 26th of February, 1927.