LETTERS PATENT.

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

DEBI DAYAL SINGH

v.

MUSAMMAT GANGO KUER.*

1925.

Oct., 22, 23.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 102 *and* 103—*record-of-rights—trees—entry* "kul haq raiyat"—*presumption of correctness, whether attaches to such entry—special incident of tenancy—section* 102(*h*).

In the Survey record-of-rights certain trees in a holding were entered as the exclusive property of the tenant (*kul haq raiyat*), and the land was recorded as liable to assessment of rent (*kabil lagan*). This latter entry was impugned by the landlord-plaintiffs and the equivalent of the bhowli rent—the landlord's share of the fruit—was claimed. The tenants contended that the trees belonged exclusively to them and that the land was rent free. Both in the Subordinate Judge's Court and in the High Court in second appeal the entry '*kul haq raiyat*" had been refused the authority usually attaching to the record-of-rights on the ground that the words indicated a departure from the general law as to property in trees and that such departure could only arise out of custom which could not, under any provision of the law, be entered in an authoritative record-of-rights.

Held, that the entry "*kul haq raiyat*" was an entry of a special incident of the tenancy, not necessarily arising out of custom and directly authorised in item (*h*) of section 102 of the Bengal Tenancy Act, 1885, and that, therefore, the presumption of correctness attached to the entry.

Suresh Chandra Rai v. *Sita Ram Singh*(1), not followed.

Debi Dayal Singh v. *Musammat Gango Kuer*(2) [decision under appeal] set aside.

* Letters Patent Appeal no. 28 of 1925, from a decision of Mr. Justice Kulwant Sahay, dated the 25th March, 1925, affirming a decision of Babu Ananta Nath Mitra, Subordinate Judge (2nd Court), Gaya, dated the 8th February, 1922, which in turn affirmed the decision of M. Shamsuddin, Munsif of Aurangabad, dated the 15th July, 1921.

(1) (1920) 57 Ind. Cas. 126.

(2) (1925) 89 Ind. Cas. 1020.

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Appeal by the defendants.

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

S. N. Dutta, for the appellants.

Kailaspati, for the respondents.

FOSTER, J.—In this appeal the tenants who were the defendants in a rent suit are urging two points, first, that the suit is not maintainable and secondly, that their holding is entirely free from rent. The case concerns two plots which are described as an orchard, nos. 900 and 901 in village Ukurmha Salem. The plaintiffs own a takhta of 2 annas 8 dams and odd along with the defendant no. 4. The orchard which lies within this takhta contains between 40 and 50 fruit trees which were planted by some men of the Barhi caste and subsequently transferred to the present tenant-defendants. It is the case of the plaintiffs that the fruit of these trees has always been divided by the tenants and the landlords under the bhowli system. A partition in which the plaintiffs' share was demarcated took place in 1898. In 1913 there was a survey and record-of-rights, and after a dispute on the subject the trees were entered as the exclusive property of the tenant-defendants (*kul haq raiyat*), and the land was recorded as liable to assessment of rent (*kabil lagan*). This latter entry in the settlement papers is impugned by the plaintiffs and the equivalent of the bhowli rent—the landlords' share of the fruit—is claimed. In the alternative it is prayed that a certain amount of cash rent be assessed and realised.

The Munsif who tried the case found that the trees not having been brought into the partition of 1898 still belong to all the landlords of the village and that the two plots are subject to payment of bhowli rent to the plaintiffs and the defendant no. 4. So a declaration was decreed to this effect but the suit for

rent was dismissed for non-joinder of all the proprietors of the village who had been found to be owners of the trees on the land.

There were two appeals in the Court of the Subordinate Judge, one by the plaintiffs and the other by the defendants. That of the plaintiffs was allowed and the Munsif was directed to make the defendant no. 4 a plaintiff as prayed and to determine the amount of bhowli rent upon the yield of fruit in the year in suit. The defendants' claim that both trees and land were rent free was dismissed and the suit remanded.

Then followed two appeals to the High Court in second appeal. It is against the decision of this second appeal that the present appeal is preferred under the Letters Patent. The contention of the tenants that the suit was not maintainable has been remanded to the Subordinate Judge, with directions to ascertain whether the trees belong to all the proprietors of the village and whether in such circumstances the suit can proceed in their absence. The tenants' contention that the trees belong to them exclusively and that the land is rent free was disallowed.

In the grounds of appeal now before us the tenants repeat their claim in respect of the trees and land and urge that on the findings the suit was not competent in the absence of the other proprietors of the village. As to the technical point which amounts in effect to a prayer for dismissal for non-joinder of necessary parties, it is difficult to see how this can arise. Neither party asserted in the pleadings that the trees belong to persons not impleaded in the suit. It appears that in the course of the litigation it was suggested that the trees were still the common property of the proprietors of the whole village as they did not find a place in the *raibandi* of the partition of 1898; but this is by no means a necessary inference. If the trees belong to the tenants alone, if the subsequent entry in the record-of-rights, '*kul haq raiyat*,' is correct,

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FOSTER, J.

then these trees would hardly form part of the dividendum. I find nothing in the record to lead to the inference that the trees had remained 'ijmal' property since the partition. The appellants have, as I have mentioned, claimed on the ground that the suit should be dismissed for non-joinder of all the proprietors. There is no basis that I can find for this contention.

Coming to the claim that the trees and land are rent free and that the trees are the exclusive property of the tenants it is important to bear in mind the character of the evidence that was put before the trial Court. There were some partition papers of 1898, some estate accounts and the record-of-rights of 1913. There was also some oral evidence. Of course the tenants lay great stress on the record-of-rights as to the trees '*kul haq raiyat*' though they impugned the entry as to the land '*kabil lagan*'. Both in the Subordinate Judge's Court and in second appeal the entry '*kul haq raiyat*' has been refused the authority usually attaching to the record-of-rights on the ground that the words indicated a departure from the general law as to property in trees, and that such a departure can only arise out of custom; and it is denied that there is any provision in law for the inclusion in the authoritative record-of-rights of a statement of local custom, even though that custom may affect the tenants' and landlords' particular rights. The argument on this point rests upon a discussion of sections 101, 102 and 103 of the Bengal Tenancy Act, and in the judgments before us the case of *Suresh Chandra Rai* v. *Sita Ram Singh*(1) is quoted. It is my respectful opinion that this discussion does not arise in the present case and that the entry '*kul haq raiyat*' is an entry of a special incident of the tenancy, directly authorised in item (*h*) of section 102 of the Bengal Tenancy Act. There is no suggestion in the entry itself or in the record of the case that this incident

(1) (1920) 57 Ind. Cas. 126.

arises out of any custom. It may just as possibly arise from contract. It is certainly a special incident of this tenancy as it stands recorded, and there is no apparent reason why the presumption of its correctness should be removed from it. This marks the point at which I consider the tenants have a grievance; full legal value has not been accorded to their evidence. If this is correct, it is obvious that the case has not been properly considered and a re-discussion of the whole evidence is called for. I would allow the appeal in this respect, that the decree for rent should be vacated and the case remanded for re-trial in the Subordinate Judge's Court of the issues 5, 6 and 9, it being premised that the record-of-rights is to be presumed to be correct until it is rebutted. The costs throughout must abide the final result of the appeal.

DAWSON MILLER, C.J.—I agree.

Appeal allowed.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1930.

July, 28, 29, 30. Aug., 5.

Before Terrell, C.J. and Dhavle, J.

RUTHERFORD

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 4(3), *clauses* (*V*) *and* (*VII*)—*sum granted by way of commuted pension by a Raj, whether taxable—section* 4(3) (*V*), *scope of —sum, whether also exempt under section* 4(3) (*VII*)—*accumulated balance at the credit of Manager of the Court of Wards as subscriber to Provident Fund, whether exempt from taxation—section* 4(3) (*V*)—*Provident Funds Act*, 1897 (*Act IX of* 1897)†, *section* 2(2)—*Court of Wards, officials of, whether are Government employees for the purposes of Provident Funds Act.*

* Miscellaneous Judicial Case no. 108 of 1929.

† Repealed by Act XIX of 1925 which in turn is amended by Act XXVIII of 1925.