knowledge of both parties ") or as in mortgage decrees, under the principle of estoppel, the Legislature was prepared to face the not inconsiderable but still far less evil of interference with the ordinary legal principle that an executing Court should not go behind the decree.

Accordingly it is altogether illegal to sell a raiyati right in land even in execution of a decree or order directing such sale. Not only may an objection be taken in execution that the land sought to be sold is not saleable, but it is incumbent on the Court itself to use every endeavour to prevent abuse of its process in covert attempts to defeat or contravene the law prohibiting the sale of holdings in Chota Nagpur.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Wort, JJ.

SANTOKHI MANDAR

v.

MAHARAJA SIR RAMESHWAR SINHA BAHADUR.*

1927.

Nov., 29.

Bengal Tenancy Act, 1885, *(Bengal Act VIII of* 1885), *section* 120—*proprietor's private land—never cultivated by the proprietor or recognised by village usage as such—presumption —rebuttable by evidence—tenant, admission of, as to the zerait character of disputed land, admissibility of.*

Where it is not shown that land has been cultivated by the proprietor himself or recognised by village usage as proprietor's private land, there is a presumption that the land is not the proprietor's private land within the meaning of section 120, Bengal Tenancy Act, 1885; but the presumption is a

*First Appeals nos. 102, 229, 230 and 281 of 1924, from an order of Babu Shiva Nandan Prasad, Subordinate Judge of Darbhanga, dated the 24th March, 1924.

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rebuttable presumption, and it can be shown by the proprietor that though he has never cultivated the land himself, it is nevertheless his private land.

Bindeshwari Prasad Singh v. *Maharaja Kesho Prasad Singh* (1), followed.

H. B. Dalgilis v. *Damodar Narain Chowdhury* (2), dissented from.

Once it is ascertained that the disputed lands are the kasht lands of the tenants, an admission by the tenants as to the zerait character of the land is of no avail to the landlord; but in order to determine whether the disputed lands are the zerait lands of the malik or the kasht of the tenants, the admission of the tenants is admissible against them.

Appeal by the defendants.

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

S. P. Sen, and *Harihar Prashad Sinha*, for the appellants.

Pugh, *K. P. Jayaswal*, *Murari Prasad* and *S. Saran*, for the respondents.

DAS, J.—In these suits the plaintiff claimed to recover the disputed lands as his private lands. The suits were resisted by the defendants substantially on the ground that they had a right of occupancy in those lands. The learned Subordinate Judge in a very careful judgment has rejected the contention of the defendants and has given the plaintiff decrees substantially as claimed by him.

I am of opinion that the decision of the learned Subordinate Judge is right and must be affirmed. The argument of Mr. S. P. Sen is founded upon the decision in *H. B. Dalgilish* v. *Damodar Narain Chowdhury* (2). It was held in that case that the indigo zerait lands, in the absence of evidence to

(1) (1926) I. L. R. 5 Pat. 634. (2) (1908) 8 Cal. L. J. 533.

show that the lands were ever in the khas possession of their ancestors, did not come within the definition of proprietor's private lands contained in section 120 of the Bengal Tenancy Act. That was a case purely on facts and the learned Judges dealing with the case had to deal with the evidence that was adduced in that case. So far as that was a decision on facts, it is of no value to us in this case; but if the learned Judges intended to lay down as a proposition of law that in order to claim land as proprietor's private land, it has to be shown that such land was in the khas possession of the landlord or his ancestors, I respectfully differ from the decision. Section 120 of the Bengal Tenancy Act itself provides that in determining whether any other land, that is to say, land other than that which is proved to have been cultivated as khamar, zerait, sir, nij, nijjot or kamat by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, or cultivated land which is recognized by village usage as proprietor's khamar, zerait, sir, nij, nijjot or kamat, ought to be recorded as proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the 2nd day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced. It is obvious therefore that land may be claimed as proprietor's private land which has never been cultivated by the proprietor himself or by his predecessor in title. It is quite true that where it is not shown that the land was cultivated by the proprietor himself or recognised by village usage as proprietor's private land, there is a presumption that the land is not proprietor's private land within the meaning of section 120 of the Bengal Tenancy Act; but the presumption is a rebuttable presumption, and it can be shown by the proprietor that though he has never cultivated the land himself, it is nevertheless his private land. In support of this proposition,

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it is sufficient to refer to the recent decision of the Judicial Committee in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh Bahadur* (1).

It is then necessary for us to consider whether there is sufficient evidence in support of the conclusion at which the learned Subordinate Judge has arrived. The plaintiff relies upon the kabuliyat of the 15th May, 1881, executed by Hiralal Mahtha in favour of Rai Goberdhan Lal Bahadur. I may mention that Rai Goberdhan Lal Bahadur was a thikadar under the proprietor and it will be noticed that the land was specifically let out as zerait land. It is well known that in enacting sub-section (2) of section 120 of the Bengal Tenancy Act, the legislature had before it the attempts which might be expected on the part of the landlords to frustrate the intention of the legislature, as asserted in the draft bill laid before the Council for consideration, to extend the occupancy rights of tenants before the measure then declared to be in contemplation became law; and therefore the particular date, the 2nd day of March, 1883, the date on which the draft bill was published in the Gazette, and leave was obtained to introduce the bill into the Council was declared to be the latest date on which there should be free action on the part of zamindars to assert their private rights, so as to prevent the accrual of special tenancy rights. [See *Nilmoni Chaukerbutti* v. *Bykant Nath Bera* (2).] The assertion in this case was made on the 15th May, 1881, and the plaintiff relies upon the assertion so made as constituting important evidence in his favour. Mr. Sen contends in the first place that the assertion that the land was indigo zerait or zerait was not an assertion that it was the proprietor's private land; and in the second place he says that there is no proof that the disputed lands are identifiable with the lands dealt with by the kabuliyat of the 15th May, 1881. So far as the first contention of Mr. Sen is concerned, it is

(1) (1926) I. L. R. 5 Pat. 634 P. C. (2) (1890) I. L. R. 17 Cal. 466.

entitled to weight, for it is well-known that in Bihar the term ' zerait ' is used to denote all lands in direct cultivation of indigo planters for cultivation of indigo as distinguished from cultivation of indigo by raiyats. Hiralal was an indigo planter and he took the lease in question for indigo cultivation. It seems to me therefore that if there was nothing else in this document, Mr. Sen would be right in contending that the term zerait as used in this document decides nothing at all. But reading the kabuliyat as a whole there is no escape from the conclusion that the proprietor was in this case asserting that the land was his private land. There is a specific covenant on the part of the tenant that

" by reason of our being in possession of the land till the term of the katkana, we shall acquire no occupancy or kashtkari right in the said land."

There was therefore a clear intimation to the tenant that the land was the proprietor's private land and that no kashtkari right could be acquired therein; and in executing the kabuliyat the tenant accepted that position. It seems to me therefore that the kabuliyat of the 15th May, 1881, constitutes a very important piece of evidence in favour of the landlord.

* * * * * * * *

In the kabuliyat of 1310, there are unqualified admissions of the tenants that the disputed lands are the zerait of the landlord and that no rights of occupancy can be acquired in those lands by them. It is contended by Mr. Sen that the tenants cannot contract themselves out of their rights and that an admission that no occupancy rights can be acquired in those lands profits nothing at all; but I am unable to accept this view. It is quite true that once it is ascertained that the disputed lands are the kasht lands of the tenants, the admission of the tenants is of no avail to the landlord; but in order to determine whether the disputed lands are the zerait lands of the malik or the kasht of the tenants, the admission of the tenants is

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admissible against them. It was at one time considered that the admission of tenants as to the zerait character of the land was inadmissible in evidence; but it was properly conceded by Mr. Sen that since the decision of the Judicial Committee in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh Bahadur* (1) the question is no longer arguable.

[The remainder of the judgment is not material to this report.]

WORT, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Ross, J.J.

GREAT INDIAN PENINSULAR RAILWAY COMPANY

1927.

Dec., 1.

v.

GOPI RAM GOURI SHANKER.*

Railways Act 1890, (*Act IX of* 1890), *section* 77—*Risk-note B*—"*non-delivery*," *suit based on*—*whether notice under section* 77 *necessary*—"*non-delivery*," *whether constitutes* "*loss*."

"Non-delivery" does not constitute "loss" within the meaning of section 77, Railways Act, 1890, and, therefore, no notice under that section is necessary in a suit for damages for non-delivery of a part of a consignment, though it may turn out that the suit will fail for want of notice if it be established by the Railway Company that it is in fact a case of loss.

*Appeal from Appellate Decree no. 532 of 1924, from a decision of Mr. Nut Bihari Chattarji, Subordinate Judge of Gaya, dated the 13th February, 1924, confirming a decision of Babu Jatindra Nath Ghosh, Munsif of Gaya, dated the 12th July, 1922.

(1) (1926) I. L. R. 5 Pat. 634 P. C.