

The only other point taken is that the defendants having been recorded as raiyats of the 6-annas shareholders, the Civil Court has no jurisdiction to deal with the present suit. The answer is that it is not the case of the plaintiff that the defendants are the tenants of the 6-annas shareholders and the plaintiff's case has been found to have been established on the evidence by both the Courts below.

I would dismiss this appeal with costs.

ALLANSON, J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Mullick, A. C. J. and Jwala Prasad, J.

RAMSARUP RAUT

v.

RAMNARAIN TEWARY.*

Evidence Act, 1872 (Act I of 1872), section 35—Batwara Khesra, whether public document—Barawarda prepared under Chapter VII, Estates Partition Act, 1876 (Bengal Act VIII of 1876), whether admissible as public document.

A batwara khesra is not a public document within the meaning of section 35, Evidence Act, 1872, and is not admissible in evidence as such.

Nand Lal Pathuk v. Mohunt Chanurput Das (1), followed.

But a batwara barawarda prepared under the provisions of Chapter VII of the Estates Partition Act, 1876, by the

*Letters Patent Appeal no. 70 of 1926, from a decision of Kulwant Sahay, J., dated the 14th July, 1926, reversing a decision of Babu Kamla Prasad, Subordinate Judge of Muzaffarpur, dated the 27th November, 1923, reversing a decision of Babu Jadunath Sahay, Munsif of Muzaffarpur, dated the 7th December, 1923.

(1) (1912-13) 17 Cal. W. N. 779.

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v.
KSHIBIDA
SUNDARI.
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Deputy Collector in the course of his official duty is admissible as a public document under section 35 and is evidence against the landlord in whose presence it was made.

Sri Ans Das v. Jugat Pat Lal (1) referred to.

Appeal by the defendants.

This appeal from the judgment of Kulwant Sahay, J., arose out of a suit for rent in respect of plot no. 42, khata no. 80 of the Survey and Settlement record.

In this khata the plaintiff had been recorded as the landlord, but there was no entry in the rent column against plot no. 42; and it was stated against khata no. 12, the plots of which were recorded as the property of another landlord, that the rent of plot no. 42 was included in the rent of khata no. 12 and was payable to the landlord of that khata who was one Feku, the son of Ramprasad Tewari.

It appeared that in the Court of the Munsif the plaintiff did not take any steps to identify plot no. 42 with the corresponding plot in a partition proceeding held under Act VIII (B. C.) of 1876 and the Munsif found upon the Survey and Settlement record and the other evidence in the case that the plaintiff was the landlord of plot no. 42 and that he was entitled to rent from the defendants in respect of it. As the Survey record did not state what the rent was, the Munsif found upon the collection papers and oral evidence produced by the plaintiff that the rent was Rs. 2-13-0 per annum and at this rate he decreed the claim.

The defendants then went on appeal and the Subordinate Judge held that Feku and not the plaintiff was the landlord of the defendants and that there was no relationship of landlord and tenant and he dismissed the suit.

In order to determine whether the plaintiff was the landlord, the Subordinate Judge issued a commission for local investigation and it was found that plot no. 42 corresponded with plot no. 28 which was allotted in the batwara proceedings to Ramprasad Tewary.

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A second appeal was then taken to this Court and Kulwant Sahay, J., held that the batwara papers were not evidence at all in the case and should not be referred to and that if the batwara papers were discarded, then there remained only the Survey and Settlement record which had not been rebutted.

He, therefore, held that the Munsif was right and he remanded the case to the Subordinate Judge for the purpose of ascertaining what was the rent payable for the land, a point which the Subordinate Judge left undecided as he found the title against the plaintiff.

The present appeal was preferred under the Letters Patent.

S. N. Roy, for the appellants.

L. K. Jha, (for *J. P. Sinha*), for the respondents.

MULLICK, A. C. J. (after stating the facts set out above, proceeded as follows:) It appears to have been conceded by the learned Advocate who appeared for the respondent before Kulwant Sahay, J., that the case of *Nand Lal Pathuk v. Mohunt Chanurput Das* (1) was conclusive against him and that the batwara papers were not admissible in evidence in the case. But the papers in question included not only the batwara khesra, which was prepared by an amin and not signed by any gazetted officer but also a Barwarda which was signed by the Partition Deputy Collector and contains an enumeration of the various plots assigned to each proprietor.

(1) (1913-14) 17 Cal. W. N. 779.

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So far as we have been able to discover this document was made under the provisions of Chapter VII of Act VIII (B. C.) of 1876 and in the course of official duty. The Deputy Collector is required by section 77 of the Act to prepare such a document and to sign it. The Act requires him to determine amongst other things the boundaries and to draw up a paper of partition specifying in detail the villages and lands which he has included in each of the separate estates, the rental thereof, with any other assets of each separate estate, the name or names of the recorded proprietor or proprietors of each separate estate, any stipulations which may have been made regarding places of worship, tanks or other matters as mentioned in part VIII and the amount of land revenue to be assessed on each separate estate. The proceeding was of course liable to revision in appeal or otherwise; but it was nevertheless a record made in the course of official duty within the purview of section 35 of the Indian Evidence Act.

The learned Judge of this Court was evidently under the impression that only the batwara khesra was before him which certainly according to the authorities and according to the terms of the Evidence Act itself cannot be held to be a public document within the meaning of section 35 of the Indian Evidence Act.

In the circumstances it is not necessary to consider whether batwara khesras after proper proof are evidence, but it may be observed in passing that the authorities show that batwara khesras if properly proved might be evidence either under section 18 or 13 of the Indian Evidence Act.

In the present case the barwarda would also be evidence against the proprietors under both these sections because they were made in their presence.

Therefore, there was legal evidence before the Subordinate Judge to support the finding that the

plot in dispute fell not within the "patti" of the plaintiff but within the "patti" of Feku. The finding of fact is, therefore, final and cannot be reversed in second appeal.

The authority of the decision in *Nand Lal Pathuk v. Mohunt Chanurput Das* (1) cannot be questioned, but in that case it was sought to have the Batwara khesra admitted under section 35 and the Court held that section 35 had no application.

With regard to the question of the proof of the batwara khesras filed in the present case, it appears that they were admitted in the trial Court without any objection by the plaintiff and no formal proof was given. If it had been necessary to use these papers we should have expressed our opinion on the argument that proof was waived but we do not do so as the matter does not arise.

It was urged that there was some kind of admission made before Kulwant Sahay, J., with regard to the applicability of *Nand Lal Pathuk's* case (1) which estops the appellant from taking the ground that the Barwarda has been wrongly excluded by the learned Judge of this Court; but the point is one of pure law and does not depend on any facts and there is no estoppel in the matter.

The appeal succeeds and is decreed with costs throughout. The judgment of the learned Judge of this Court is set aside and that of the Subordinate Judge restored.

JWALA PRASAD, J.—I agree. I would only refer to my decision in the case of *Sri Ans Das v. Jugat Pat Lal* (2) upon the question of the admissibility of the batwara barwarda prepared by the Deputy Collector under the former Estates Partition Act VIII of 1876 (B.C.) as evidence against the landlord.

Appeal allowed.

(1) (1913-14) 17 Cal. W. N. 779.

(2) (1917) 38 Ind. Cas. 205.

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