APPELLATE CIVIL.

Before Ross and Wort, JJ.

RANI BHUNESHWARI KUER.

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v.

Dec., 22.

SUKHDEO SINGH.*

Bengal Tenancy Act, 1885 (*Bengal Act VIII of* 1885), *sections* 70 *and* 71(4)—*Collector, jurisdiction of, to pass an order under section* 70 *when portion of the crops removed—section* 71(4), *whether applies to proceedings before Collector.*

A Collector has jurisdiction to make an order under section 70, Bengal Tenancy Act, 1885, even where some of the crops which are divided have been damaged or misappropriated.

The rule embodied in section 71(4) that

"if the tenant removes any portion of the produce at such a time or in such a manner as to prevent due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest,"

is applicable to proceedings before the Collector.

Appeal by the plaintiff.

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

S. M. Mullick and *S. N. Roy*, for the appellant.

Nawal Kishore Prasad, for the respondent.

Ross, J.—This is an appeal by the plaintiff in a suit for produce rent of the years 1327 and 1328. The claim related to the paddy and rabi crops of 1327 and

*Appeal from Original Decree no. 63 of 1924, from a decision of Babu Narendra Nath Chakravarty, Subordinate Judge of Gaya, dated the 30th of September, 1923.

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the rabi crop of 1328. The learned Advocate for the appellant did not prosecute his claim in respect of the paddy crop of 1327 and the question in this appeal is confined to the rabi crops of 1327 and 1328 and to the question of damages for the lands which the tenants intentionally left uncultivated.

I shall deal first with the rabi crop of 1328. That crop was removed by the tenants admittedly and the learned Subordinate Judge, following the rule laid down in section 71(4) of the Bengal Tenancy Act, purports to have assessed the rent at the maximum produce. But his judgment on this point is defective. He says :—

"The minimum rate admitted by the plaintiff's witness of rabi produce is six maunds per bigha pucca and the maximum produce of rabi according to the defendants is three maunds per bigha. Under the circumstances of the case I am prepared to accept the maximum rate stated by the defendants, namely, three maunds per bigha to be the produce of rabi in 1328."

Now the only evidence of outturn on the side of the defence was that given by the son of the defendant. The defendant himself did not come to the witness-box. On the other hand the plaintiff's witnesses had given evidence that the produce was six to 12 maunds a bigha and not only that, but appraisement papers had been filed. The learned Subordinate Judge makes no reference to these papers nor to the evidence on the plaintiff's behalf. It was contended on behalf of the respondent that his judgment means that he had considered that evidence and had disbelieved it; but there is nothing in the judgment to show on what grounds the evidence was disbelieved, if it was disbelieved, or that it was taken into consideration at all. In my opinion there is no proper judgment on this part of the case and it will have to be decided afresh.

* * * * *

The main question in the appeal is with regard to the rabi crop of 1327. The tenants applied on the

1st of March, 1920, for a division of the crop by the Collector under section 69 of the Bengal Tenancy Act. The landlord objected; but the objection was overruled and an Amin was deputed to divide the crop. He reported that the crops of some lands had been entirely removed and that the crops of the remaining plots had been damaged and misappropriated, the consequence of which was that a very small quantity of crops was found standing on the field. He prepared his khesras and divided these crops. We are not concerned in this appeal with the lands from which the crops had been entirely removed; the respondent was not one of the tenants from whose lands the crops had been entirely removed. The argument on behalf of the appellant is that as the Amin's report shows on its face that some of the crops which were divided had been damaged and misappropriated, the Collector had no jurisdiction to pass an order under section 70 of the Bengal Tenancy Act which would have the force of a decree of the Civil Court. It is contended that if there was no division of the complete crop, the landlord was not bound; and that the jurisdiction of the Collector only arises where the crop has not been cut in whole or in part. In answer to the argument on behalf of the respondent based on section 71(4), it is contended that that section has no application and, if it has any application, no decree has been made under it.

Sections 69 to 71 of the Bengal Tenancy Act are a group of sections dealing with the question of produce rents and they contain the procedure to be adopted when an application is made to the Collector for appraisement or division of crops. When the officer appointed by the Collector has reported, then the Collector is to consider his report and, after giving the parties an opportunity of being heard, to pass such order as he thinks just. He may, if he thinks fit, refer any question in dispute between the parties for the decision of the Civil Court but, subject to that, his order is final and is enforceable as a decree. The

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last section of the group, section 71, deals with the custody of the crop until appraisement or division is made and it provides that

> "if the tenant removes any portion of the produce at such a time or in such a manner as to prevent due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest."

Now there seems to be nothing in this section to support the view that it is not applicable to proceedings before the Collector. The Collector has jurisdiction to make a division of the crops. The division would ordinarily be made by dividing the crops; but if the tenant has removed any portion of the crop so as to prevent the due division thereof, then an artificial rule is stated to meet this case. The object of sections 69 and 70 would be to a great extent defeated if section 71(4) was not available to the Collector in cases which must frequently arise.

What then is the position here? It appears from the order-sheet of the Collector that when the plaintiff-appellant stated (as the Amin also had stated) that the crop had been partially removed and damaged by the tenant, the tenant denied that this had been done. There was, therefore, a clear issue which the Collector had jurisdiction to decide, namely, the issue of fact whether the crop had been removed and damaged or not, and, upon a determination of that question, the crop was either to be divided or appraised according to rule. The Collector had full jurisdiction in this matter; but the plaintiff instead of submitting to his jurisdiction turned his back upon the Court and said that he was going to the Civil Court. The Collector thereupon passed an order accepting the division made by the Amin. It is clear from the form of the order that the Collector did not refer the matter to the Civil Court as he might have done, but accepted the Amin's khesras. The appellant allowed the matter to go by default and an order was passed which under the provisions of section 70 of the Bengal Tenancy Act

was final and was enforceable as a decree. In my opinion, therefore, the decision of the learned Subordinate Judge on this part of the case was correct.

The result is that the appeal succeeds in part only and the case will be remanded to the trial Court for a decision on the evidence on the record on the question of the rabi produce rent for 1328 and the amount, if any, of damages due to wilful neglect to cultivate any of the produce-rent lands in suit.

There will be no costs of this appeal.

WORT, J.—I agree.

Decree modified.

Case remanded.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

BASIST NARAYAN SINGH

v.

MODNATH DAS.*

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rules* 3 *and* 4—*one of the representatives of deceased respondent already on the record—appeal, whether abates—appellant, duty of, to apply for substitution within time—managing member already on the record—other members, substitution of, whether necessary.*

The fact that one of the legal representatives of a deceased respondent is already on the record but not as such, does not prevent the abatement of the appeal, and the appellant is not thereby relieved from the duty of applying within time for the substitution of the legal representatives of the deceased respondent in terms of Order XXII, rule 4, Code of Civil Procedure, 1908.

*First Appeal no. 2 of 1924, from a decision of Babu Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 5th May, 1923.