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2nd party, what to speak of the dakhaldehani in April, 1926. It is further the case of the 1st party that Chaman Chaudhri had mortgaged portions of the land in dispute and settled some portions with tenants and was in khas possession in respect of the remaining. These contentions of the parties could not be appropriately decided in a summary proceeding under section 144. I refuse to go into the merits of the case.

I set aside the order of the Magistrate, dated the 11th September, 1927, and of the District Magistrate, dated the 28th September, 1927. Although the order has spent itself by reason of lapse of two months, yet it is a case in which the order being prejudicial and not coming properly within the scope of section 144 must be set aside. The Magistrate will in case of his being satisfied that there is still an imminent danger to a breach of the peace within the words of section 145, inquire into the dispute under that section.

S. A. K.

Rule made absolute.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Mullick, J.

HIRA LAL SINGH

v.

MATUKDHARI SINGH.*

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Dec., 22.

Bengal Tenancy Act, 1885 (*Bengal Act VIII of* 1885), *section* 120—*malik's zerait, what is*—"*bakasht malik or thikedar*," *meaning of*—*tenant given the right to cultivate, whether is a raiyat*—*section* 5.

The term "bakasht malik or thikedar" means "in cultivating possession of the malik or thikedar" and applies

*Second Appeals nos. 1035 and 1047 of 1925, from a decision of H. R. Meredith, Esq., I.C.S., District Judge of Monghyr, dated the 18th May, 1925, reversing a decision of Babu Tulsi Das Mukharji, Subordinate Judge, 1st Court, Monghyr, dated the 22nd December, 1923.

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to those lands which are held directly by the malik or tenure-holder but which are not zerait land as defined in section 120 of the Bengal Tenancy Act, 1885.

Raja Dhakeshwar Prasad Narain Singh v. *Gulab Kuer* (1), distinguished.

A tenant who, under a lease, is given the right to bring the land under cultivation, is a raiyat within the meaning of section 5, sub-section (2) of the Bengal Tenancy Act, 1885.

Appeal by the plaintiffs.

The facts material to this report are stated in the judgment of Dawson Miller, C.J.

N. C. Sinha, *S. N. Rai* and *C. P. Sinha*, for the appellants.

L. P. E. Pugh, *S. N. Neyamatulla* and *A. H. Fakhruddin*, for the respondents.

DAWSON MILLER, C.J.—The question for determination in these two second appeals is whether the respondent Matukdhari Singh acquired occupancy rights in the holdings leased to him in the one case by the appellants themselves as landlords and in the other by the predecessor in interest of the appellants. The material facts of each case are the same except that the lands the subject of appeal no. 1047 arising out of suit no. 493 are cultivated lands whereas in appeal no. 1035 arising out of suit no. 494 the lands are what is known as kharor lands, that is uncultivated lands on which thatching grass is grown. The leases began in the one case in the year 1321 F. and in the other 1322 F. and the term in both cases expired in Jeyth 1329 F., that is June, 1922. Within six months of the latter date the appellants sued the respondents Matukdhari Singh and others for arrears of rent and for recovery of possession of the holdings on the ground that the lands in question being zirat, or proprietors' private lands, within the meaning of section 116 of the Bengal Tenancy Act, the tenants were liable to be ejected on the termination of the leases.

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The defendants pleaded, inter alia, that the lands were not zirat and that being settled raiyats of the village they had acquired occupancy rights in the holdings and were not liable to ejectment.

Both the Subordinate Judge, before whom the case came for trial, and the District Judge, before whom it went on appeal, found that the lands were not zirat. The Subordinate Judge, however, held that occupancy rights could not be acquired in kharor lands and in suit no. 494 gave the landlords a decree for possession whilst in suit no. 493 he held that the landlords could not recover possession as the tenants had acquired occupancy rights in the holding which consisted of cultivated raiyati lands.

The landlords appealed to the District Judge in suit no. 493 whilst Matukdhari, whose interest had been severed and who paid a separate rent for his share, appealed in suit no. 494, the appeals being heard together. The landlords' appeal was dismissed whilst that of Matukdhari was allowed and the decree of the trial Court for possession in suit no. 494 was set aside.

From that decision the landlords have appealed to this Court. The question of rent is no longer in dispute and the only matter for determination is the landlords' right to recover possession. Although a separate question arises with regard to the kharor lands, the main question, which is common to both appeals, is whether the District Judge misdirected himself in holding that the record-of-rights created a presumption in favour of the tenants. In the record-of-rights the lands are entered as bakasht malik, a term which the District Judge held did not mean zirat. There were also recitals in the kabuliyats that the lands were khudkasht lands but the learned Judge gave due weight to this part of the evidence in determining how far it went in rebutting the presumption arising from the record-of-rights. He further held that this description of the lands as khudkasht in the kabuliyats did not act as an estoppel against the

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tenants in view of section 178 of the Bengal Tenancy Act which provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall prevent a raiyat from acquiring, in accordance with the Act, an occupancy right in land. There was moreover no evidence to shew that the lands had been cultivated by the proprietors themselves before the passing of the Bengal Tenancy Act and hence he was of opinion that there was no reason to doubt the accuracy of the description of the lands as recorded in the survey. Assuming that the learned District Judge's interpretation of the term bakasht is accepted, I am of opinion that his finding on this part of the case cannot be questioned.

It is contended, however, that the term bakasht is equivalent to khudkasht and that khudkasht is equivalent to zirat. In support of this contention a passage in the judgment of the Judicial Committee in *Raja Dhakeshwar Prasad Narain Singh* v. *Gulab Kuer* (1), is relied on where Mr. Amir Ali, in delivering their Lordships' judgment, is reported to have said: "The term bakasht, invented by the revenue officers to meet a certain contingency, conveys to all intents and purposes the same meaning as khudkasht which is admittedly the same as sir or zirat. It might, however, imply raiyati lands that had temporarily come into the possession of the landlord and were temporarily under his cultivation." The meaning attributed in that passage to the word khudkasht is apparently based upon an admission by the parties in that suit. But with that we are not immediately concerned in this appeal. The meaning attributed to the word bakasht must also I presume be based upon the evidence in the case, or upon an admission, for it is at variance with the meaning assigned to it by the staff of the Settlement Officer himself in the guide and glossary attached to the report of the survey and settlement operations in the Patna and Bhagalpur divisions within which the land in suit is situated, and it is

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obvious that their Lordships could not have had the advantage of having the report and glossary in evidence before them. According to the glossary, Part IV, the term "bakasht malik, or ticcadar" means " in cultivating possession of the malik or ticcadar " and is there stated to apply to those lands which are held directly by the malik or tenure-holder which are not zirat land as defined in section 120 of the Bengal Tenancy Act. That is also the meaning which in my experience is invariably attributed to the term bakasht in this province and a finding of fact based upon the evidence before the Judicial Committee in another case cannot have been intended to be binding in all future cases whatever the evidence. In my opinion the learned District Judge was right in holding that the presumption arising from the record-of-rights was in the respondents' favour, and, having found that the presumption was not rebutted by the evidence, we are bound as a court of second appeal by that finding and appeal no. 1047 should be dismissed with costs to the contesting respondent Matukdhari.

It remains to consider whether the tenant of the kharor lands, the subject of appeal no. 1035 can acquire an occupancy right in such lands. This must depend upon whether the tenant was a raiyat of these lands within the meaning of section 5, sub-section (2) of the Bengal Tenancy Act. By that sub-section " Raiyat " means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right. By the explanation appended to the sub-section, where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it. It is argued that the lease was not for the purpose of cultivating the land, or bringing it under cultivation, but merely for the purpose of growng thatching grass

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thereon. The material part of the kabuliyat has been translated by the appellants as follows:—

"After coming and remaining in possession of the following bakasht and khudkasht lands and after taking all possible care and trouble and protecting the kharor" (that is the thatching grass) "or after doing whatever management may seem advisable I shall appropriate the produce of every kind in the same and shall pay the rent," etc.

This translation was not accepted as accurate by the respondents and we accordingly had a translation prepared by the translator of this Court the material part of which reads as follows:—

"I shall enter into and remain in possession of the bakasht and khudkasht lands specified below, make proper cultivation thereof, protect the kharor or take proper steps and make the necessary arrangements in respect thereof and shall continue to appropriate every kind of produce thereof and pay the rent as noted above," etc.

Whichever translation is taken it seems to me that the meaning of this clause is that the tenant shall have the option of either preserving the land as grass land or taking proper steps and making such arrangements as may be necessary to cultivate it in some other manner and it is noticeable that the tenant may appropriate the produce of every kind. This was also the opinion of the learned District Judge who remarks as follows:—

"Was it a lease merely to cut the thatching grass or a lease giving him the right to bring the land under cultivation. I find that in the lease it is recited that he has taken thika settlement of the land by coming into possession by protecting the kharor, making necessary settlement, *or cultivating the same* and he shall have the right to *appropriate every sort of produce thereof*. In my opinion this clearly contemplates the possibility of cultivation and when Matukdhari acquired possession in virtue of such a lease he became an occupancy raiyat of the land."

Assuming, without deciding, that a lease for the purposes of growing grass cannot be regarded as a lease for the purpose of cultivation, I think the tenant was given the right to bring the land under cultivation and was therefore a raiyat within the meaning of the Act and could, and did, acquire an occupancy right being a settled raiyat of the village.

In my opinion both appeals should be dismissed with costs to the contesting resoondent.

MULLICK, J.—I agree.

Appeals dismissed.