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TERRELL, C.J.

particular or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement may be given full weight. In this case in my opinion there was ample evidence upon which the jury could come to their verdict and there was no misdirection on the part of the learned Judge. It is frequently urged in dacoity cases where the accused have been identified by a witness who is shewn to have mistakenly identified also other persons who clearly could not have been present that the evidence of such a witness is unreliable against the others. But this view cannot be stated as a general proposition. Each case must depend upon its own merits and where the erroneous identification is of such a character as definitely to throw doubt upon the credibility of the witness then it may well be that the jury should be warned against the danger of accepting his identification of the other accused, particularly where the sole evidence against the accused is that of identification by the witness. These circumstances do not present themselves in this case. In my view the appeal should be dismissed and the convictions and sentences should be affirmed.

ALLANSON, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

GANJHU UPENDRA SINGH

v.

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July, 23.

Trees, tenant's liability to rent for, in Ranchi District—Entry in record-of-rights relating to liability in respect of trees—Chota Nagpur Tenancy Act, 1908 (*B. & O. Act VI of*

*Appeal from Appellate Decree no. 488 of 1924, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Ranchi, dated the 2nd February, 1924, reversing a decision of Babu Khetra Nath Singh, Munsif of Ranchi, dated the 24th November, 1922.

1908) *sections* 81(*f*) *and* (*k*) *and* 84(3)—*Admissibility of village note—Evidence Act*, 1872 (*Act 1 of* 1872) *section* 35.

In the district of Ranchi, where a raiyat clearing land for cultivation conserves a tree, he is not liable by custom or otherwise to pay rent or a tax in respect of the tree if he cultivates lac on it, unless on a stipulation in the original settlement to that effect.

Rai Charan Mahanti v. *Kanai Kumar*(1), referred to.

An entry in the record-of-rights stating that " the landlord has forcibly introduced a tax (on the right to set and collect lac on trees). The tenants are entitled by custom to enjoy lac on their don and tanr lands ", is admissible under section 35 of the Evidence Act, 1872.

Suresh v. *Sitaram*(2), referred to.

Section 81 of the Chota Nagpur Tenancy Act, 1908, requires the Revenue Officer to enter in the record-of-rights inter alia—

(*f*) the rent payable at the time the record-of-rights is being prepared and

(*k*) the special conditions and incidents of the tenancy.

Held, that the above clauses authorise the Revenue Officer to make entries as to the tenant's liability for rent for trees on the land and, therefore, under section 84(3) a presumption of correctness attaches to such an entry.

Appeal by the plaintiff.

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

Manohar Lal (with him *Anirudhaji Barman*) for the appellant.

Siveshwar Deyal and *Sarjoo Prasad*, for the respondents.

MACPHERSON, J.—The suit out of which this second appeal has arisen relates to twenty four paras trees situated in kusumtanr, plot no. 1739, of village

(1) (1916) 24 Cal. L. J. 21.

(2) (1920) 57 Ind. Cas. 126.

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Hardag in Ranchi thana. The plaintiff is the jagirdar of the village and the defendants are occupancy raiyats of a holding of which that plot is a part. The plaintiff sought to recover possession of the trees from the defendants on the ground of dispossession in 1920, or, in the alternative, for assessment of rent in respect thereof. The defendants pleaded in substance that the trees were their own property and that plaintiff had no right to the trees standing on their holding and so could not get rent in respect of them when defendants cultivated lac upon them.

The Munsif decreed the suit and directed that the plaintiff should recover possession. On appeal by the defendants the Subordinate Judge held, first, that the trees appertain to the defendants' holding and do not stand severable therefrom so as to be liable to a separate rent, and, secondly, that in any event the claim to possession was barred by limitation. Accordingly he allowed the appeal and dismissed the suit. The plaintiff has now preferred this second appeal.

In support of the appeal Mr. Manohar Lal contents that the trees belong to the plaintiff as landlord and even though he is no longer entitled to possession he is entitled to a rent in respect of them separate from the rent of the holding, and his right to rent being a recurring one is not subject to limitation. It is conceded that if the trees are in fact the raiyat's property or part of the holding no other point can arise.

In my opinion there is no substance in the appellant's contention. The facts found in appeal are that at a date not later than 1902-03 the defendants obtained settlement of tree-clad waste land for the purpose of reclamation and that

> "the lease was of the land and of the trees and not simply of the land apart from the trees,"

that in the course of reclaiming they "saved" the trees in dispute and have been growing lac upon them

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for twenty years at least without payment of or demand for separate rent for the trees, and that they were so in possession of the trees on the claim that they were entitled to them free of separate rent as being included in their holding. It was held, therefore, that not only had possession been throughout adverse, but that the trees belong to the raiyat and no rent or lac-tax is payable to the landlord.

In support of his contention that the trees belong to the landlord, learned counsel urges, in the first place, that the learned Subordinate Judge in coming to his decision on the facts both relied upon inadmissible evidence and misunderstood the entry in the record-of-rights. He contends that the village note is inadmissible in evidence and cites the decision in *Suresh* v. *Sitaram Singh*(1). But assuming that the views there expressed are correct, they have no relevance in the present case. The village note answers the question:

> "Is any payment made to the landlord for the right to plant and collect lac on trees (*a*) on cultivated lands, (*b*) on waste lands"

in the words

> "The landlord has forcibly introduced tax. The tenants are entitled by custom to enjoy lac on their don and tanr lands."

This entry has been used by the lower appellate Court only as evidence under section 35 of the Indian Evidence Act and such use is according to law. The question whether the Court would have erred in law by conceding to it the presumption of correctness accorded to the record-of-rights by section 84(*3*) of the Chota Nagpur Tenancy Act does not, therefore, arise and I express no opinion on it. As a matter of fact, the appellate Court did not place the onus on the plaintiff in spite of the fact that the defendants produced the khatian distributed to them just after final publication the entry in which is

> "Paras 24—timber with lac in possession of the raiyat."

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The reason was that the plaintiff produced a copy of

"The finally-published record as completed under rules 35 and 38,"

which is deposited with the Deputy Commissioner. The copy shows the word "malik" in place of the word "raiyat". The trial Court had accorded the presumption to the raiyat's copy, and as there is no trace of any corrections under rule 38 which alone could be relevant, he was justified in doing so. The appellate Court, from motives of caution, refrained from calling in aid of the defendants any presumption under section 84(*3*). It found on the other evidence on record that in fact the entry in the plaintiff's copy is wrong.

In respect of the entry in the record-of-rights Mr. Manohar Lal raises two points. He urges that there was no jurisdiction to make the entry as to trees in the remarks column. But clauses (*f*) and (*k*) of section 81 give the requisite jurisdiction. Indeed if payment beyond the rent of the holding has to be made by the raiyat in respect of the trees standing thereon it would also be the duty of the settlement officer to record the fact, and the absence of such a record possesses high significance. He next sought to minimise the significance of the expression "in the possession of the raiyat" as used in the record-of-rights in respect of a tree and the lac thereon. But indisputably the expression connotes that the raiyat is entitled to all the natural and cultivated products of the tree, and that too free of any payment (beyond the rent of the holding) unless otherwise expressly stated in the entry. No paras or other lac tree is shown as in the possession of the raiyat if the landlord is entitled to any impost upon it. In some cases indeed the landlord may not be entitled to an impost even when the timber of the tree is in his possession, e.g., the other entries as to trees in plot 1739 are:

"Jamun 2—timber in possession of the malik, fruit in possession of the whole village; bair 1—timber in possession of the raiyat, fruit in possession of the whole village."

Counsel next points to "the general right" of the landlord to trees and to the following passage from the note to section 81 in Reid's Edition (1910) of the Chota Nagpur Tenancy Act at page 100:

"Trees growing on the jungle or waste lands belong to the zamindar unless they have been planted by a tenant, in which case they belong to *him*. When a tenant makes a clearance in the jungle and brings new lands under cultivation he frequently allows scattered jungle trees to stand on the lands comprised within his tenancy. These trees still remain the property of the landlord and the right of ownership over them does not pass by custom to the tenant."

The general right of the landlord to trees, though the law of the land, is subject to important qualifications, among which are local custom which, in the environment of a jungle area, is strongly adverse, and the particular case of tree-clad land settled for reclamation for cultivation.

Then Mr. Reid's note, including the paragraph quoted, is, except for the opening and concluding sentences, really paragraph 309 of his Settlement Report of the Ranchi District published in 1912. The note certainly misrepresents completely, to the detriment of the tenant, the position in Porahat, the portion of Singhbhum adjoining the Ranchi district. But it is also misleading in the same direction as regards the Ranchi district. In fact the statement in paragraph 212 of the Report furnishes a complete answer to the argument founded upon paragraph 309, so far as the present case is concerned. There it is said:

"It cannot therefore be said that the raiyats have a customary right to produce lac in trees which are not their own property, free of rent or at any fixed customary rate of rent. The existing custom or practice has been recorded in village notes of each village and in the khatian of jungle and grazing rights."

Thus even assuming that the trees saved by the defendants during reclamation remained by custom the property of the landlord, the self-sown paras trees which have grown after reclamation are admittedly the tenant's property, even according to paragraph 309, and no rent on them has even been claimed, still in this particular village the custom, on Mr. Reid's

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own showing, is that (apart from contract prior to reclamation), the raiyat is under no liability to lahkar in respect of trees standing on the upland or lowland of his holding when lac is cultivated upon them.

A further complete answer is that, in respect of the particular trees in suit, it has been found by the final Court of fact that they are the property of the raiyat, the lease having been of the land and of trees, so that the alleged custom could not operate in regard to them. Mr. Reid in the note on page 100 concedes that the owner of a tree can use it for producing lac or for any other purpose without payment of any fee.

Finally, there does not appear to be any warrant for Mr. Reid's view that the trees standing on a raiyat's holding which a raiyat or his predecessor-in-interest has saved in the course of reclamation are by custom the property of the landlord. His view as to the existence of such a custom is opposed to that of experienced district and settlement officers. Reclamation of land is undertaken either after obtaining the consent of the landlord (which sometimes is implied) or without his permission, under custom or usage. When the consent of the landlord is necessary there may be a stipulation that certain trees shall be saved and that these or any trees saved shall be the property of the landlord or that they shall be subject to an impost beyond the rent for the surface, if they are used for the cultivation of lac. The reclaimer is bound by such a stipulation though of course the rent of the land would be less if the trees impaired the agricultural value of the land. But reclamation normally implies the destruction of the trees on the land reclaimed. If the land is settled for reclamation without any stipulation, or if the raiyat reclaims without permission in virtue of a right to do so by custom or usage, he saves scattered trees solely in accordance with his own interest and convenience and usually to the detriment of the new cultivation. It is not credible that in the statement quoted Mr. Reid

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intended to express the view that the fruit and flowers and lac as well as the timber of trees saved in such circumstances are by custom the property of the landlord. As to the right to fruit and flowers and the cultivation of lac on "saved" trees on a raiyat's holding, the right is certainly not by custom with the landlord, at all events while the land on which these trees are situated is held by the reclaimer or his heirs or assignees, any more than it is in respect of the trees planted by the raiyat or in respect of self-sown trees which the raiyat has "saved" subsequent to reclamation or raiyati settlement, and reared. And even as to the timber of a self-sown tree "saved" at the time of reclamation, while there may be some doubt in portions of the older area of the district as to whether the timber of the whole of it is by custom the property of the raiyat on whose cultivation it stands when he is *not* the reclaimer or the successor-in-interest of the reclaimer, elsewhere there is none that it is the property of the raiyat unless there was a contrary stipulation at the time of the settlement. Accordingly any tree that a raiyat clearing land for cultivation saves, he saves for himself and not for the landlord and it is his own property, in the absence of such stipulation in that regard or (sometimes) village custom in respect of important fruit trees. Furthermore, even where the timber of a tree or part of it belongs to the landlord, it does not follow that he or any one deputed by him, is entitled to enter upon the holding of the raiyat and cultivate lac on the trees. Thus where a lessor expressly reserved property in the trees growing on leaseheld land, but allowed phal phul to the lessee, it was held that the ownership of the trees did not carry with it a right to go on the lessee's lands to cultivate shellac on the reserved trees [*Rai Charan Mahanti* v. *Kanai Kumar*(1)]. As Woodroffe, J., remarked, "A transfer of property passes to the transferee the interest of the transferor unless a different intention is expressed or necessarily

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implied." When a tree which ex hypothesi it was intended that the reclaimer should cut down, the landlord getting rent for the cultivated area, is conserved by the reclaimer, he is not liable by custom or otherwise in the Ranchi district to pay rent or a tax in respect of the tree if he cultivates lac on it, unless on a stipulation in the original settlement to that effect.

No other point arises. The appeal is entirely without merits and I would dismiss it with costs.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Terrell, C.J. and Allanson, J.

1928.

August, 3.

BAJO SINGH

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 72—*separate sentences under sections* 147 *and* 326/149 *whether legal—Code of Criminal Procedure,* 1898 (*Act V of* 1898), *section* 35, *amendment of.*

Separate sentences under sections 147 and 326 read with 149, Penal Code, are illegal.

Nilmony Podar v. *Queen-Empress*(1), *Paltu Singh* v. *King-Emperor*(2), followed.

Queen-Empress v. *Bana Punja* (3) and *Emperor* v. *Piru Rama Havaldar* (4), not followed.

*Criminal Revision no. 280 of 1928, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Monghyr, dated the 10th April, 1928, upholding an order of Babu Harihar Charan, Assistant Sessions Judge of Monghyr, dated the 19th November, 1927.

(1) (1889) I. L. R. 16 Cal. 442, F.B.
(2) (1918) 3 Pat. L. J. 641.
(3) (1893) I. L. R. 17 Bom. 260, F. B.
(4) (1925) I. L. R. 49 Bom. 916.