APPELLATE CIVIL.

1933.

Sept. 11, 12, 18.

Before Fazl Ali and Rowland, JJ.

MAHARAJA BAHADUR KESHAVA PRASAD SINGH

v.

BARHAMDEV RAI.*

Landlord and tenant—mere non-payment of rent, whether creates rent-free title—long user, whether can lead to an inference of legal origin—Bengal Tenancy Act, 1885 (Act VIII of 1885), section 18A, whether rule of evidence—section, whether applies to proceedings taken after it came into force—recitals in sale deed of prior date, whether admissible—Evidence Act, 1872 (Act I of 1872), section 13—lost grant presumption of, when arises—question depending on the facts of each case.

Section 18A, Bengal Tenancy Act, 1885, provides :—

"Nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, amount or fixity of rent, area, transferability or any incident of any tenure or holding referred to in such instrument."

Held, (*i*) that the rule embodied in section 18A is a rule of evidence which must necessarily apply to all proceedings taken after it came into force and it is applicable to recitals in a sale-deed of a prior date so that they are not evidence of title and cannot be used to prove a grant :

(*ii*) that it is, however, permissible to use the recitals not as evidence of a grant but to show the nature of the title that was being asserted and as transactions relevant under section 13 of the Evidence Act, 1872, by which a right was claimed or asserted on some past occasion.

Banwari Lal Singh v. *Dwarkanath Misser*(1), followed.

The principle that mere non-payment of rent will not create rent-free title is indisputable; but it does not follow that long possession cannot be used to support an inference of legal origin.

* Appeal from Original Decree no. 164 of 1929, from a decision of Babu Debi Prasad, Subordinate Judge of Shahabad, dated the 15th March, 1929.

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Maharani Rajrup Koer v. *Syed Abdul Hussain*(1) and *Srinath Roy* v. *Dina Bandhu Sen*(2), followed.

Jagdeo Narain Singh v. *Baldeo Singh*(3), distinguished.

The question whether the presumption of a lost grant should arise or not depends on the circumstances of the particular case.

Rai Kiran Chandra Roy Bahadur v. *Srinath Chakravarti*(4), followed.

Appeal by the plaintiff.

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

S. M. Mullick (with him *Sunder Lal* and *Ramnandan Prasad*), for the appellant.

Mahabir Prasad (with him *H. N. Singh*, *S. N. Banerjee* and *Harians Kumar*), for the respondents.

ROWLAND, J.—This appeal arises out of a suit brought by the Maharaja Bahadur of Dumraon who is the sixteen-annas landlord of Dumraon. In Mahala Bhikhabandh of that town there were two plots of land in khata no. 71, bearing khesra no. 158, area 5.50 acres and khesra no. 159, area 1.67 acres. Khata no. 71 is the gairmazrua malik khata in the name of the proprietor Raj Dumraon. The lands are described as mango orchards and in the remarks column are given particulars of the trees and there is a note that khesra no. 159 is in possession of Jugeshwar Kamkar and that khesra no. 158 is in possession of Musammat Sheobarti. The first defendant Barhamdev Rai acquired plot no. 158 by a sale-deed dated 19th January, 1916, executed by the heirs of Musammat Sheobarti and acquired plot no. 159 by sale-deed dated 14th December, 1916, from

(1) (1880) L. R. 7 I. A. 240.
(2) (1914) L. R. 41 I. A. 221.
(3) (1922) I. L. R. 2 Pat. 38, P. C.
(4) (1926) 31 Cal. W. N. 135.

Jugeshwar Ram. The plaintiff sought to recover possession of these two plots alleging that Musammat Sheobarti's plot was granted to her as a khidmati jagir, that is to say, in lieu and consideration of her private and personal service, she being a maid-servant of the present Maharaja and his predecessor; that the services for which the land was granted have ceased to be performed and that the plaintiff is entitled to resume possession. Similarly it is said that plot no. 159 was granted to Jugeshwar Ram in consideration of private and personal service as khidmatgar and resumption of this plot also is sought on similar grounds. In the alternative there is a prayer for assessment of fair and equitable rent. The defence was that the plots are held in permanent hereditary and transferable rent-free tenure. The Subordinate Judge held that the lands were held in rent-free tenure and dismissed the suit.

The principal defendants contesting the suit on the merits were nos. 1-3. Plaintiff had impleaded defendants nos. 1-11 as being members of the family of the purchasers, but defendants nos. 4-11 pleaded that they have no concern with the lands in suit, being separate from defendants nos. 1-3. The Subordinate Judge held that they were separate and had been unnecessarily added as parties. The appeal against these defendants has not been pressed.

In evidence in the lower court the plaintiff sought to prove the fact of grants of these lands as service lands to Jugeshwar and Musammat Sheobarti. The defendants alleged a permanent jagir grant to Ramdin from whose descendants the vendors of the defendants acquired the lands. The evidence adduced by the plaintiff to prove the actual service grants alleged by him has been so effectively discredited by the criticisms directed on it in the judgment of the Subordinate Judge that Mr. S. M. Mullick for the

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appellant could not ask us to accept this story as true, but felt compelled to submit to the correctness of the Subordinate Judge's finding that it was mythical. He contended, however, that the finding of a jagir grant in favour of Ramdin was erroneous, was not supported by the evidence and had been based in part on evidence which was not admissible. This grant to Ramdin not having been proved mere possession however long continued without payment of rent could never avail to create a title in the respondents to hold the land rent free; and that even if he could not succeed in obtaining a decree for ejectment his client was at least entitled to the alternative relief of assessment of a fair and equitable rent. The evidence discloses that the lands in suit were being bought and sold under the description of lakhiraj jagir lands as far back as three sale-deeds Exhibit E series, dated 1888, 1889 and 1892 respectively. They were again transferred by the two sale-deeds of 1916, Exhibit A series already referred to. The genuineness of these documents is beyond question and they enable the defendants to trace back possession of the land to the family of Ramdin the alleged grantee. The Subordinate Judge has referred to the recitals as evidence. The objection was taken before him that under section 18A of the Bengal Tenancy Act such recitals could not be used against the landlord as any evidence of title; but the Subordinate Judge thought that this provision could not have retrospective effect and the documents executed before this provision came into force would be admissible apparently for all purposes. The Subordinate Judge is not correct here. Section 18A is a rule of evidence which must necessarily apply to all proceedings taken after it came into force and it is applicable to the recitals in Exhibit E series, so that they are not evidence of title and cannot be used to prove a grant. It is, however, permissible to use them not as evidence of a grant but to show the nature of the title that was being asserted and as transactions

relevant under section 13 of the Indian Evidence Act by which a right was claimed or asserted on some past occasion. That has been held in *Banwari Lal Singh* v. *Dwarkanath Misser*(1) and no authority to the contrary has been placed before us. In Bengal section 18A has been amended and the words

> " notwithstanding anything contained in section 13 of the Indian Evidence Act "

have been inserted; but in Bihar section 18A remains in the same form in which it stood at the time when the decision in *Banwari Lal's*(1) case was pronounced. In 1911 at the time of the preparation of the record-of-rights there were objections taken by the Raj to the draft entries regarding about 150 alleged mafi malik and other rent free holdings. Exhibits D, D(1) and D(2) are the notes of the Assistant Settlement Officer and the order of the Settlement Officer showing what was known of these holdings at the time and how they were directed to be entered. The notes show that the claim to hold as lakhiraj jagir was put forward in 1911 since when the defendants and their predecessors continued to hold these lands paying no rent for a further period of 15½ years to the date of suit, 7th January, 1927. Exhibit C series, road cess returns, filed by a predecessor of the plaintiff about 1900 show that these two plots were reported on behalf of the predecessor of the plaintiff in the category of lands for which no rent is paid and against which the word ' jagir ' is entered in the column for description. That shows that the right to hold as jagir was claimed not secretly but to the knowledge of the proprietor and was not at that time challenged. On the oral evidence also it is quite clear that the right to receive service in return for the occupation of the land has not been claimed or exercised for very many years. For the appellant it has been argued that after all what the evidence proves does not amount

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to more than this that the land has been long held without payment of rent; that mere non-payment does not by itself create adverse possession so as to defeat the title of the landlord as landlord and that at the most the defendants can be allowed to hold on payment of a fair rent. The principle that mere non-payment of rent will not create rent-free title is indisputable in face of the decision in *Jagdeo Narain Singh* v. *Baldeo Singh*(1); but it does not follow that long possession cannot be used to support an inference of legal origin. The case of *Jagdeo Narain Singh*(1) was one in which the defendant sought to base his title on adverse possession. There was no question of an alleged grant and so there could be no question of presuming a lost grant. *Maharani Rajrup Koer* v. *Syed Abdul Hussain*(2) and *Srinath Roy* v. *Dina Bandhu Sen*(3) are cases in which a lost grant was presumed. In the latter case it was observed that the original grants are rarely forthcoming. The courts may have to depend on secondary evidence and on inference of legal origin from long user. The legal position is clearly stated in *Rai Kiran Chandra Roy Bahadur* v. *Srinath Chakraverti*(4) which proceeded on the footing that it must depend on the circumstances of the particular case whether the presumption of a lost grant should arise or not. That in short is the question on which the decision of this appeal must turn. It cannot be said that the defendants have been able to give reliable direct evidence of the grant. Some witnesses have spoken of it, but their evidence in cross-examination has turned out to be hearsay. Even so it is relevant under section 13 of the Indian Evidence Act as proving assertion of a right long ago. The oldest witness whom the defendants could produce, D. W. 6 Lalji Rai, is aged 86

(1) (1922) I. L. R. 2 Pat. 38.
(2) (1880) L. R. 7 Ind. App. 240.
(3) (1914) L. R. 41 Ind. App. 221.
(4) (1926) 31 Cal. W. N. 135.

and he has to admit that the grant was not made in his presence; but he remembers the grantee Ramdin and was told by Ramdin that the gachi was lakhiraj mafi and Ramdin died 60 or 70 years ago. This witness was a tahsildar in the service of the Raj though not of the Dumraon Circle. I need not refer in detail to the evidence of the other witnesses except to Barmeshwar Rai, D. W. 1, who speaks of the terminology of the Raj in describing jagir lands. He says :

" The word jagir as used by Dumraon Raj means rent-free lands given to any class except Brahmins and rent-free lands given to Brahmins are known as milik lands "

and explains in cross-examination that Kurmis and Kahars who are in service of the Raj are given lands on occasions of child birth and other happiness by Maharajas. The lands given to Kurmis were known as mafi lakhiraj or jagir.

Having regard to the evidence above referred to I am of opinion that in the circumstances of the present case it is right to presume a lost rent-free jagir grant. On this view the appeal should be dismissed with costs to each set of contesting respondents.

FAZL ALI, J.—I agree.

Appeal dismissed.

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Sept. 6, 7, 8, 11, 18.

Before Fazl Ali and Rowland, JJ.

RAI BAHADUR RADHA KISHUN

v.

SHYAM DAS.*

Record-of-rights—Gangetic survey map and cadastral survey map, conflict between—which should prevail—Bengal Alluvion and Diluvion Act, 1847, *(Beng. Act IX of* 1847),

* Appeal from Original Decree no. 141 of 1929, from a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Muzaffarpur, dated the 11th January, 1929.