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the judgment-debtor. But the greater includes the less, and it is impossible to accept the contention.

The appeal is dismissed with costs.

S. A. K. *Appeal dismissed.*

FULL BENCH.

DHAVLE AND ROWLAND, JJ.

Before Harries, C.J., James and Agarwala, JJ.

MAHANTH DWARKA DASS

v.

BHEKHU MAHTON.*

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March, 20, *April*, 17.

Landlord and Tenant—occupancy holding—mafi on condition of rendering services as Jeth raiyat—landlord, whether entitled to dispense with the services—tenant's holding, whether a service tenure and a grant burdened with services—tenant's claim to remission on dispensation with services, whether tenable—decision as to annual rent payable or dispute regarding tenant's status—second appeal, maintainability of—Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 153.

In the record-of-rights the tenant was recorded as a settled raiyat of the village liable to pay a certain rent. There was an entry to the effect that at the end of the year the raiyat received Rs. 12 as *haqajri* on condition of rendering services as a *jeth* raiyat, assisting the landlord in the collection of rent. The holding was subsequently partitioned into three holdings, one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming a proportionate amount from each of the tenants who, however, contended that the right to deduct Rs. 12 was an incident of the tenancy, so that each of them was entitled to a proportionate remission

*Appeals from Appellate Decrees nos. 655 to 657 of 1936, from a decision of Babu Dwarika Prashad, Subordinate Judge of Muzaffarpur, dated the 28th March, 1936, confirming a decision of Babu Kamini Kumar Banarji, Munsif of Muzaffarpur, dated the 12th September, 1935.

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in the rent. The landlord, who had in the meantime dispensed with the services of the *jeth* raiyat, claimed that he was entitled to the full rent of the holding. The lower Courts upheld the contention of the defendants and the landlord having preferred a second appeal a preliminary objection was taken that the appeal was barred by the provisions of section 153 of the Bihar Tenancy Act, 1885 :

Held, (*i*) that the *jeth* raiyat having been relieved of his duties by the landlord, the question of whether the defendants were liable to pay the full amount of rent or a reduced sum, must be treated as " a dispute regarding the amount of rent annually payable by the tenants ", and that the lower Courts having found that the tenants held under a grant burdened with service, the dispute regarding the status of the tenants raised a question relating to an interest in land which had been decided by the decrees under appeal;

(*ii*) that, therefore, the second appeal was not barred by the provisions of section 153 of the Bihar Tenancy Act, 1885;

Sheikh Safait Hossain v. *Sheikh Waizuddin*(1), distinguished.

(*iii*) that the facts of the case did not warrant the inference that the occupancy holdings were of the nature of service tenures, or that the settlement of the original holding was a grant of land burdened with services;

(*iv*) that the landlord was entitled to dispense with the services of the *jeth* raiyats, and having done so, he was entitled to recover the rent of the subdivided holding at the rate which was shown as payable in the record-of-rights and the tenants were no longer entitled to claim remission which they enjoyed on condition of rendering service to the landlord.

Radha Prashad Singh v. *Budhu Dushad*(2), followed.

Raja Venkata v. *Raja Sobhandari*(3), distinguished.

Appeal by the plaintiff.

(1) (1916) 1 Pat. L. J. 504.
(2) (1895) I. L. R. 22 Cal. 938.
(3) (1905) L. R. 33 Ind. App. 46.

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

The appeals were first heard by Manohar Lall, J. who referred them to a Division Bench by the following order:

"In my opinion, this case should be referred to a Division Bench. In the case of *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1) in circumstances similar to those in the present case it was held that no second appeal lay to the High Court. But my attention has been drawn to the case of *Jagdish Misser* v. *Rameshwar Singh*(2) where the learned Chief Justice apparently accepted the distinction that where a tenant claimed deduction of a *mafi* as an incident of his tenure (not merely as a set off against the rent claimed) a second appeal will lie. I am doubtful if the latter proposition of law is correct and also whether the case of *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1) could be said to have been overruled by a mere remark in *Jagdish Misser's* case(2). Again if a second appeal lies then the question which arises for decision is whether upon the facts found in this case it can be held as a matter of law that the claim of the defendant-tenants to a deduction from rent is an incident of the tenancy.

For these reasons I think it is desirable that this case should be decided by a Division Bench."

The appeals then came on for hearing before Harries, C. J. and Agarwala, J. who referred them to a Full Bench by the following order:

"These appeals raise a question of importance.

Originally the appeals came before Manohar Lall, J. who referred them to a Division Bench. The cases have been argued at considerable length before us, and it appears to us that there is a conflict of authority upon the points involved.

The question in issue in these cases is whether the defendant-respondents are entitled to get the *jeth* raiyati *mafi*, claimed as a permanent incident of their tenancy, deducted from the rent, or is such *mafi* determinable by notice dispensing with the services of the defendant-respondents. We are doubtful whether the decision in *Jagdish Misser* v. *Rameshwar Singh*(2) can be reconciled with an earlier decision of this Court in *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1). Further we are doubtful whether the *jeth* raiyati *mafi* can ever be claimed as a permanent incident of a tenancy. As there is this conflict of opinion in this Court, we direct that these cases be laid before a Bench of three Judges for disposal."

(1) (1916) 1 Pat. L. J. 504.

(2) (1920) 57 Ind. Cas. 621.

On this reference.

A. K. Mitter, for the appellant.

Rai T. N. Sahay and *Girjanandan Prasad*, for the respondents.

HARRIES, C. J., JAMES AND AGARWALA, JJ.—In the record-of-rights of Ghanipur in Muzaffarpur district the occupier of the land covered by khatian no. 254 is recorded as a settled raiyat of the village liable to pay rent at Rs. 53-2-6 a year. There is an entry to the effect that at the end of the year the raiyat receives Rs. 12 as *haqajri* on condition of his having worked for the landlord. The record-of-rights does not specify the nature of the duty; but it is agreed that the duties which were rendered were those of a *jeth* raiyat, assisting the landlord in the collection of rent. The holding has now been partitioned with the result that there are three holdings, one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming the proportionate amount of Rs. 53-2-6 from each of the tenants; but the tenants contended that the right to deduct Rs. 12 was an incident of the tenancy, so that the occupier of the half holding was entitled to deduct Rs. 6 and the other two raiyats were entitled to deduct Rs. 3 each. The landlord had dispensed with the services of the *jeth* raiyat and he, therefore, claimed that he was entitled to the full rent of the holding. The Munsif held that as the right to deduct Rs. 12 was entered in the record-of-rights in a column which contained the incidents of the tenancy, this right must be considered an incident of the tenancy, which must be treated as a grant burdened with service, of which the tenants were entitled to take advantage so long as they were willing to render the services, whether the landlord required the services or not. The decision was affirmed on appeal by the Subordinate Judge; and the landlord has now come to this Court in second appeal.

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A preliminary ground of objection to the appeals is taken on behalf of the respondents that the provisions of section 153 of the Bihar Tenancy Act bar a second appeal in this case. The respondents rely on the decision in *Sheikh Safait Hossain* v. *Sheikh Waizuddin*(1) wherein it was held that *mafi* allowed to a *jeth* raiyat in lieu of wages was not rent, and that a dispute as to whether the *mafi* could be claimed or not was not a dispute relating to the amount of rent payable for the holding. It does not appear from the judgment in that case that the *jeth* raiyat had been relieved of his duties or that the right to pay lower rent was claimed irrespective of whether the duties had been performed or not. In the present case where the *jeth* raiyat has been relieved of his duties by the landlord, the question of whether the tenants are liable to pay at the rate of Rs. 53-2-6 or at Rs. 41-2-6 should in our judgment be treated as a dispute regarding the amount of rent annually payable by the tenant. It is also to be observed that the claim of the tenants which has been allowed by the Courts below amounts to a claim that their holding is something other than an occupancy holding, that they hold under a grant burdened with service; and the dispute regarding the status of the tenants raises a question relating to an interest in land which has been decided by the decrees under appeal. We consider, therefore, that this appeal is admissible under section 153 of the Bihar Tenancy Act.

It is pointed out on behalf of the appellant that the Courts below are in error when they regard the entry in the record-of-rights as describing this right to deduct Rs. 12 on condition of rendering of services as an incident of the tenancy. The learned Munsif has remarked that this *mafi* is not entered in the column of rent, and he goes on to say that if that had been so the natural conclusion would have been that a certain amount of rent was to be deducted in lieu

(1) (1916) 1 Pat. L. J. 504.

of wages; but in fact the entry is in the column which has been provided for giving particulars regarding the rent, although that column also contains special conditions and incidents, if any, of the tenancy. It certainly cannot be said that the entry in the record-of-rights describes this right to *mafi* unequivocally as an incident of the tenancy. The question remains of whether in these circumstances the Courts below could properly come to the conclusion that this tenancy was a service tenure, a grant of land burdened with service.

Mr. A. K. Mitter on behalf of the appellant relies upon the decision of the Privy Council in *Raja Venkata* v. *Raja Sobhandari*(1) wherein it was held that the grant of village as a service *mokhasa* to a naik who undertook to be present with fourteen peons at harvest-time, and to accompany the zamindar carrying spears, muskets and other weapons when he went hunting, was a grant burdened with service; and that it was not resumable when the zamindar dispensed with the services because he found that the inconvenience arising from the expense of maintaining this following was greater than the services were worth. The tenure described in that case was a tenure of a feudal nature, having no proper analogy with the case of a zamindar who appoints a considerable raiyat of the village to give him some assistance in his collection, and allows him to deduct his wages from his rent, thereby saving the raiyat from the trouble of recovering his wages in the zamindar's office. The services to be rendered in the cases with which we are concerned here have more analogy with the services of a *gorait*, the nature of which was discussed in *Radha Prashad Singh* v. *Budhu Dushad*(2). In that case the *gorait* held a jagir which had descended from father to son; the son had been allowed to retain possession without rendering

(1) (1905) L. R. 33 Ind. App. 46.
(2) (1895) I. L. R. 22 Cal. 938.

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services to the zamindar, and the zamindar could not prove the terms of the grant. It was held by the Calcutta High Court that the facts found did not legitimately lead to the inference that the tenure was of a permanent character, and it was held that the zamindar was entitled to resume on dispensing with the services of the *gorait*. In the present case the facts apparent from the entries in the record-of-rights from which the inference has been drawn that the zamindar is not liable to resume are as follows. The defendants' ancestor was an occupancy raiyat; he did not hold a service tenure but an occupancy holding the rent of which was settled at Rs. 53-2-6 annually. He was appointed *jeth* raiyat and on condition of rendering such services he was permitted to deduct Rs. 12 from the amount of rent payable. This is not described in the record-of-rights as an incident of the tenure, but the mode in which the rent is now payable has been fixed; and the entry cannot properly be treated as indicating that the holding is something other than an occupancy holding, or that it is a *jeth* raiyati tenure. There is nothing in the entry from which it can be deduced that this holding is a *jeth* raiyati jagir; or that it is anything but an ordinary occupancy holding of which the annual rental including cess is Rs. 53-2-6. The Courts below in coming to the conclusion that this was a grant burdened with services have also omitted to notice the very important fact that the holding has been partitioned. They have divided up the amount allowed as remuneration to the *jeth* raiyat on condition of his performing services, so that one of the tenants is treated as being half of a *jeth* raiyat and each of the other two as a quarter. This is altogether inconsistent with the theory that the holding is something other than an occupancy holding and that it is in the nature of a jagir for a village servant. It is also to be observed that throughout the case there has been no suggestion that the *jeth* raiyat occupied any position like that of a village servant such as a chaukidar, or that the

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services which he rendered were anything but purely personal services to the zamindar. The zamindar is ordinarily entitled to dispense with such services at his pleasure, as was held in *Radha Pershad Singh* v. *Budhu Dushad*(1).

We consider that it must be held that the facts found do not warrant the inference that these occupancy holdings are of the nature of service tenures, or that the settlement of the original holding was a grant of land burdened with services. The zamindar has dispensed with the services of the *jeth* raiyat and having done so, he is entitled to recover the rent of the subdivided holding at the rate which is shown as payable in the record-of-rights; and the tenants are no longer entitled to claim remission which they enjoyed on condition of rendering service as *jeth* raiyat to the landlord.

The result is that the appeals must be allowed and the decisions of the Courts below are set aside. The plaintiff's suit is decreed with costs throughout.

S. A. K. *Appeals allowed.*

FULL BENCH.

1939.

March, 21, *April*, 19.

Before Harries, C.J., Wort and Dhavle, JJ.

LAL SADANAND SINGH

v.

MADAN MOHAN SAHU GAONTIA.*

Central Provinces Land-Revenue Act, 1881 (*Act XVIII of* 1881), *section* 65-A—*protected thikadar, whether, liable to ejectment for non-payment of rent—sub-section* (7), *meaning and significance of.*

*Letters Patent Appeals nos. 22 to 24 of 1937 (Cuttack), from a decision of Mr. Justice Rowland, dated the 22nd April, 1937.

(1) (1895) I. L. R. 22 Cal. 938.