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has been prejudiced by the omission in the particular case.

In the proceedings before me the Magistrate reports that the particulars of the offence were explained to the accused, though this was not noted in the order-sheet. I accept this assurance and feel no doubt that in future the Magistrate will be careful to see that all proceedings are fully noted in the order-sheet so that no such question may arise.

ROWLAND, J.

The rule is discharged.

J. K.

Rule discharged.

APPELLATE CIVIL.

Before Khaja Mahamad Noor and Madan, JJ.

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October, 7.

SURPAT SINGH

v.

KUMAR BHUPENDRA NARAYAN SINGH.*

Record-of-Rights—presumption of correctness of entry in—Bihar Tenancy Act, 1885 (Act VIII of 1885), section 103-B—entry as to rent-free, if rebutted by showing that land was within a permanently settled revenue paying estate—onus.

The plaintiffs instituted suits for declaration of title and recovery of possession on the allegation that the suit lands were mal lands and not rent-free. The defendants relied on the entry in the record-of-rights finally published under section 103B of the Bihar Tenancy Act. In second appeal it was contended that the onus had been wrongly placed and the entry in the record-of-rights had been rebutted by the plaintiffs showing that the land was within their permanently settled estate.

*Appeal from Appellate Decree no. 621 of 1933, from a decision of Aghore Nath Banarji, Esq., District Judge of Purnea, dated the 31st March, 1933, confirming a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Purnea, dated the 16th July, 1931, and appeal from Appellate Decree no. 1116 of 1933, from a decision of Babu Nidheswar Chandra Chandra, Subordinate Judge of Purnea, dated the 11th May, 1933, affirming a decision of Babu Dwarika Das, Additional Munsif, Araria, dated the 27th January, 1932.

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Held (*i*) that the question of onus did not arise in the case as both parties had adduced evidence and the decision was based on balance of evidence.

(*ii*) it cannot be laid down as a general proposition of law that the presumption as to correctness of the entry in the record-of-rights of a particular land being rent-free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and is assessed to revenue.

Whether the presumption of the correctness of an entry had been proved to be rebutted was a question of fact and had to be decided on the facts of each particular case.

Jagdeo Narayan Singh v. *Baldeo Singh*(1), explained.

Lachman Lal Pathak v. *Kumar Kamakshya Narayan Singh*(2), *Sri Jagarnath Kishore Lal Singh Deo* v. *Prasanna Kumar Misra*(3), *J. A. Stonewig* v. *Kameshwar Narayan Singh*(4), *Nibaran Chandra Mukherji* v. *Harendra Lal Ray*(5), *Jodha Sahu* v. *Tirbena Sahu*(6) and *Raja Sri Sri Jyoti Prasad Singh Deo* v. *Bharat Shah Babu*(7), followed.

Maharajadhiraj Sir Kameshwar Singh Bahadur v. *Sheikh Sakhawat Ali*(8), dissented from.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Mohamad Noor, J.

S. N. Bose, for appellants in S. A. 821.

J. C. Sinha, for appellants in S. A. 1116.

Dr. K. P. Jayaswal (with him *S. C. Mazumdar* and *Bindeshwari Prasad*), for respondents in S. A. 821.

D. L. Nandkeolyar, for respondents in S. A. 1116.

(1) (1922) I. L. R. 2 Pat. 38, P. C.
(2) (1931) A. I. R. (Pat.) 224.
(3) (1933) S. A. 1584 to 1590 of 1930 (Unreported).
(4) (1923) 11 Pat. L. T. 444.
(5) (1931) I. L. R. 59 Cal. 629.
(6) (1929) 11 Pat. L. T. 468.
(7) (1935) I. L. R. 15 Pat. 260.
(8) (1936) 17 Pat. L. T. 819.

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KHAJA MOHAMAD NOOR, J.—These two appeals arise out of two suits instituted by the same plaintiffs against two sets of defendants for recovery of possession of certain lands on the ground that the defendants were in their wrongful possession and that their names were wrongly recorded in the Survey records-of-rights in respect of them.

The plaintiffs of the suits are the landlords of the villages where the suit lands are situated. The defendant of one of the suits, Kumar Bhupendra Narayan Singh (who is respondent in Second Appeal no. 821 of 1933) has been recorded in the settlement records as a rent-free tenureholder in respect of 125.08 acres of land in village Achra, situated in the area known as Kosi Diara in the district of Purnea. In the other case the defendants (who are respondents in Second Appeal no. 1116 of 1933) have been recorded as milikdar in respect of 14.03 acres of land in village Kusmaul also within Kosi Diara. The plaintiffs instituted these two suits for recovery of possession of these lands on the declaration of their title to them and on a finding that the defendants have not got the status given to them in the record-of-rights. The first suit was instituted before the Subordinate Judge and the second before the Munsif. Both of them were dismissed by the respective trial courts The appeal of the plaintiffs in the first suit has been dismissed by the learned District Judge of Purnea and that in the second suit by the learned Subordinate Judge of the same place. The plaintiffs have, therefore, preferred these two second appeals. As the appellants are the same and the points of law raised on their behalf are common to both the appeals they have been heard together.

Strictly speaking on the findings of the lower courts, no question of law arises in either of the two appeals. In Second Appeal no. 821 of 1933, the plaintiffs' case was that the suit lands were their mal lands and not rent-free. They further urged that,

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assuming that they were rent-free tenure of the defendant he lost it by the adverse possession of the plaintiffs. It was alleged by them that the lands submerged under the Kosi river and that since they came out of the river they had been in their possession through their own tenants. There is a clear finding of the lower appellate court which is in agreement with that of the trial court, that the lands are the rent-free tenure of the defendant and that the entry in the record-of-rights is correct. It has also been found that after their emersion from the river the lands were for a considerable time unfit for being taken possession of and therefore on the basis of his title the defendant must be held to have continued in possession. Both the courts have disbelieved that the plaintiffs were in possession of the lands after they came out of the Kosi. Similar is the case in respect of the lands involved in Second Appeal no. 1116 of 1933. The defendant of this suit claimed, as I have said, to be the milikdar of the suit land and was recorded as such in the record-of-rights. The lower appellate court has found that at least since 1909 he had been holding it as milikdar having in that year purchased it under a sale deed in which it was described as milik. It was also held that the entry in the record-of-rights was not proved to be incorrect by the plaintiffs. The learned Advocate for the appellant has contended that the statement in the deed that the land was milik was not admissible in evidence. It is true that the statement is not admissible to prove that the land is the milik of the defendant but it is admissible to prove that when the defendant came in possession of the land he did so with an assertion that he was holding it as a milikdar and since then he began to prescribe against the plaintiffs as milikdar. The suit having been instituted after 12 years of the commencement of that possession is obviously barred. The only other point urged in this case is that the entry in the record-of-rights is based upon no evidence. No material has been placed before us to support this contention.

The main contention of the learned Advocates for the appellants in both the appeals has been that the onus to rebut the presumption of the correctness of the entries in the record-of-rights was wrongly placed upon the plaintiffs. It was contended that the entries stood rebutted as soon as it was admitted that the lands were within the ambit of the permanently settled villages of the plantiffs and were assessed to revenue. After that it was incumbent on the defendants of the two suits to prove that they acquired from the zamindar either rent-free tenure or milik as the case may be.

Now, the question of onus does not really arise in these cases. As the learned District Judge in his judgment (appealed against in Second Appeal no. 821 of 1933) has pointed out, both the parties adduced evidence and the cases were decided on the balance of evidence. However, as the learned Advocates for the appellants have very elaborately argued the question of onus and placed a number of authorities before us, I think I should give my decision especially as I find myself with all respects in disagreement with the view taken in this connection by a Division Bench of this Court.

Now, the contention of the learned Advocates, as I have said, has been that the lower courts were wrong in relying upon the entries in the record-of-rights as they were proved to be incorrect by the fact that it was established that the lands were assessed to revenue and were within the permanently settled villages of the plaintiffs. In support of this contention reliance was placed upon the observations of their Lordships of the Judicial Committee in the well-known case of *Jugdeo Narain Singh* v. *Baldeo Singh*[1]. It was contended that their Lordships have laid down that the presumption of the correctness of an entry in the record-of-rights about a certain land being rent-free is rebutted if the landlord proves

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that the land was included within the ambit of his village which was permanently settled with him. If the facts of the case which was before their Lordships are not kept in view, the argument of the learned Advocates at the first sight may appear to have some force and one may think that there is a conflict between the view taken in that case and the clear words of section 103B of the Bihar Tenancy Act. The observations relied upon are at page 48 of the report and are these :—

" Considerable stress has been laid on the presumption, (ie., the presumption under section 103B of the Tenancy Act). Once however the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or mahal the onus is shifted. In the present case the lands in dispute lie within the ambit of the estate which admittedly belongs to the plaintiffs and the pro forma defendants for which they pay the revenue assessed on the mauza. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of that obligation either by some contract or by some old grant recognised by Government."

As I shall presently show this observation is in connection with the particular rent-free tenure which was before their Lordships, i.e., malikana, and cannot be applied to ordinary rent-free tenures or holdings which are before us.

The correctness of an entry in a record-of-rights can only be rebutted by proof of facts which are inconsistent with the entry. Assessment of land revenue on any land is not inconsistent with its having been made rent-free after the assessment of land revenue. It is certainly inconsistent with its being malikana which, as I shall show, originated at the time of the Permanent Settlement. I am absolutely certain that their Lordships have not laid down as a general proposition of law that the presumption of the

correctness of the entries in the record-of-rights about a particular land being rent-free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and was assessed to revenue. Obviously, whether the presumption of the correctness of an entry has been proved to be rebutted is a question of fact and has to be decided on the facts of a particular case. Section 103B which was being considered by their Lordships run thus (see page 48 of the report):

"Every entry in a record-of-rights so published, (i.e., Chapter X of the Act) shall be presumed to be correct until the contrary is proved".

The sub-section now runs thus:—

"Every entry in a record-of-right so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect."

Though the amendment was made in 1907 it does not seem to have been brought to the notice of their Lordships. As was pointed out by Ross, J. in the case of *Lachman Lal Pathak* v. *Kumar Kamakshya Narayan Singh*(1), the presumption of the correctness of the record-of-rights cannot now be rebutted by another presumption under the general law in favour of the landlord as laid down by Sir James Colvile in *Raja Sahib Perhlad Sein* v. *Doorga Prasad Tewari*(2). In a large number of cases the very record which shows that a particular tenancy is rent-free shows that a particular person is the landlord of the village and that the tenancy is held under him and is not revenue-free, that is to say, it is assessed to revenue. Under the Bihar Tenancy Act the word 'landlord' is defined as a man immediately under whom a tenant holds, and 'tenant' is one who holds land from another person and is but for a special contract liable to pay rent for that land to that person. A rent-free holder is in most cases a tenant. Therefore if the contention of

(1) (1931) A. I. R. (Pat.) 224.

(2) (1869) 12 Moo. I. A. 286.

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the learned Advocates be accepted that their Lordships have held that the proof that a particular person is the landlord of a land holding it under the Permanent Settlement rebuts the presumption of the record-of-rights that the land is held rent-free by another person, then it will follow that in most cases we shall have to hold that the entry of rent-free tenancy is rebutted by another entry that it is under the landlord. This will lead us to a vicious circle and we shall have to hold that their Lordships' decision is in conflict with the clear provisions of section 103B of the Bihar Tenancy Act which says that every entry in the record-of-rights shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect. We will have to insert into this section an exception that an entry about the land being held rent-free shall not be presumed to be correct in cases where the land is held under a landlord of a village which has been assessed to revenue.

In the case of *Sri Jagarnath Kishore Lal Singh Deo* v. *Prasanna Kumar Misra*(1), decided by me singly, I explained that the observations of their Lordships have to be read as referring to the entry in the particular case where the claim of the defendants who were appellants before them was independently of the landlord. I quote the following passage from the judgment which I then delivered :—

" The defendants in that suit claimed to be malikanadars of certain lands in a village and they were recorded as such in the record-of-rights published under the Bengal Tenancy Act. I may note that the provision about the presumption of the correctness of the record-of-rights and the entry therein under the Bengal Tenancy Act is similar to the one under the Chota Nagpur Tenancy Act. Now, the plaintiff instituted that suit for a declaration that the defendants were not malikanadars and were liable to

(1) (1933) S. A. 1584—1590 of 1930 (Unreported).

pay rent. The two courts below upheld the plaintiff's contention and held that the defendants were not malikanadars of the lands. This Court in Second Appeal reversed those decisions and relying among other things upon the record-of-rights held in favour of the defendants. The matter went up to the Privy Council and their Lordships examined the evidence for themselves and held that there was no malikana in the village when it was assessed to revenue in 1839. Now according to the glossary of the terms given by the Settlement authorities in the Settlement Report of the Patna district from where that case came 'malikana' means the allowance of a dispossessed malik. In some cases the right to malikana has been compounded for a certain area of land thus known as malikana land. The word is also used in Behar to describe the land retained by the ex-proprietors for their subsistence when parting with the estate. When at the time of settlement of land revenue a proprietor refused to take settlement of an estate, or the Revenue authorities for some reason or other did not consider it proper to settle the estate with him and consequently settled with somebody else, the ex-proprietor was allowed some compensation. This compensation was either a perpetual annual payment of money known as the malikana money or some land in the village itself and was known as malikana land. The land was given by an arrangement between the Revenue authorities, the new proprietor and the old proprietor. Now their Lordships of the Judicial Committee, as I have said, examined the history of the settlement of the village which had taken place by the year 1839 and came to the conclusion that the entire village was included in this settlement with the then proprietress Musammat Umatul Zohra. The passage quoted above comes after the finding and should be read in the light of the finding and referring to it. It is clear to me that what their Lordships meant was that the plaintiff having proved that the land which was claimed by the defendants to be the

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malikana land was included in the land which was settled with the predecessor of the plaintiff and pro forma defendants and assessed with revenue, they sufficiently rebutted the presumption of the record-of-rights. I do not read the passage as meaning that once the plaintiff has proved that he is the landlord of the village the presumption about the record-of-rights in favour of the tenancy being rent-free is at once rebutted."

Further I said:

" The important words in the judgment of their Lordships of the Judicial Committee in the case of *Jagdeo Narayan*(1) are " the land which is sought to be rent-free lies within his regularly assessed estate or mahal ", " the land in dispute lies within the ambit of the estate ", and " for which they pay revenue assessed in the mauza ". These facts rebutted the presumption in favour of the malikana."

It is obvious that a malikanadar claims a title independent of the landlord, as the malikana had its origin at the time of the Permanent Settlement. Either he claims that the land was excluded from the Permanent Settlement or that by an arrangement between the Government and the man with whom the Permanent Settlement was made a certain land was set apart for the ex-proprietor as malikana. It is obvious that in such cases the production of evidence to show that the land was in fact included in the Permanent Settlement will obviously rebut the entry of malikana in the record-of-rights. But in other cases where the assessment of land revenue has no connection with a land being rent-free the facts found by the Settlement authorities to have existed at the time of the cadastral survey cannot possibly be rebutted by proof of facts which existed at the time of the Permanent Settlement and, if the facts of the case in which these observations were made were kept in view there is no conflict between the law and the observations of their Lordships. The case of *Jagdeo*

(1) (1922) I. L. R. 2 Pat. 88, P. C.

Narayan Singh(1) was considered in several cases. They are *J. A. Stonewigg* v. *Kameshwar Narayan Singh*(2), *Nibaran Chandra Mukherji* v. *Harendra Lal Ray*(3), *Jodha Sahu* v. *Tirbena Sahu*(4), *Lachman Pathak* v. *Kumar Kamakshya Narayan Singh*(5) already referred to, and *Raja Sri Sri Jyoti Prasad Singh Deo* v. *Bharat Shah Babu*(6). In none of these cases the observations of their Lordships of the Judicial Committee have been held to mean what the learned Advocate for the appellants has contended for.

The learned Advocate has referred us to an unreported decision of a Bench of this Court in *Maharajadhiraj Sir Kameshwar Singh Bahadur* v. *Sheikh Sakhawat Ali*(7). This case no doubt supports the contention of the learned Advocate. It seems, however, that the change in section 103B of the Bihar Tenancy Act was not brought to the notice of their Lordships. However, as in the present case, in view of the fact that it has been decided on the balance of evidence, the question does not arise, it is not necessary to refer it to a Full Bench.

I would dismiss the two appeals with costs in favour of those respondents who have appeared. There will be one set of costs in each case.

MADAN, J.—I agree.

J. K.

Appeals dismissed.

(1) (1922) I. L. R. 2 Pat. 38, P. C.
(2) (1923) 11 Pat. L. T. 444.
(3) (1931) I. L. R. 59 Cal. 629.
(4) (1929) 11 Pat. L. T. 468.
(5) (1931) A. I. R. (Pat.) 224.
(6) (1935) I. L. R. 15 Pat. 260.
(7) (1936) 17 Pat. L. T. 819.