1935.

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MAHARAJA-DHIRAJA KAMESHWAR SINGH BAHADUR.

MACPHERSON, J.

shadow of the name of the Raj throughout the twelve months and he could never have otherwise paid the amount at which he had secured the ferry at auction. Had the trial Judge not been at the very beginning of his first period of appointment as officiating Subordinate Judge he also could not have failed so to hold.

Appeal allowed.

Cross-objection dismissed.

APPELLATE CIVIL.

Agarwala and Varma, JJ.

1935.

November, 5.

RAJA SRI SRI JYOTI PRASAD SINGH DEO

v.

BHARAT SHAH BABU.*

Landlord and Tenant—rent-free grant—suit for declaration that certain village was not debattar property—onus probandi on landlord to prove that the village formed part of his revenue assessed estate—record-of-rights, presumption of—Common law presumption, when available—Evidence Act, 1872 (*Act* 1 *of* 1872), *section* 13(2)—*statement as to rent-free nature in documents, how far binds one who is no party to them.*

A certain village was recorded in the record-of-rights as rent-free debattar property of the defendant idols, and other defendants were recorded as shebaits. The plaintiff sued for a declaration that the village in question was a rent-paying mauza within his zemindari, and that the defendants were tenure-holders and liable to pay rent. The defendants relied on the record-of-rights and two pattas executed by the predecessors-in-interest of the defendants and a kabuliat by a tenant, where the mauza was referred to as defendant's lakhiraj debattar.

Held, that the description in the pattas and kabuliats to which the plaintiff was not a party was not admissible against him.

---

*Appeal from Appellate Decree No. 885 of 1931, from a decision of Mr. Najabat Hussain, District Judge of Manbhum, dated the 18th April, 1931, reversing a decision of Babu Ashutosh Mukharji, Subordinate Judge of Manbhum, dated the 12th April, 1930.

1935.

RAJA SRI SRI JYOTI PRASAD SINGH DEO v. BHARAT SHAH BABU.

The relevant portions of section 13(*b*) is as follows :—

"Where the question is as to the existence of any right or custom, the following facts are relevant :—(*a*) particular instances in which the right or custom was claimed recognised or exercised, or in which its exercise was disputed, asserted or departed from.

Held, that the word "claim" in the section indicates that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim.

The mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right.

The statement in the documents that the mauza was rent-free could not be said to be covered by the words "particular instances in which the exercise of the right was asserted." Such a right can be asserted by a refusal to pay rent.

Brojendra Kishore Roy Chaudhuri v. *Mohim Chandra Bhattacharji*(1), followed.

The common law presumption that a zamindar is entitled to rent for lands lying within his zamindari unless the person in possession is able to prove that by contract or otherwise he is exempted from payment of rent is of no avail to the landlord until he proves that the land which is claimed as rent-free lies within his regularly assessed estate or mahal and that revenue has been assessed on it.

Jagdeo Narain Singh v. *Baldeo Singh*(2), explained.

Jagannath Kishore Lal Singh Deo v. *Prasanna Kumar Misra*(3), followed.

Jodha Sahu v. *Tirbena Sahu*(4) *and Lachuman Lal Pathak* v. *Kumar Kamakhya Narayan Singh*(5), referred to.

The onus of proving that Government revenue fixed in 1793 is assessed on any particular lands is on those who affirm that such is the case.

Jagadindra Nath Roy v. *Secretary of State for India*(6), relied on.

(1) (1926) 31 Cal. W. N. 32, F. B.
(2) (1922) I. L. R. 2 Pat. 38, P. C.
(3) (1933) S. A. 1584 to 1590 of 1930 (Unreported).
(4) (1928) 11 Pat. L. T. 468.
(5) (1931) 12 Pat. L. T. 891.
(6) (1902) I. L. R. 30 Cal. 291.

1935.

RAJA SRI SRI JYOTI PRASAD SINGH DEO v. BHARAT SHAH BABU.

Appeal by the plaintiff.

The facts of the case material to this report are to be found in the judgment of Agarwala, J.

A. B. Mukharji and S. C. Mazumdar, for the appellant.

R. S. Chattarji, for the respondents.

AGARWALA, J.—In the record-of-rights finally published in 1923 village Shampur was recorded as the rent-free debattar property of the defendant idols Damodarjiu and Shamsunderjiu and the other defendants were recorded as shebaits. In the present suit the plaintiff-appellant sued for a declaration that the village is a rent-paying mauza within his zamindari, that it is not debattar property and that the defendants are ordinary tenure-holders and are liable to pay rent at Rs. 26 a year.

The first court decreed the plaintiff's suit. On appeal the lower appellate court reversed this decision, holding that the village was rent-free debattar property. This decision is challenged in second appeal by the plaintiff-appellant. By reference to the Badshahee Grants Regulation, XXXVII of 1793, and the non-Badshahee Grants Regulation, XIX of 1793, and the other Regulations intended for the purpose of ascertaining and registering rent-free grants, it is argued that village Shampur has not been shown to have been a rent-free grant before the time of the decennial settlement as alleged by the defendants. It may be mentioned that the defendants were unable to produce the grant by which they say their ancestors acquired the mauza in dispute, because it has been lost. The court of appeal below has referred to the documentary evidence adduced by the plaintiff, but has been unable to draw from it the inference which the plaintiff seeks to place upon that evidence. With regard to the documentary evidence of the defendants, the court of appeal below has come to the conclusion that that evidence proves that the property was rent-free property granted to

the ancestors of the defendants. That evidence consists, first, of an extract from a general register of records showing that in 1873 the plaintiff's predecessor in title sued the defendants for recovery of cess: a receipt for cess was also produced. The lower court has inferred, from the fact that only cess was claimed, that the predecessor of the plaintiff did not assert the right to recover rent from the defendants. It appears, however, that the name of the mauza in dispute in the present litigation is not entered in the papers on which the court of appeal below relies and there is nothing on the record to connect those papers with mauza Shampur. The documents referred to were documents put in by the defendants, and it was, therefore, the duty of the defendants to show the connection between those documents and the property in dispute.

The next items of evidence on which the court of appeal below relied were two pattas and a kabuliat. The pattas were executed by the predecessor in interest of the defendants and the kabuliat by a tenant to whom a certain right was granted by the defendants. In these documents the mauza is referred to as defendants' lakheraj debattar. The learned Advocate for the appellant contends that this description of the defendants in documents to which the plaintiff was not a party is not admissible against him. For the respondents, on the other hand, it is contended that the statements in the patta and kabuliat are admissible under section 13 of the Evidence Act, clause (*b*). The relevant portion of section 13 is as follows:

"Where the question is as to the existence of any right or custom, the following facts are relevant:—

(*b*) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from."

In the present case the question is whether these statements in the pattas and kabuliat were instances in which the right was claimed or instances in which the exercise of the right was asserted. A similar

1935.

RAJA SRI SRI JYOTI PRASAD SINGH DEO v. BHARAT SHAH BABU.

AGARWALA, J.

contention was raised before a Bench of three Judges of the Calcutta High Court in *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji*(1). In that case the plaintiff sued for assessment of fair rent on the land in suit in which he alleged that the defendants had a right of occupancy only. The defendants pleaded that the land was held rent-free, and produced in evidence a kabala executed many years previously by which one of their predecessors purported to sell the plaint lands with other lands alleging that they were nishkar brahmottar and that his father was in possession of them in nishkar right. A question arose whether the statement in the kabala was admissible either under clause (*a*) or (*b*) of section 13. In considering the meaning of the word "claimed" in clause (*a*) Cuming, J., one of the two Judges who first heard the case and whose decision was approved by three Judges before whom the case eventually came, held that the word "claim" in the section indicates that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim. His Lordship went on to observe :

"The mere assertion of the right in a document, to which the person against whom the right is asserted, is not a party and of which he knows nothing is not to claim the right."

With regard to the second part of paragraph (*b*) of section 13, in considering the meaning of the words,

"Particular instances in which the exercise of the right was asserted."

His Lordship observed :

"The mere statement in the deed of sale that the vendor had a nishkar right cannot be said to be an instance when the exercise of the right was asserted. It is difficult for me to conceive how a nishkar transaction right can be exercised except perhaps by the refusal to pay rent."

(1) (1926) 31 Cal. W. N. 32, F. B.

With these observations on the construction of section 13 of the Act I respectfully agree, and would, therefore, hold that the statements in the patta and kabuliat are not admissible to prove the contention of the defendants in the present case.

The next item of evidence on which the court of appeal below relied for its finding was a certified copy of a statement made by an ancestor of the defendants in the course of filing a road-cess return in 1872. In that statement he described mauza Shampur as his rent-free debattar property. This statement also appears to me to be inadmissible under section 13 of the Evidence Act for the reasons already indicated.

There remains in favour of the case for the defendant-respondents the statutory presumption arising from the entry in the record-of-rights. With regard to this the learned Advocate for the appellant contends that this statutory presumption is insufficient to rebut what may be called the common law of presumption that a zamindar is entitled to rent on lands lying within his zamindari unless the person in possession of any portion of it is able to prove that by contract or otherwise he is exempted from the payment of rent. For this, reliance was placed on the decision of the Privy Council in *Jagdeo Narain Singh* v. *Baldeo Singh*(1). In that case the respondents had been entered during the settlement operations in the record-of-rights as rent-free tenure-holders of lands lying within the appellant's zamindari. The appellant sued for a declaration that the respondents were ordinary rent-paying tenants. The first court found that the defendants were liable to pay rent for the holding and its decree was upheld on appeal by the District Judge. In second appeal the High Court reversed this, finding of fact. The Privy Council, in view of the fact that the High Court had differed from the lower courts not only in the estimate of the evidence but also with regard to the inferences derivable from the documents produced in the case, themselves dealt with the appeal on its

(1) (1922) I. L. R. 2 Pat. 38, P. C.

1935.

RAJA SRI SRI JYOTI PRASAD SINGH DEO v. BHARAT SHAH BABU.

AGARWALA, J.

merits and reversed the decision of the High Court. Referring to the statutory presumption in favour of the correctness of the entry in the record-of-rights their Lordship observed :

"Considerable stress has been laid on this presumption on behalf of the respondents. 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, and for which they pay the revenue assessed in 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 this obligation, either by contract or by some old grant recognized by Government."

It will be observed, therefore, that it is not until the landlord proves that the land which is to be held rent-free lies within his regularly assessed estate or mahal and that revenue has been assessed on it that the onus is shifted to the defendants to prove that they are entitled to hold the land free of the obligation to pay rent for it. The decision in *Jagdeo Narain Singh* v. *Baldeo Singh*(1) has been considered by Khaja Mohammad Noor, J., in *Jagannath Kishore Lal Singh Deo* v. *Prasana Kumar Misra*(2), decided on the 28th of April, 1933. These appeals arose out of seven suits instituted by a patnidar under the Raja of Pachet, who is the appellant in the present appeal, for a declaration that the entry in the record-of-rights, that the defendants were niskar brahmottardars, was incorrect and that the lands in their possession were liable to rent. In the courts below the suits had been dismissed on the ground that the presumption arising from the entry in the record-of-rights had not been rebutted. In second appeal to

(1) (1922) I. L. R. 2 Pat. 38, P. C.
(2) S. A. 1584—1590 of 1932 (unreported).

1935.

RAJA SRI SRI JYOTI PRASAD SINGH DEO v. BHARAT SHAH BABU.

AGARWALA, J.

the High Court the plaintiff contended that having proved that the lands were situate within his zamindari the presumption of the record-of-rights was rebutted and the onus was shifted upon the defendants to establish that they had acquired a right to hold the lands free of rent. In that case, as in the present appeal, reliance was placed on the decision of the Privy Council in *Jagdeo Narain Singh* v. *Baldeo Singh*(1). Khaja Mohammad Noor, J., observed :

"I am clearly of opinion therefore that the important words in the judgment of their Lordships of the Judicial Committee in the case of *Jagdeo Narain*(1) are 'the land which is sought to be held 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.'"

The view that we take of the decision in *Jagdeo Narain* v. *Baldeo*(1), therefore, appears to be in accord with the view taken by Khaja Mohammad Noor, J., in the unreported second appeals. The decision of the Privy Council in Jagdeo Narain has also been considered by Benches of this Court in *Jodha Sahu* v. *Tirbeni Sahu*(2) and *Lachuman Lal Pathak* v. *Kumar Kamakhya Narain Singh*(3). There is nothing in either of these decisions to support the contention of the learned Advocate for the appellant. The onus of proving that the Government revenue fixed in 1793 is assessed on any particular lands as being included in the permanent settlement is on those who affirm that such is the case —*Jagadindra Nath Roy* v. *Secretary of State for India*(4). The onus, therefore, of proving in the case that Shampur was included within the lands in respect of which the predecessor of the plaintiff was

(1) (1922) I. L. R. 2 Pat. 38 P. C.
(2) (1928) 11 Pat. L. T. 468.
(3) (1931) 12 Pat. L. T. 891.
(4) (1902) I. L. R. 30 Cal. 291.

1935.

RAJA SRI SRI JYOTI PRASAD SINGH DEO *v.* BHARAT SHAH BABU.

AGARWALA, J.

assessed lies on him and he has failed to discharge that onus to the satisfaction of the court of fact below. The statutory presumption in favour of the defendants, therefore, remains unrebutted with the result that the appeal must be dismissed with costs.

Appeal dismissed.

VARMA, J.—I agree.

PRIVY COUNCIL.

*J.C.** 1935.

November, 11.

K. C. MUKERJEE

v.

MUSAMMAT RAM RATAN KUER—

On Appeal from the High Court at Patna.

Bihar Tenancy Amendment Act, 1934 (*VIII of* 1934), *section* 10—*Bihar Tenancy Act* (*VIII of* 1885), *sections* 26 *N and* 26 *O—Pending suits—Effect of amendment.*

Sections 26 (N) and 26 (O) of the Bihar Tenancy Act, 1885, are expressed and intended to have retrospective action. There being no saving clause, they are applicable to pending suits.

Appeal (no. 68 of 1934) from a decree of the High Court (April 27, 1933) reversing a decree of the First Additional Subordinate Judge at Patna (January 20, 1930).

The facts are stated in the judgment of their Lordships of the Judicial Committee.

1935, October 28. *DeGruyther K. C.* and *Parikh* for the appellant.

The respondents were not represented.

---

* PRESENT: Lord Thankerton, Sir John Wallis and Sir George Rankin.