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HARRIES, C. J.

I have stated, an amendment is asked at this very last stage, and in my view this Court cannot grant it having regard to the views expressed by their Lordships of the Privy Council in the case to which I have referred. That being so, the Court cannot give the appellant any relief by way of compensation.

For the reasons which I have given, I am satisfied that the decision of Agarwala, J. was right and I would, therefore, dismiss this appeal with costs.

FAZL ALI, J.—I agree.

S. A. K.

Appeal dismissed.

LETTERS PATENT.

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September, 8.

Before Harries, C. J. and Fazl Ali, J.

SRI THAKUR KAPILDEO BHAGWAN

v.

ALI RAZA.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 102(*ii*)(*gg*) *and* 103*B*—*fard-ab-pashi*—*entry as to tenant's obligation to pay existing rent subject to landlord maintaining irrigation system in order*—*Settlement Officer, whether authorized to make the entry*—*presumption of correctness, whether attaches to such entry.*

Where an entry in the *fard-ab-pashi* was to the effect that the raiyat would be under an obligation to pay the existing rent if the arrangements for irrigation were fully maintained by the landlord:

Held, that under section 102(*ii*)(*gg*) of the Bengal Tenancy Act, 1885, the Settlement Officer was authorized to make the entry in the *fard-ab-pashi* which was a part of the record-of-rights, and, therefore, that presumption of correctness attached to the entry.

*Letters Patent Appeals nos. 7 and 8 of 1939, from a decision of Mr. Justice Dhavle, dated the 23rd November, 1938.

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Appeal by the plaintiffs, under clause 10 of the Letters Patent, from the following judgment of Dhavle, J.

These are appeals by the plantiffs in two suits for rent for the years 1339 to the first four-annas Kist of 1342 Fasli. The defence was that the landlords had neglected the gilandazi that they ought to have kept up, that there had been a complete failure of the crops in consequence, and that, therefore, the tenants were exonerated from the payment of any rent. The trial Court was not satisfied that there was failure of crops as a consequence of the landlords' " neglect of the irrigation system ". The lower appellate Court held that this neglect (which had also been found by the trial Court) with consequent failure of crops had been established down to Chait, 1341 (March, 1934), and accordingly gave the plaintiffs a decree for rent only from that time onwards.

It has been contended on behalf of the appellants that remission of rent on the ground of the landlords' failure to attend to the irrigation works cannot be claimed by a tenant defendant under section 38 of the Bengal Tenancy Act, and in support of this contention a recent decision of this Court—*Someshwar Nath Singh* v *Raghubans Lal*(1)—has been cited. The facts in *Someshwar Nath's* case(1) were, however, rather peculiar in that as mokarraridars or dar-mokarraridars in respect of a four-annas share the defendants were responsible along with the plaintiffs for the upkeep of the irrigation works. Fazl Ali, J., who delivered the judgment of the Court in that case, undoubtedly observed that where the productive capacity of the land depends on irrigation, the mere fact that for want of irrigation the land does not yield as much produce as it did before, will not amount to a permanent deterioration of the soil within the meaning of section 38. The learned advocate for the appellant has relied on this observation; but it is to be borne in mind that it refers to a case of reduced yields and not to a case of a total failure of crops year after year by reason of the landlords' neglect to keep up the irrigation works. The learned Judge, moreover, proceeded to observe—

" At the same time it must be recognised that where it is shown that as a result of some local custom or by contract the landlords are not entitled to receive the full rent unless they maintain the irrigation system in good order, suitable relief can be given to a tenant even in a suit for rent. For this purpose, however, the case whether it is based on custom or contract must be clearly made out in the pleadings and supported by proper evidence. A tenant may also in certain circumstances make a counter-claim for damages when he has sustained any loss owing to the omission on the part of the landlord to carry out his obligation to him or the tenants in general."

Upon these observations the learned advocate for the appellants has argued that the tenants in the present case did not make any counter-claim and have not established any local custom or contract. Counter-claim there certainly was not, but as to custom or contract,

(1) (1938) A. I. R. (Pat.) 514.

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the pleadings have not been placed before me, while it is clear from the judgment of the lower court that there is an entry in the *fard-ab-pashi*, which was pleaded by the tenants and to which effect has been given by the lower appellate Court, showing that the tenants were to pay rent in case the irrigation system was maintained by the land-lords. This entry is said to be " *maujude lagan sairabika pura intizam rahanese raiyat ko paebandi adaekarika hoga* " (the raiyat will be under an obligation to pay the existing rent if irrigation is fully maintained). The entry in *Someshwar Nath Singh's* case(1) was merely to the effect that the costs of the irrigation and earth-work were met by the tenure-holder; but in the present case the entry limits the obligation to pay the existing rent to the full maintenance of the irrigation system by the landlord. On the assumption—for it can be no more—that the limitation arises from a local custom, the learned advocate has cited *Suresh Chandra Rai* v. *Sitaram Singh*(2) where Das, J. (sitting singly) held that an entry in the record-of-rights, if based on a village custom, cannot be among the special conditions and incidents of a particular tenancy and is not entitled to the presumption of correctness that attaches to the rest of the record. The learned Judge observed that there was a wide distinction between a local custom binding all persons in the locality, and the special conditions and incidents of a particular tenancy binding that tenancy and no other; and in his view Revenue Officers have no power under sections 101 and 102 of the Bengal Tenancy Act to record the existence of any village custom as part of the record-of-rights—they have power to prepare a record-of-rights in respect of the lands but not in respect of any local custom that may affect the lands. This view was followed by Kulwant Sahay, J. in *Debi Dayal Singh* v. *Musammat Gango Kuer*(3), and the entry " kul haq raiyat " in respect of the trees on a holding refused the statutory presumption of correctness attaching to the record-of-rights on the ground that it only indicated a custom or usage varying the common law and that the Revenue Officer preparing the record-of-rights had no power to record the existence of any such custom (as distinguished from the incidents of the tenancy). There was an appeal under the Letters Patent against this decision—*see Debi Dayal Singh* v. *Musammat Gango Kuer*(4)—and it was held that the discussion in *Suresh Chandra Rai's* case(2) about the power of the Revenue Officer to include a local custom affecting the rights of the tenants and landlords did not arise in the case under appeal and that the entry certainly recorded a special incident of the tenancy, whether or not it arose out of custom (for it may just as possibly arise from contract), and must carry the statutory presumption of correctness. In *Singheshwar Choudhry* v. *Parbal Mandal*(5) the question arose before James, J. with respect to an entry ' *shikmi dakhalkar* ', which as Rankin, C. J. pointed out in *Abdul Hamid* v. *Eakub Ali Pandit*(6), must be presumed to be based on local custom. The learned Judge of our Court found nothing in

(1) (1938) A. I. R. (Pat.) 514.
(2) (1920) 57 Ind. Cas. 126.
(3) (1925) 89 Ind. Cas. 1020.
(4) (1925) I. L. R. 10 Pat. 311.
(5) (1927) 103 Ind. Cas. 471.
(6) (1928) 33 Cal. W. N. 1193.

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the Letters Patent decision in *Debi Dayal's* case(1) which could be taken as expressing disapproval of Das, J.'s view in *Suresh Chandra Rai's* case(2), and it was apparently on this ground that he was prepared to concede that a Revenue Officer may be travelling out of his sphere when he records as a special incident of every tenancy in a village a local custom of special remissions in times of flood, as held in *Suresh Chandra Rai's* case(2). He nevertheless declined to extend the decision to support a general rule that no incident of a tenancy, however vitally it may affect the status of the tenant, can be recorded under section 102(*h*) of the Bengal Tenancy Act, if the right or the liability recorded is based on the existence of a local custom; and he considered that a record-of-rights which omitted to mention the special incident that the under-raiyat enjoyed occupancy rights would be certainly defective in most important particulars. A similar view had been taken in *Umesh* v. *Jamini*(3) by Rankin, C. J. (with the concurrence of Mukerjee, J.) who said that he could imagine no more valuable part of a record-of-rights than the part which states such customs (in that case, a custom of rent reduction in case of inundation), that unless it was allowable in some way or another to deal with the matter of local custom, it may well be doubted whether the preparation of a record-of-rights would be worth the trouble and expense, and that there is no ground for holding that a statement in the record as to the custom of a mauza is outside the purview of Chapter X of the Bengal Tenancy Act. In our own Court Macpherson, J. declined, in *Malik Mokhtar Ahmed* v. *Akloo Mahton* (4), to subscribe to the view that an entry cannot be made under section 102 (*h*) of the special conditions and incidents of a tenancy simply because these are in accordance with the local custom. The learned advocate has contended that there is still some part of the decision in *Suresh Chandra Rai's* case(2) which ought to be accepted. But speaking with all respect, Das, J. was led to make his observations by the decision in *Tulsi Mahton* v. *Jhandoo Pandey*(5) where the *fard rewaj bhaoli* was attacked as forming no part of the finally published record-of-rights. In the present case we have an entry from the *fard ab pashi* which was finally published and had been prepared under the specific authority, I take it, of clause (*gg*) of section 102 of the Act as then in force. As regards clause (*h*) which Das, J. dealt with, the context and the object of the record-of-rights would seem to require us to treat all those conditions and incidents of a tenancy as special which would not ordinarily attach to a tenancy of that class, and this, irrespective of whether they arise from local custom (and thus apply to other tenancies in the locality or contract or otherwise) or from contract or in any other manner. But in any event clause (*gg*) distinguishes this case from that of *Suresh Chandra Rai*(2), and the entry before us is indistinguishable from that dealt with in *Dhanukdhari Singh* v. *Musammat Bibi Amma*(6) by James, J.

(1) (1925) I. L. R. 10 Pat. 311.

(2) (1920) 57 Ind. Cas. 126.

(3) (1924) 78 Ind. Cas. 836.

(4) (1931) I. L. R. 10 Pat. 622.

(5) (1917) 2 Pat. L. J. 187.

(6) (1932) 14 Pat. L. T. 368.

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who had in *Singeshwar Choudhry's* case(1) dealt with Das, J.'s views and whose opinions in such matters are based on unrivalled experience and command assent. The entry in the *fard-ab-pashi*, it may be conceded, points to the existence of a custom or a contract, but if the plaintiffs landlords had challenged the existence of either, evidence would have been given about it and I would have been referred—as I have not—to its discussion in the judgments of the Courts below. The entry was obviously unrebutted, and the defendants were entitled to the benefit of the presumption of correctness attaching to it.

In my opinion, these appeals are concluded by the finding of fact of the lower appellate Court that there was a complete failure of crops by reason of the landlords' neglect of gilandazi down to March, 1934, supported by the entry in the *fard-ab-pashi* to which reference has been made. The appeals are, therefore, dismissed with costs.

Barhamdeva Narayan, for the appellants.

Ghulam Muhammad, for the respondents.

FAZL ALI, J.—These are appeals under the Letters Patent from the decision of Dhavle, J. in two second appeals arising out of two suits brought by the plaintiff-appellants to recover rent for the years 1339 to 1341 and first kist of 1342 Fasli.

The main point raised by the defendants in the suit was that the landlords had neglected the gilandazi and in consequence of their neglect there was a total failure of crops and so they were not liable to pay any rent. The defendants in support of their defence relied upon an entry in the *fard-ab-pashi* which is to the effect that the raiyat will be under an obligation to pay the existing rent if the arrangements for irrigation are fully maintained.

The Munsif found on a consideration of the evidence that the landlords had neglected gilandazi till March, 1934, but he granted a full decree to the plaintiffs on the ground that the defendants had failed to show that their crops had suffered in any way owing to the neglect of gilandazi. The lower appellate Court agreed with the view of the Munsif

(1) (1927) 103 Ind. Cas. 471.

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that the landlords had neglected gilandazi, but he held in disagreement with him that

" by reason of the bad condition of the irrigation system in the village there was failure of crops of the rent claimed lands during the period 1339 to Chait, 1341 F."

He accordingly negatived the plaintiffs' claim for rent relating to the period 1339 to eight annas kist of 1341 F. and dismissed the plaintiffs' suit for that period. The plaintiffs thereupon preferred a second appeal which was dismissed by Dhavle, J. They have now preferred an appeal under the Letters Patent.

The points urged on behalf of the appellants before us are three in number: (*1*) that no presumption of correctness attaches under section 103B of the Bengal Tenancy Act to the entry in the *fard-ab-pashi* which is relied on by the defendants, inasmuch as the Settlement Officer was not authorized to make such an entry; (*2*) that this entry can be relied upon only as proof of a custom and the custom being uncertain and indefinite should not be given effect to by this Court; and (*3*) that there is no evidence whatsoever on the record to prove that the failure in crops alleged by the tenants was due to neglect of gilandazi by the landlords.

The first point is fully answered by section 102, clause (*gg*), sub-section (*ii*). There can be no doubt that under this provision the settlement officer was authorized to record

" the rights and obligations of each tenant and landlord in respect of the repairs and maintenance of appliances for securing a supply of water for the cultivation of land held by each tenant, whether or not such appliances be situated within the boundaries of such land."

Thus if there was an obligation upon the landlords to maintain the irrigation system in good order by gilandazi, the settlement officer was clearly authorized to make an entry to that effect in the *fard-ab-pashi* which is part of the record-of-rights. The learned Advocate for the appellants contends that in any event the settlement officer was not authorized to record the fact that the liability of the tenant to pay

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rent will depend on the maintenance of the irrigation system by the landlord. I am, however, not prepared to accept this contention. The section refers to the rights and obligations of the tenant as well as those of the landlord. The entry in effect amounts to this, that there was an obligation on the landlord to maintain the irrigation system in good order, and the tenant had a corresponding right to claim remission of rent in case that obligation was not carried out by the landlord. In my judgment, the entry in question must be presumed to be correct under section 103B of the Bengal Tenancy Act, and the Courts below were right in basing their decision upon it as the plaintiffs had failed to adduce any evidence to rebut it.

The second point also appears to me to be without substance. The entry in question is an entry as to one of the incidents of the tenancy, but even if it is taken to be an entry as to a custom prevailing in the village, I do not think that the custom can be held to be uncertain or indefinite. The learned Advocate for the appellants contends that the custom is uncertain, because if the neglect of the landlords as to gilandazi does not lead to a total failure of crops there is nothing in the *fard-ab-pashi* to show to what extent and on what basis the remission of the rent is to be allowed. In the present case no such question arises, because it has been found as a fact by the lower appellate Court that there was a total failure of crops; but even if such a question had arisen, the Courts would, in my opinion, have found no difficulty in deciding it upon the entry as it stands.

The last point raised on behalf of the appellants is clearly one which might have been raised on their behalf before Dhavle, J., but cannot be raised in the present appeal. We are informed by the learned Advocate for the appellants that he attempted to raise it before Dhavle, J., but he was not allowed to do so, because no certificate had been given in the memorandum of appeal as required by the rules of this Court to the effect that in fact there was no

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evidence on the record to support the contention of the defendants that there was a total failure of crops in consequence of the neglect of the landlords to maintain the irrigation system in good order. The learned Advocate for the appellants contends that, though he had given no such certificate in the memorandum of second appeal, he is entitled to raise this point now, because such a certificate has been given by him in the memorandum of appeal filed under the Letters Patent. This argument is, however, clearly fallacious. The appellants can succeed in these appeals only if they can show that the judgment of Dhavle, J. in second appeal is not correct, but on the case stated before us it is clear that Dhavle, J. was right in refusing to allow the appellants to raise the point before him in the absence of a certificate required by the rules. It is obvious that we cannot entertain in these appeals any point which the appellants were not competent to raise in second appeal.

As all the grounds raised on behalf of the appellants have failed, I would dismiss these appeals with costs. There will be only one set of hearing fee in both the appeals.

HARRIES, C. J.—I agree.

S.A.K.

Appeals dismissed.

APPELLATE CIVIL.

Before Harries, C. J. and Fazl Ali, J.

SHEIKH MOHAMMAD MURTAZA

v.

CYRIL INDERNATH DEY.*

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September, 1, 4: 5, 13.

Chota Nagpur Tenancy Act, 1876 (*Beng. Act VI of* 1876), *sections* 11, 208 *and* 211—*tenure-holder's transferee—failure*

*Appeal from Appellate Decree no. 718 of 1936, from a decision of F. F. Madan, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, Ranchi, dated the 11th June, 1936, confirming a decision of Babu Gobind Saran, Munsif of Palamau, dated the 29th June, 1935.