1931.

TILAK MAHTON v. AKHIL KISHORE. KULWANT SAHAY, J.

by the opposite party at the final hearing of the application. That practice had continued from April, 1924, the date of the decision of Sir Dawson Miller in *Musammat Bachan Dai* v. *Jugal Kishore*(1). The case that came before me—*Musammat Bibi Sogra* v. *Radha Kishun*(2) was heard in May, 1928, when the said practice had been established in this Court for more than four years and the view taken by me in that case was in conformity with the said practice. On a consideration of the law, however, I am fully satisfied that the view taken by my learned brothers is correct. After a notice is issued to show cause why the application for leave to appeal in forma pauperis should not be granted, it is open to the opposite party to show that the case did not satisfy the proviso to Order XLIV, rule 1; in other words, that it was not shown that the decree was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. The order directing the issue of a notice does not decide the question finally; it only shows that the Court in issuing the notice was satisfied that there was a prima facie question which ought to be heard and decided under Order XLIV, rule 1, and in calling upon the opposite party to show cause the court could not preclude him from showing that the case did not comply with the provisions and was not a fit case in which leave ought to be granted. Having regard to the reasons given by my learned brothers, I am satisfied that the decision of Sir Dawson Miller in *Bachan Dai's*(1) case was not correct.

LETTERS PATENT.

1931.

January, 6, February, 9.

Before Macpherson, J.

MALIK MOKHTAR AHMAD

v.

AKLOO MAHTO.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 102(*h*) *and* 103*B*—*entry* "kul haq raiyat", *whether is an*

* Letters Patent Appeal no. 126 of 1930.

(1) (1924) 8 Pat. L. T. 119.

(2) (1928) 10 Pat. L. T. 46.

1931.

MALIK MOKHTAR AHMAD v. ABLOO MAHTO.

incident of tenancy such as is referred to in section 102(h)—presumption of correctness, whether attaches to such entry—incident of tenancy based on local custom, whether should be entered in the record-of-rights.

An entry "*kul haq raiyat*" in the record-of-rights with respect to trees standing on the holding is a record of an incident of a tenancy such as is referred to in section 102(*h*) of the Bengal Tenancy Act, 1885, and, therefore, presumption of correctness attaches to such an entry under section 103B of the Act.

An incident of a tenancy can be properly recorded under section 102(*h*), even where the right or liability recorded is based on the existence of a local custom.

Bishun Pragash v. *Sheosaran Teli*(1), *Singheswar Chaudhuri* v. *Parbal Mandal*(2), *Matukdeo Narain* v. *Sadhusaran Ojha*(3) and *Debi Dayal Singh* v. *Musammat Gango Kuer*(4), followed.

Suresh Chandra Rai v. *Sitaram Singh*(5), *Debidayal Singh* v. *Mussammat Gango Kuer*(6) and *Sheo Partap Sahi* v. *Sheonandan Panday*(7), not followed.

Raghubir Misser v. *Bhajan Singh*(8), distinguished.

Observations on the serious danger of citing unauthorised law reports and on duties of editors of law reports.

The facts of the case material to this report are stated in the judgment of the Court.

Khurshaid Hasnain and *Qazi Nazrul Hasan*, for the appellant.

No one for the opposite party.

MACPHERSON, J.—This is an application for permission to appeal under the Letters Patent against the dismissal of a second appeal under Order XLI,

(1) (1922) I. L. R. 1 Pat. 268.
(2) (1927) 103 Ind. Cas. 471.
(3) (1931) 12 Pat. L. T. 304.
(4) (1925) I. L. R. 10 Pat. 311.
(5) (1920) 57 Ind. Cas. 126.
(6) (1925) 89 Ind. Cas. 1020.
(7) (1930) C. R. 403 of 1930 (Unreported).
(8) (1917) 40 Ind. Cas. 987.

1931.

MALIK MOKHTAR AHMAD v. ANLOO MAHTO.

MACPHERSON, J.

rule 11. As Mr. Khurshaid Hasnain has pressed the point very strenuously I adopt the somewhat unusual course of recording my reasons for refusing permission.

Appellant sued for damages in respect of palm trees alleged to have been cut and appropriated by the defendants from lands within his zamindari. The defence was that the trees stood on the nakdi lands of some of the defendants and that the trees were the property of the raiyats of the land who had cut them. The defence adduced the entry in the record-of-rights in respect of the trees which is '*kul haq raiyat*.'

The Munsif in an elaborate judgment dismissed the suit on the finding that the plaintiff had failed to rebut this entry in the record-of-rights and was not entitled to any damages since the whole property in the trees belonged to the raiyat including the felled timber. An appeal failed on the same grounds. Prima facie the decision is sound.

It is now urged by Mr. Khurshaid Hasnain that no presumption of correctness attaches to the entry '*kul haq raiyat*' since it is an entry recording a local custom and so is outwith the scope of an incident of a tenancy such as is referred to in section 102(*h*) of the Bengal Tenancy Act. He relies upon the decisions in *Raghubir Misser* v. *Bhajan Singh*(1), *Suresh Chandra Rai* v. *Sitaram Singh*(2), *Debidayal Singh* v. *Gango Kuer*(3) and the judgment in *Sheo Partap Sahi* v. *Sheonandan Panday*(4) which followed the last mentioned case.

The head-note in *Raghubir Misser* v. *Bhajan Singh*(1) which is "An entry in the record-of-rights cannot have the effect of overruling well-settled principles of law. Where such entry conflicts with

(1) (1917) 40 Ind. Cas. 987.
(2) (1920) 57 Ind. Cas. 126.
(3) (1925) 89 Ind. Cas. 1020.
(4) (1930) C. R. 403 of 1930 (Unreported).

the established law, the established law must prevail over the entry and the presumption attaching to the entry must be deemed to have been rebutted " does not really represent the actual decision. The point in controversy was the ownership of some palm trees which stood on the plaintiff's side of an *ar* or boundary fence and, therefore, within his plot but which were shown in the record-of-rights as belonging to the defendants. As an examination of the record of the second appeal shows, the lower appellate Court had set out

" I do not think there can be any doubt that the settlement entry is mistaken.....and is not in accordance with its own practice "

and had found that the correctness of the entry had been rebutted and that in fact the trees had been recently planted by the defendants in the plaintiff's land without permission. The only point for decision, therefore, was no more than whether the entry prevailed in face of the finding of fact that it had been rebutted. The appeal being obviously concluded by the findings of fact, the other observations in the judgment are obiter. They are also in direct conflict with the decision in *Bishun Pragash* v. *Sheosaran Teli*(1) where it was held that the presumption attaching to an entry in the record-of-rights is not rebutted merely by showing that the entry is contrary to the general law on the subject with which the entry deals and, therefore, where the record-of-rights contained an entry that the trees belonged to the tenants, it was held that the mere fact that ordinarily the law gives to the landlord the full right in respect of the timber was not sufficient to rebut the presumption arising from the entry. Indeed, with all respect they appear to be altogether contrary to the plain provision of the statute.

In *Suresh Chandra Rai* v. *Sitaram Singh*(2) it was held by a single judge that a village custom is not one of the particulars which have to be recorded under

(1) (1922) I. L. R. 1 Pat. 368.
(2) (1920) 57 Ind. Cas. 128.

1931.

MALIK MOKHTAR AHMAD v. ARLOO MARTON.

MACPHERSON, J.

section 102(*h*) of the Bengal Tenancy Act and if it is recorded there is no presumption under section 103B of the Bengal Tenancy Act that it is correct, though it is relevant evidence under section 35 of the Indian Evidence Act, and accordingly the burden of proving existing custom lies on the party who relies on the custom. Now the question for decision was whether the entry in the record-of-rights

> " if there is produce, the landlord gets rent upon measurement of the lands at the rate of Rs. 2-8-0 per bigha ",

made in respect of a holding in the Kosi area was a ' special incident of the tenancy ' and the decision was that as the defendants did not in their written statement contend that this was a special condition of the tenancy but alleged local custom in derogation of the common law right of the landlord, the entry in the record-of-rights did not support the case of the defendants as put forward by them. There is no suggestion that if the defence had alleged that it was an incident of the holding that the tenant paid only on the measured area of the land on which there was produce instead of alleging custom, the entry in the record-of-rights would not under section 103B of the Bengal Tenancy Act have carried the presumption of correctness. In addition the view that an entry cannot be made under section 102(*h*) of the special conditions and incidents of a tenancy simply because these are in accordance with the local custom is one to which, as at present advised, I am not prepared to subscribe. The decision of Mr. Justice Das has been considered by Mr. Justice James in *Singheswar Chaudhuri* v. *Parbal Mandal*[1] where the entry with regard to an under-raiyat was shikmi dakhalkar. He observed :

" It cannot be assumed as a matter of course that the entry of shikmi dakhalkar in the record-of-rights must have followed on a decision of the Revenue Officer on the question of local custom, but the defendant, apart from his reliance upon the entry in the

(1) (1927) 103 Ind. Cas. 471.

record-of-rights, now founds his case upon local custom and Mr. S. N. Bose argues that it should be presumed that he always did so. Now although it may be conceded that a Revenue Officer may be travelling out of his sphere when he records as a special incident of every tenancy in that village a local custom by which special remissions may be made in time of flood as was held by Mr. Justice Das in the case of *Suresh Chandra Rai* v. *Sitaram Singh*(1), that decision should, I think, be read with reference to the particular facts of the case then under discussion, and it should not, I would respectfully submit, be extended to support a general rule that no incident of a tenancy, how vitally it may affect the status of a tenant, can be properly recorded under section 102(*h*) of the Bengal Tenancy Act, if the right or the liability recorded is based on the existence of a local custom.

Where occupancy rights may be obtained by a tenant as a result of local usage or by any other means, the Revenue Officer whose duty it is to frame the record-of-rights must, I think, record as an incident of the tenancy the fact that the tenant possesses such rights. Revenue Officers are required under section 102 to enter the class to which the tenant belongs, the situation and a quantity of his land, the rent payable by him, the mode in which that rent has been fixed and special conditions and incidents of any of the tenancy. If the under-tenant enjoys occupancy rights, that is to say, if he is free from liability to eviction under section 49 of the Bengal Tenancy Act and if he enjoys special privileges under section 113 of the Act with regard to the period during which a settled rent cannot be enhanced, a record-of-rights which omits to mention this special incident of the tenancy, that the under-raiyat enjoys occupancy rights, would be certainly defective in most important particulars.'' With these remarks I respectfully agree.

(1) (1920) 57 Ind. Cas. 126.

1931.

MALIK MOKHTAR AHMAD v. AKLOO MAHTON.

MACPHERSON, J.

The decision in *Debidayal Singh* v. *Gango Kuar*(1) expressly followed the decision in *Suresh Chandra Rai* v. *Sitaram Singh*(2) and extended it to the case of an entry in the record-of-rights in respect of the rights of raiyats in the fruit and timber of trees standing on their holdings where the entry was '*kul haq raiyat*.' The decision was that the entry was not one with regard to the incidents of the tenure and did not carry with it the presumption of correctness under section 103B. It was on this decision that Mr. Khurshaid Hasnain laid most reliance. But upon sending for the original record of the case, I find that the decision had been reversed in *Debidayal Singh* v. *Mussammat Gango Kuer*(3). Mr. Justice Foster in delivering the judgment of the Court observed:

"The entry '*kul haq raiyat*' is an entry of a special incident of the tenancy directly authorized in item (*h*) of section 102 of the Bengal Tenancy Act. There is no suggestion in the entry itself or in the record of the case that this incident arises out of any custom. It may just as possibly arise from contract. It is certainly a special incident of this tenancy as it stands recorded, and there is no apparent reason why the presumption of its correctness should be removed from it."

This decision was not mentioned in argument. Indeed the serious danger of citing unauthorized law reports is well illustrated by the present case. It is highly reprehensible of compilers of such reports or of any law reports to omit to report the judgment of the appellate Court reversing the decision in a case which they have reported and there can be no doubt that their failure to do so in this instance has occasioned much harm in the Courts of this Province. Steps will now be taken to have the decision reported in the Patna Series of Law Reports. I am impelled

(1) (1925) 89 Ind. Cas. 1020.
(2) (1920) 57 Ind. Cas. 126.
(3) (1925) I. L. R. 10 Pat. 311 [since reported.]

to observe that a decision in second appeal should rarely be reported until any appeal preferred against it under the Letters Patent has been determined.

In the fourth case(1) mentioned the decision in *Debidayal's case*(2) was adduced before the Judge of this court without any mention of the fact that it had been reversed in appeal and the learned Judge without committing himself to it guardedly directed a consideration of the evidence.

The point which was urged before me was that the matter was in doubt in view of the three decisions of single judges cited on behalf of the appellant and the decision of Mr. Justice James which differed from them. But in my opinion there is no doubt at all by reason of the decision in *Debidayal Singh* v. *Mussammat Gango Kuer*(3) which definitely holds that the entry '*kul haq raiyat*' in respect of trees is an entry of a special incident of a tenancy which carries the presumption under section 103B of the Bengal Tenancy Act. The same view is implied in the decision in *Bishun Pragash Narain Singh* v. *Sheosaran Teli*(4) already cited and was taken in Letters Patent Appeal no. 4 of 1928. There the controversy was with regard to an entry in respect of trees and the Court held: "the entry in the record-of-rights which was made under section 102(*h*) of the Bengal Tenancy Act is evidence that as an incident of his tenancy the plaintiff is entitled to appropriate the timber of his trees, and section 103B of the Act provides that this entry must be presumed to be correct until the contrary is shown." The same view has been admirably set out by Ross, J. in *Matukdeo Narain* v. *Sadhusaran Ojha*(5) decided within the last ten days.

There is thus no doubt at all as to the law which is entirely against the contention of the appellant and

(1) (1930) C. R. 403 of 1930 (Unreported).
(2) (1925) 89 Ind. Cas. 1020.
(3) (1925) I. L. R. 10 Pat. 311.
(4) (1922) I. L. R. 1 Pat. 368.
(5) (1931) 12 Pat. L. T. 204 [since reported].

1931.

MALIK MOKHTAR AHMAD v. AKLOO MAHTON.

MACPHERSON, J.

the second appeal was correctly dismissed in limine. The application is refused.

Application refused.

APPELLATE CIVIL.

Before Ross and Fazl Ali, JJ.

SOMESHWARI PRASAD NARAIN DEO

v.

MAHESHWARI PRASAD NARAIN DEO.*

1931.

February 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 26.

Impartible property, income from, to whom belongs—acquisitions from income, whether accretions to estate—intention to incorporate, absence of—Court of Wards, whether has power to incorporate—merger, rule of, applicable to interests created before the passing of the Transfer of Property Act, 1882 (Act IV of 1882)—intention either express or presumed, absence of—effect—Discovery of title of deeds, when can be ordered—presumption from non-production, when available to a party.

The income from impartible property belongs to the owner and acquisitions from that income follow the ordinary rule of succession unless the facts show that the owner intended to incorporate that property with the impartible estate.

Parbati Kumari Debi v. *Jagadis Chunder Dhabal*(1), *Muriaza Husain Khan* v. *Muhammad Yasin Ali Khan*(2) and *Rani Jagdamba Kumari* v. *Wazir Narain Singh*(3), followed.

Query: Whether the Court of Wards has power to incorporate?

The rule of merger governing interests created before the passing of the Transfer of Property Act 1882, is that upon the acquisition of the superior with the inferior right, in the absence of any intention either express or presumed on the part of the owner, merger or extinguishment of title will follow.

* Appeal from Original Decree no. 181 of 1925, from a decision of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge of Patna dated the 22nd of August, 1925.

(1) (1902) I. L. R. 29 Cal. 433, P. C.
(2) (1916) I. L. R. 38 All. 552, P. C.
(3) (1922) I. L. R. 2 Pat. 819, P. C.