Solicitor for appellants (defendants): *Solicitor, India Office.*

Solicitors for respondent (plaintiff): *Watkins and Huntor.*

1934.

MAHARAJA SRISCHANDRA NANDY v. BAIJNATH JUGAL KISHORE.

LORD THANKERTON.

PRIVY COUNCIL.

On Appeal from the High Court at Patna.

SRI RADHA KRISHNA THAKURJI

v.

BABU RAGHUNANDAN SINHA.

1934.

*J. C.** December, 20.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *ss.* 20, 21, 116, 120—*Right of Occupancy—Zirat—Proprietor's Bakasht—Khudkasht—Raiyat—Land let for cultivation—Restrictive provisions.*

Lessees of lands let in 1914 on a lease for nine years claimed a right of occupancy under sections 20 and 21 of the Bengal Tenancy Act, 1885. The proprietors denied the right claimed, contending (*1*) that the lands were their private lands (*zirat*) within the meaning of s. 116 of the Act, and (*2*) that a clause in the *kabuliyat* restricted cultivation and so prevented the lessees from being raiyats within ss. 20 and 21. The lands had been entered in the survey *khatian*, completed in 1899, as "proprietor's bakasht", and the lessees had admitted in the kabuliyat that it was "*khudkasht*". A Glossary and a Final Report, officially published in 1907 and 1926 respectively in connection with the survey and settlement operations, explained what was meant by the term "*bakasht*" as therein used, and the Final Report stated that the term "*zirat*" was locally applied to all lands in a proprietor's possession whether it was truly *zirát* or not,

Held, (*1*) That the above publications made clear that the entry in the record-of-rights negatived the proprietors' contention that the land was *zirat*, and prevented the lessees'

* *Present*: Lord Blanesburgh, Lord Thankerton, and Sir Lancelot Sanderson.

1934.

SRI RADHA KRISHNA THAKURJI v. BABU RAGHUNANDAN SINHA.

admission from being a clear admission that it was so; (2) that the presumption under section 120 that the land was not private land, and the presumption under section 103B, that the record-of-rights was correct, were not rebutted by the evidence in the case; (3) that so far as the clause in the *kabuliyat* might be said to restrict the right to cultivate (including the right to bring under cultivation) otherwise clearly conferred, the clause would be ineffective to exclude the statutory right of occupancy; and accordingly that the lessees had that right in the land included in the lease.

Raja Dhakeshwar Prasad Narain Singh v. *Gulab Kuer*(1), distinguished.

Appeal dismissed.

Appeal (No. 6 of 1932) from a decree of the High Court (November 18, 1929) reversing a decree of the Subordinate Judge of Darbhanga (January 26, 1927).

In 1925 the respondents brought a suit claiming that certain lands, 101 bighas in area, were lands in which they had acquired occupancy rights under the Bengal Tenancy Act, 1885, and that they had been illegally dispossessed by the appellants their lessors; they prayed for possession and mesne profits. The defendants by their written statement pleaded that the lands in suit were their zirat (proprietor's private lands), and that no right of occupancy could arise therein. The plaintiffs-respondents, or their predecessors, had been in possession since before 1870 under a series of leases, the last being dated August 14, 1914, for a period of 9 years at an annual rent of Rs. 520.

The Subordinate Judge dismissed the suit, but upon appeal to the High Court the learned Judges (Wort and Ross JJ.) made a decree for possession, and for mesne profits to be ascertained.

The facts of the case and the grounds of the decisions in India appear from the judgment of the Judicial Committee.

The Guide and Glossary of the Survey and Settlement Operations in the Patna and Bhagalpur Divisions, officially published in 1907 and referred to in

(1) (1926) I. L. R. 5 Pat. 735; L. R. 53 I. A. 176.

the judgment of the Judicial Committee and in the judgment of the High Court, contained (Part IV) a glossary of terms used in connection with the Survey and Settlement Operations in Bihar. This included the following:

Vernacular.	English.	Remarks.
Baksht malik or thikadar, etc.	In cultivating possession of the malik or thicadar.	Entered in the status column of khatians in which details are recorded of those lands held directly by the malik or tenure holder which are not "zirat" land as defined in section 120.
Zirat ...	Proprietor's private land.	Entered in the status column of khatians in which details are recorded of lands found to be "zirat, kamat, nij-jote, khamar, etc." within the meaning of s. 120 of the Bengal Tenancy Act.
Kharour ...	Land producing thatching grass.	

Reference was made also to page 103 of the Final Report of the Operations in the Darbhanga District 1896 to 1903, officially published in 1926, with regard to the local usage of the term "zirat".

1934 Nov. 27, 30; Dec. 3, 4, 6.—*De Gruyther K. C.* and *Parikh* for the appellants.

Sir Dawson Miller K. C. and *Wallach* for the respondents.

The respective contentions appear from the judgment. Reference was made to the Bengal Tenancy Act, 1885, sections 4, 5, 19, 20, 21, 116, 118,

1934.

SRI RADHA KRISHNA THAKURJI v. BABU RAGHUNANDAN SINHA.

120; *Chandra Kumar* v. *Chaudhri Narpat Singh*(1), *Ajodhya Prosad* v. *Ram Golam Singh*(2), *Bhagtu Singh* v. *Raghunath Sahai*(3), *Dhakeshwar Prasad Narain Singh* v. *Gulab Kuer*(4), *Hira Lal Singh* v. *Matukdhari Singh*(5), and S. C. Mitra's Land Law of Bengal (1898 edn.) pages 319-326.

Dec. 20.—The judgment of their Lordships was delivered by LORD THANKERTON.—This is an appeal from a decree of the High Court of Judicature at Patna dated the 18th November, 1929, which reversed a decree of the Subordinate Judge at Darbhanga dated the 26th January, 1927, and decreed the plaintiffs' suit with costs.

The present suit was instituted by the respondents on the 30th April, 1925, against the appellants for ejection of the latter from an area of land in village Samartha amounting to about 101 bighas, on the ground that the respondents had acquired a right of occupancy in the lands in suit under the Bengal Tenancy Act (Act VIII of 1885), and the question in issue in the present appeal is whether they had such a right at the date of the suit.

It was conceded by the respondents before this Board that their claim to a right of occupancy depended on a lease of the lands in dispute (subject to a small exception referred to later) which was granted to them by the appellants in 1914, the terms of which are contained in a kabuliyat executed by respondent no. 1, who is the head of the Hindu family of which the respondents are the members, and dated the 14th August, 1914. That lease was for a period of nine years extending from 1322 to 1330 Fasli, that is, from 5th September, 1914, to 24th September, 1923. While the parties are in dispute whether the respondents

(1) (1906) I. L. R. 29 All. 184; L. R. 34 I. A. 27.
(2) (1908) 13 Cal. W. N. 66.
(3) (1908) 13 Cal. W. N. 135.
(4) (1926) I. L. R. 5 Pat. 735, 745; L. R. 53 I. A. 176, 185.
(5) (1927) I. L. R. 7 Pat. 275.

were forcibly ejected or voluntarily ceded possession, there is no doubt that the respondents were out of possession at the date of suit.

The respondents' claim is based on section 21 (*1*) of the Tenancy Act, which is as follows:—

"21.—(1) Every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village."

It is admitted that when they obtained the lease of 1914 the respondents were settled raiyats of the village within the meaning of the Act. The appellants maintained that the respondents had acquired no right of occupancy on two alternative grounds, viz.: (*a*) that no right of occupancy could attach to the lands in suit as they were the appellants' private lands within the meaning of section 116 of the Tenancy Act; and (*b*) that, in any event, the lands in suit were not held by the respondents under the lease of 1914 as raiyats, as they were not held for the purpose specified in section 5 (*2*) under the definition of raiyat, namely, "for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners."

The learned Subordinate Judge held that the terms of the kabuliyat showed that the lands were let to the respondents for the purpose of cultivation according to section 5, but that the kabuliyat contained an admission by the respondents that the lands were the private lands of the appellants, which was sufficient evidence to establish the fact, and he dismissed the suit. On appeal, the High Court agreed that the lands were let for the purpose of cultivation, but they differed from the learned Judge's conclusion as to private lands, and they allowed the appeal.

As regards the appellants' second contention, their Lordships agree with the decision of both the Courts below that, assuming that the lands were not the private lands of the appellants, the terms of the

1934.

SRI RADHA KRISHNA THAKURJI v. BABU RAGHUNANDAN SINHA.

LORD THANKERTON.

kabuliyat of 1914 show that they were let for the purpose of cultivation as defined in section 5 (2).

The appellants founded on the clause which provides:

"I and my heirs and representatives neither have nor shall have any sort of interest in the said land save and except to get the produce to cultivate the land and to pay the rent. I shall not change the features and status of the land, nor shall I take recourse to any illegal act or interfere in any matter with regard to the land, which may go against the wishes of the said Babu or against the provision of law."

The extent of the operation of this clause is not very clear, but their Lordships are of opinion that, in so far as it might be said to restrict the right to cultivate, including the right to bring under cultivation, otherwise clearly conferred, this clause would constitute an attempt to contract out of the Tenancy Act and would be ineffective. The holding must be considered as a complete unit, and there is no good reason for separating the paddy lands from the kharhur lands both of which, on the facts of this case, must be taken as being under cultivation within the meaning of the Act.

On the question of private lands, it is the duty of the Court, as provided in section 120 of the Tenancy Act, to presume that land is not a proprietor's private land until the contrary is shown. Further, the lands in suit are entered in the survey khatian, completed in 1899, as "Proprietor's bakasht," and their Lordships agree with the High Court that the "Guide and Glossary to the Survey and Settlement Operations in this District," which were published in 1907, and the "Final Report of the Survey and Settlement," published in 1926, make clear that the entry in the Record of Rights negatives the appellants' contention, and is entitled to the statutory presumption of its correctness. The report also states the term "ziráat" is locally applied to all land in the possession of the proprietor, irrespective of whether it is truly ziráat, or private land, within the meaning of the statute. For this reason, their Lordships agree with the High Court that the admission in the kabuliyat of 1914

that the lands were " Khudkasht " cannot be accepted as a clear admission that they were not only in the possession of the appellants but were also ziráat, or private land. For the above reasons, also, the judgment of this Board in *Raja Dakeshwar Prasad Narain Singh* v. *Gulab Kuer*(1), which proceeded on the evidence and admissions in that case, is not applicable to the present case.

The appellants also founded on the batwara khesra of mauza Samartha of 1853, but the most that they can get from it is that the lands in suit were then in the proprietor's possession, while the fact that other lands are therein described as ziráat, while these lands are not so described, is unfavourable to the appellants' contention. As regards the whole documentary evidence in the case, their Lordships agree with the High Court that the most that it shews in support of the appellants' contention is that from time to time they were in direct possession of the lands in suit. They also agree with the High Court that the oral evidence fails to establish that these lands were ziráat, or private land. The evidence as to how possession passed to the appellants prior to suit is inconclusive. Accordingly, their Lordships are of opinion that the appellants have failed to displace the statutory presumptions already referred to.

The plaint includes among the lands in suit survey plot no. 2139, and this is included in the decree of the High Court, but this plot is not included among the lands described in the kabuliyat of 1914. The appellants' counsel drew their Lordships' attention to this, and respondents' counsel was unable to support its inclusion in the decree, which should therefore be varied so as to exclude this plot.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs,

(1) (1926) I. L. R. 5 Pat. 735; L. R. 53 I. A. 176.

1934.

SRI RADHA KRISHNA THAKURJI v. BABU RAGHUNANDAN SINHA.

LORD THANKERTON.

and the decree of the High Court of the 18th November, 1929, should be affirmed, subject to the exclusion of plot no. 2139, as above mentioned.

Solicitors for appellants: *Callingham, Ormond and Maddox.*

Solicitors for respondents: *W. W. Box and Company.*

APPELLATE CIVIL.

Before Courtney Terrell, C. J., and Varma, J.

1934.

April, 5.
July, 18.
October, 6.
November, 9.

BHUBANESHWARI DASI

v.

PULIN KRISTA RAI.*

Bengal, Agra and Assam Civil Courts Act, 1887 (*Act XII of* 1887), *section* 14—*Sontal Parganas Act*, 1885 (*Act XXXVII of* 1885), *section* 2—*Sontal Parganas Justice Regulation*, 1893 (*Reg. V of* 1893), *sections* 5 *and* 11—*suit valued at more than Rs.* 1,000—*Court in Sontal Parganas, whether should take up and dispose of such cases at a place different from headquarters.*

A court in the Sontal Parganas should not take up and dispose of a suit valued at more than Rs. 1,000 at a place different from the headquarters.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of the Court.

S. N. Bose, for the appellant.

B. N. Mitter and *N. N. Roy*, for the respondents.

COURTNEY TERRELL, C. J. and VARMA, J.—This is an appeal against an order of the Subordinate

* Appeal from Original Order no. 321 of 1933, from an order of Mr. C. E. Walze, Subordinate Judge of Deoghar, dated the 24th day of November, 1933.