APPELLATE CIVIL.

Before Harries, C.J. and Rowland, J.

1938.

December, 6.

MAHANT SIDHAKAMAL RAMANUJ DAS

v.

BETAKRISHNA MAHAPATRA.*

Orissa Tenancy Act, 1913 (*B. & O. Act II of* 1913), *sections* 126 *and* 127—*entry in the record-of-rights as to rent, whether final—suit—declaration as to nature of tenancy, whether can displace the irrebuttable presumption as to correctness of rent—tanki bahaldar, whether is a tenant for purposes of part I of Chapter XI—revenue officer, whether has jurisdiction to settle and record his rent—second appeal —question as to finality of entry in the rent roll, whether is a point of law—practice to clothe a decision on a question of law with the appearance of a finding of fact deprecated.*

Failing a suit under section 126 of the Orissa Tenancy Act, 1913 (corresponding to section 104H of the Bengal Tenancy Act), the entry in the record-of-rights as to the rent settled under part I of Chapter XI of the Act is final.

A declaratory suit (such as is contemplated by the proviso to section 141 of the Orissa Tenancy Act) can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the record-of-rights; but such a declaration does not displace the irrebuttable presumption of correctness of the rent entered in the rent roll.

Protap Chandra Jana v. *The Secretary of State for India*(1) and *Raja Promoda Nath Roy* v. *Asiruddin Mandal*(2), followed.

The only ground on which an entry of rent can be challenged is that of want of jurisdiction.

Although a holder of a *tanki bahal* land is a sub-proprietor within the meaning of section 3, clause (*21*), of the Act, he is

*Circuit Court, Cuttack. Appeal from Appellate Decree no. 4 of 1936, from a decision of A. N. Banerji, Esq., District Judge of Cuttack, dated the 23rd September, 1935, reversing a decision of Babu C. Acharya, Deputy Collector of Puri, dated the 8th January, 1935.

(1) (1922) I. L. R. 49 Cal. 1026.
(2) (1911) 15 Cal. W. N. 896.

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a tenant for purposes of Part I of Chapter XI and what he pays kist by kist to the proprietor is for those purposes rent. Therefore, the revenue officer has jurisdiction to settle and record the rent of a *tanki bahaldar*.

The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect is a point of law which can be raised in second appeal.

Observations deprecating the practice which has been observed in the judgments of some of the lower appellate courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact.

Appeal by the plaintiff.

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

B. N. Das, for the appellant.

B. Mahapatra, for the respondent.

ROWLAND, J.—This is an appeal by the plaintiff who sued as proprietor for the rent of the period second kist of 1337 to first kist of 1341 in respect of a tenure described in the current record-of-rights as a *tanki bajyafti* tenure and entered as bearing a rent of Rs. 7-3-0. The claim was laid in accordance with the settlement rent roll. The defendant resisted it, contending that the land was *tanki bahal* and not *tanki bajyafti* and that its rent was Rs. 3-5-3. The Rent Deputy Collector considered himself precluded from giving effect to this plea of the defendant by section 127 of the Orissa Tenancy Act, the settlement rent roll having been prepared in the course of a settlement of land revenue in the local area under part I of Chapter XI of the Act. Under this part a settlement rent roll is prepared which, after sanction by the confirming authority, is finally framed and incorporated in the record-of-rights. Any person aggrieved by entries in the record-of-rights can prefer within two months an appeal under section 125 or within six

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months a suit under section 126, such suit being limited to the grounds specified in clause (*3*) of the latter section. No such appeal or suit was preferred. The Rent Deputy Collector considered himself therefore bound by section 127, which enacts that subject to the provisions of section 126, all rents settled under the preceding sections shall be deemed to have been correctly settled and to be fair and equitable rents. He passed a decree for the rent as claimed. He held that the operation of section 127 was not affected by the result of a suit brought by the defendant in 1929 more than a year after the final publication of the rent roll, in which he obtained a declaration that the land was *tanki bahal* and not *tanki bajyafti*.

From this decision an appeal was preferred to the District Judge in which two contentions were raised. First, that rent was recoverable only for the period subsequent to the 4th May, 1932; and, secondly, that the status of the defendant being that of a *tanki bahal* tenant, the rent which in earlier settlement records had been recorded as Rs. 3-5-3 could not be enhanced and should have been held notwithstanding the entry in the settlement rent roll to be still only Rs. 3-5-3. The District Judge accepted both these contentions and allowed the appeal.

In second appeal the finding that rent is recoverable only for the period after 4th May, 1932, is not challenged. We are concerned only with the question whether the annual rent payable is Rs. 7-3-0 or Rs. 3-5-3.

The learned District Judge has said in his judgment " I find it as a fact that the rent payable by the defendant is only Rs. 3-5-3." When an obvious point of law has arisen, I deprecate the practice which has been observed in the judgments of some of the lower appellate courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a question of law with the appearance of a finding of fact. The question whether an entry of rent in the settlement rent roll is conclusive

or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law, and the plaintiff is perfectly competent to raise this question in second appeal. In fact, no attempt has been made by the respondent to contend that the finding of the District Judge as to the rent binds us as a finding of fact.

The appeal first came before a single Judge of this Court who, considering that a question of some general importance was involved, has referred it to a Division Bench, indicating at the same time his own view that the courts are bound to give effect to the entries of rent incorporated in the rent roll. The particular point does not appear to have been decided under the Orissa Tenancy Act, but in the decisions under the corresponding provisions of the Bengal Tenancy Act there is ample authority that failing a suit under section 104H of that Act (corresponding to section 126 of the Orissa Tenancy Act) the entry as to the rent is conclusive. A declaratory suit (such as is contemplated by the proviso to section 141 of the Orissa Tenancy Act) can no doubt be entertained and a declaration can be had that the tenancy is of a different class from that shown in the record-of-rights —*Raja Promoda Nath Roy* v. *Asiruddin Mandal*(1); but such a declaration does not displace the irrebuttable presumption of correctness of the rent entered in the rent roll. In *Protap Chandra Jana* v. *The Secretary of State for India*(2) even where it appeared that the entry of rent in the record-of-rights had been made by mistake and the actual rent was much higher and where the certificate procedure for recovery of the higher rent had been resorted to by the landlord, the Secretary of State, it was held on a suit by the tenant that the revenue authorities, not having taken the procedure contemplated by the statute, could not reopen the question in defence to a suit to set aside the certificate. The only ground on which an entry

(1) (1911) 15 Cal. W. N. 896.
(2) (1922) I. L. R. 49 Cal. 1026.

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of rent can be challenged is that of want of jurisdiction. The District Judge thought that a *tanki bahal* tenant being a tenant at fixed rent there was no jurisdiction to settle higher rent or to enhance his rent. There is some confusion here. The decisions relied on by the District Judge do not support him. The District Judge was entitled to enquire whether it was within the jurisdiction of the Settlement Officer to record a rent in respect of the tenancy, but if that question is answered affirmatively, the Settlement Officer was within his jurisdiction whether he recorded it correctly or erroneously, and if erroneously, the statute has provided one procedure and one procedure only for correcting the mistake. That procedure the respondent did not utilise. When he did sue to correct the entry regarding his status (as to which the record has a presumptive but not a conclusive value), he no doubt advisedly abstained from asking for any declaration as to the quantum of rent: advisedly because had he asked for such a relief it must have been refused. The District Judge says "unfortunately" and proceeds as if the decision operated to give him the very relief which the civil court could not have given him.

When it appeared in the course of the hearing that the decision of the District Judge could not possibly be supported on the grounds on which it was based the learned advocate for the respondent raised a novel contention that the holder of *tanki bahal* land being a sub-proprietor is not a tenant at all but a proprietor and the duty of the revenue officer to settle rents "for all classes of tenants" did not include the settling of rents for *tanki bahal* holders—a class who are not tenants at all. No doubt the holder of a *tanki bahal* land is a sub-proprietor within the meaning of section 3, clause (*21*), of the Act, and we are asked to hold that a sub-proprietor is a proprietor within the meaning of section 3, clause (*14*) which defines "proprietor" as including also the sub-proprietary interest referred to in section 3, clause (*2*).

That clause, however, defines *bajyaftidars* but contains no reference to *tanki bahaldars*. We must look further, therefore, to see whether a *tanki bahaldar* is a tenant. Section 15(*1*)(*a*) speaks of sub-proprietors other than sarbarahkars as one of the classes of tenure-holders, and section 6, clause (*iii*), enacts that for the purposes of certain sections every sub-proprietor shall be deemed to be a tenure-holder, and for the purposes of section 74 shall be deemed to be a permanent tenure-holder. With the other sections we are not particularly concerned here, but section 74 is the section imposing liability on a tenant to have his tenure or holding sold in execution of a decree for the rent thereof and declaring that the rent shall be a first charge thereon. It is difficult in face of these provisions to hold that what the sub-proprietor is to pay to the proprietor is not rent, and it does not seem to have been suggested in the courts below that the defendant was not a tenant under the plaintiff. The distinctive characteristics of tenancy are that a person should hold land under another person and be liable to pay rent for it to him. " Sub " is Latin for " under " and by its derivation the expression " sub-proprietor " would seem to mean a person holding land under another proprietor just as an under-tenure-holder holds land under a tenure-holder and an under-raiyat holds under a raiyat. A *tanki bahaldar* pays a fixed *tanki* and the word " tanki " is explained in the glossary to Mr. Maddox's Settlement Report thus: " Tanki (rent)—A quit rent ".

Tanki lands are referred to as tenures in paragraph 317 at page 215 of Mr. Maddox's Settlement Report. Again in paragraph 512 at page 347 is a list of classes of tenancy and in this list appears *tanki bahal*. *Tanki bahaldars* are again referred to as a class of tenants in paragraph 515 at page 349 of the report. At the time of Mr. Maddox's settlement the Orissa Tenancy Act had not been passed and corresponding provisions of the Bengal Tenancy Act were in force. There was no such status as " sub-proprietor " recognised at that time. I may refer

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then to the final report of the current settlement operations—Mr. Dalziel's report. In paragraph 50, page 19, he refers to sub-proprietors as tenure-holders whose position approximates to that of proprietors of estates. In paragraph 447 at page 157 he says that "Section 15 recognizes their right to transfer their tenures without the consent of their landlords. But in other respects their position is practically that of an ordinary permanent tenure-holder, with fixity of rent." In the form of kabuliat for sub-proprietors annexed to the same report column 3 is for the "Date on which rent falls due". I have no doubt that what the sub-proprietor pays kist by kist to the proprietor is for our present purposes rent and he is for those purposes a tenant. It follows that the revenue officer had jurisdiction to settle and record the rent of the respondent.

The result is that the entry in the rent roll of annual rent Rs. 7-3-0 must be deemed to be correct. I would allow the appeal and give the plaintiff a decree for rent at this rate for the period in respect of which he has been held entitled to it with costs of the appeal and proportionate costs in the courts below.

HARRIES, C.J.—I agree.

Appeal allowed.

S. A. K.

REVISIONAL CIVIL.

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December, 7.

Before Harries, C.J. and Rowland, J.

BHARI JENA

v.

GAURANGA CHARAN SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 89—*full decretal amount and compensation*

*Circuit Court, Cuttack. Civil Revision no. 56 of 1937, from an order of A. N. Banarji, Esq., District Judge of Cuttack, dated the 5th October, 1936, affirming an order of Babu Dwarikanath Das, Munsif of Jajpur, dated the 18th April, 1936.