Privy Council Appeal No. 35 *of* 1924.

Patna Appeal No. 5 *of* 1923.

Bindeshwari Prasad Singh - - - - - - *Appellant*

v.

Maharaja Kesho Prasad Singh Bahadur - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH APRIL, 1926.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
SIR JOHN EDGE.

[*Delivered by* SIR JOHN EDGE.]

The suit in which this appeal has arisen was instituted on the 22nd December, 1917, in the Second Court of the Subordinate Judge of Arrah by the Maharaja of Dumraon for possession of lands in mauzas Majharia and Khutaha in the district of Shahabad by the ejectment of the defendants. It was alleged in the plaint that the milkiat interest of the Dumraon Raj in the 16 annas of each of the mauzas belongs to the plaintiff, and that his name stands recorded in respect thereof. The suit was brought against the two defendants Babu Parmeshwari Prasad Singh and his younger brother, Babu Bindeshri Prasad Singh, minors, zamindars, sons of Babu Kesho Prasad Singh, deceased, under the guardianship of their mother, Musammat Radha Kuar. Kesho Prasad Singh and the defendants constituted until he died a joint Hindu Mitakshara family. The second defendant died a minor and without issue after the suit was brought.

The defence is that the defendants had a right of occupancy in the lands from which it was sought to eject them. If that right of occupancy existed, it was acquired under the Bengal Tenancy Act, 1885 (Act VIII of 1885). The defendants were in possession, and under the circumstances of the case it was for the plaintiff to prove that he was entitled to eject them. Seven issues were framed: the third was the material issue. It was: "Have the defendants occupancy rights in the land in suit?" That issue practically depended on whether the plaintiff should succeed in proving that the lands in question were his zerait, private lands, as the proprietor. The Subordinate Judge found that the lands were not zerait land, and that the defendants had a right of occupancy in them, and made his decree dismissing the suit. From that decree the plaintiff appealed to the High Court at Patna, and the High Court finding that the defendants had no right of occupancy in the lands, reversed the decree of the Subordinate Judge, and gave the plaintiff the decree for ejectment and mesne profits which he claimed. From that decree of the High Court this appeal has been brought.

Before considering Section 120 of the Bengal Tenancy Act, 1885, which appears to their Lordships to be the section upon the true construction of which the fate of this appeal mainly depends, they will state, as briefly as may be, the history of the lands in question so far as that history is known to them.

All the lands in suit were in the bed of the river Ganges until shortly before 1843, but whether their position in the bed of the Ganges was owing to erosion or not their Lordships do not know. The lands to which the suit relates consist of 228 bighas, 11 kathas and 12 dhurs of land, which emerged from the Ganges shortly before 1843, and in 1843 became suitable for cultivation, and of 25 bighas, 14 kathas and 17 dhurs of land which in or shortly before 1902 emerged from the Ganges, and in 1904 were suitable for cultivation. The lands are contiguous, and were in the plaint alleged to be zerait of the plaintiff.

In 1843 the Government, which was carrying on a stud farm, got possession of all the lands which had then emerged from the Ganges, and thenceforward for about 30 years cultivated them for the purposes of supplying food and fodder for the horses at the stud farm. It does not appear whether the Government held the lands under a written lease or under an oral agreement. The Government surrendered the lands to the Maharaja of Dumraon in 1873, and quitted possession of them. It is not suggested that the Government on or after quitting possession of the lands made any claim to any interest in them.

After the Government quitted possession the Maharaja of Dumraon let the lands which the Government had held to a Mr. Fox for a term of years, and in 1883 let them to Mr. Fox for a further term of nine years. The kabuliyat which Mr. Fox executed in 1883 is dated the 21st June, 1883, and in that kabuliyat Mr. Fox stated that he could "in no circumstances acquire occupancy

right" in the lands, and that at the expiration of the term the proprietor (the Maharaja) shall have full power to keep the said land as his (sir) zerait or to settle it with me or any other person." It is stated in the plaint that "after some time Mr. Fox was granted occupancy rights" in the lands by the Maharaja. That statement was not traversed in the written statement, and must be treated as admitted. The grant or gift of such right of occupancy appears to have been, as stated in the judgment of Mr. Justice Das in 1891, for valuable services rendered to the Raj by Mr. Fox. A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor. However that may be, Mr. Fox became in arrear for three years in the payment of the rent of the lands, and in 1895 the then Maharaja brought a suit against him for the arrears of the rent, and obtained in that suit a decree. In execution of that decree Mr. Fox's right and title to the lands were, on the 2nd March, 1896, sold by auction, and were purchased by the Maharaja of Dumraon, and then such rights of occupancy, if any, as Mr. Fox had in the lands were extinguished.

After the 2nd March, 1896, the Maharaja of Dumraon let the lands to one Akhauri Ram Udanaj Singh in shikmi right for a term of five years, who cultivated them himself or by his shikmi tenants. Akhauri obtained no right of occupancy in the lands, and in any case the defendants are not his representatives by assignment or otherwise.

By 1902 the 25 bighas, 14 kathas and 17 dhurs of land had emerged from the Ganges and had become suitable for cultivation, and on the 25th November, 1902, all the lands in suit were let by Maharani Beni Prasad Kuari, proprietress and heiress, widow and executrix of Maharaja Sir Radha Prasad Singh of Dumraon, to Babu Kesho Prasad, the father of the defendants, for a term of seven years from 1309 to 1315 Fasli. A putta and a kabuliyat were exchanged between the parties. In each of those documents the lands which were let were described as zerait lands, and it was expressly agreed in each of them that no right of occupancy in favour of the tenant should accrue, that Kesho Prasad Singh was not entitled to transfer his interest in the lands to any other person, and that on the expiration of the tenancy the Maharani should be entitled to keep the land in her direct possession as zerait, or to let it to any person. In the specification at the end of each document the land let was described as Jaiwala zerait land. Kesho Prasad Singh remained in possession of the lands in suit under the putta and kabuliyat of the 25th November, 1902, until he died. Upon the death of Kesho Prasad Singh, his sons, the defendants, under the guardianship of their mother, Musammat Radha Kuar, continued in possession of the lands as cultivating tenants, except during a temporary dispossession from some of them by trespassers who had no title, until the expiration of the

term of seven years for which the lands had been let to their father, Kesho Prasad Singh, in 1902.

In 1908 the lands in suit were in the charge, custody and management of the Court of Wards, and on the 8th December, 1908, Musammat Radha Kuar, the mother of the defendants, in her own name, but, in fact, on behalf of and in the interest of the defendants, took the lands in suit in temporary shikmi settlement for a term of nine years from 1316 to 1324 Fasli, and executed and gave to the manager of the Court of Wards a kabuliyat dated the 8th December, 1908, in which she declared that she made of her own free will and accord the declarations contained in it after fully understanding everything without any pressure brought to bear upon her by anybody. The kabuliyat contained several declarations. It is only necessary to refer to the fifth, seventh, ninth and tenth declarations. The fifth declaration, so far as it is now material in this suit, was as follows :—

> "It is incumbent on me that I should keep the aforesaid newly accreted seer zerait land as it is at present and maintain the boundaries thereof. I neither have nor shall have any right whatsoever to make any alteration in connection therewith. I shall not allow anybody to encroach upon the aforesaid newly accreted seer zerait land and shall give timely information to the manager."
>
> "7. I have taken the aforesaid land in temporary shikmi settlement for the purposes of cultivation. I have no right either to plant or to get planted any tree or to construct a house, temple, mosque, dharamsala, or any other building and gola, etc. I shall not in any way change the status of the land whereby damage may be caused to the land and its productive power may be reduced and altered.
>
> "I neither have nor shall have any right to give either the whole or a portion of the land to anybody in shikmi settlement or to transfer it in favour of any person without the manager's sanction in writing.
>
> "9. I have no right to the said land other than that of cultivation during the period of settlement, and I neither have nor shall acquire in future, occupancy or other rights to the same. After the expiry of the term of the lease, the manager of the estate shall have the right either to take it in seer possession, or to settle it with any other person, or to make such other management as he may think proper, and I neither have nor shall have any objection to the same.
>
> "10. After the expiry of the term I shall surrender the aforesaid seer zerait newly accreted land. Should I fail to do so, shall be considered a trespasser for the period it will remain in my illegal possession, and I shall be liable for the payment of damages and compensation for that period."

On the expiration of the term of nine years the defendants refused to give up possession, and hence this suit.

The position in which Musammat Radha Kuar was when she executed the kabuliyat in 1908 was a difficult one as she must well have known. The trespassers who had taken unlawful and forcible possession of some of the lands in 1906 were still in possession. In executing that kabuliyat of 1908 Musammat Radha Kuar must herself have understood the difficulties as to her own title and that of her sons, the defendants, to the lands in suit, or have had independent advice as to them and as to the kabuliyat which she should give to the manager of the Court of Wards.

As has been mentioned, in 1906, after the death of Kesho Prasad Singh, several persons who were mere trespassers and had no title to any of the lands in suit took forcible and wrongful possession of some of the lands in question in the suit, and ousted Musammat Radha Kuar and her sons, the defendants, and it became necessary for these defendants and their mother to obtain decrees in ejectment against the trespassers. In 1910 these defendants, under the guardianship of their mother, and their mother brought two suits in ejectment against the trespassers. In the plaints in each of those suits the lands are described as lands, the milkiat interest in which belonged to the Dumraon Raj, and the lands were stated to be zerait lands, and to have been recognised as such by village custom. The Subordinate Judge who tried those suits found that the cases of all the defendants to those suits were false, that the defendants were mere trespassers, and that the lands were zerait lands of the Dumraon Raj in the time of the Government stud farm, that Mr. Fox had no occupancy right in the lands and was in possession of them by cultivating them and subletting them for short periods, and that Akhauri and the plaintiffs' father were in possession in the same way, and gave the plaintiffs decrees for possession. These decrees were obviously not collusive or obtained by fraud.

In 1885 the Bengal Tenancy Act, 1885 (Act VIII of 1885) was passed. It has been amended by the Bengal Tenancy (Amendment) Act, 1907 (Bengal Act No. 1 of 1907), by which (2a) became part of Section 120.

The lands in suit were an estate within the meaning of the Act, and the Maharaja of Dumraon is the proprietor of the estate within the meaning of the Act. Section 120, as amended, is as follows :—

"(1) The Revenue officer shall record as a proprietor's private land—

"(*a*) Land which is proved to have been cultivated as khamar (ziráat, sir) nii, nijjot (or kamat) by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(*b*) cultivated land which is recognised by village usage as proprietor's khamar (ziráat, sir) nii, nijjot (or kamat.)

"(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced ; but shall presume that land is not a proprietor's private land until the contrary is shown.

"(2a) Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue officer shall not record any land as a proprietor's private land unless it is proved to be such by satisfactory evidence of the nature described in sub-section (1) or sub-section (2).

"(3) If any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue officers."

Previous to that amendment (2) and (3) had been variously construed by different Benches of the High Court at Calcutta, none of which seem to have considered themselves bound by any previous decision on the subject by a Bench of that Court, and had not followed the constitutional principle of referring the question on which they differed from a previous decision of their own Court to a Full Bench to decide what, so far as the High Court was concerned, would be a binding decision on all the Benches of that Court. If such a question had been referred to a Full Bench, the Chief Justice would no doubt have appointed a Full Bench to consider such an important reference and to decide the question referred.

It is necessary for their Lordships to refer to these various decisions so far as they have been brought to their attention. They will now briefly do so.

In 1890, in *Nilmoni Chuckerbutti* v. *Bykant Nath Bera* (I.L.R17 Cal. 466) Prinsep and Bannerjee, JJ., held that " any other evidence that may be produced " in sub-section (2) of Section 120 to show an assertion of any title on the part of the proprietor as to land as his private land must be an assertion communicated to the tenant before the 2nd March, 1883.

In 1892, in *Sher Bahadur Sahu* v. *M. H. Mackenzie* (7 Cal. W. N. 400) Bannerjee and Pratt, JJ., held that the mere fact that the land having been taken in lease on the 23rd August, 1888, as zerait would not give to that fact any probative value, as the lease was not before the 2nd March, 1883.

In *Sobhab Koeri and others* v. *Mahabir Prasad* (Special Appeal 2129 of 1901), an unreported case, Mitra, J., appears to have taken a different view of the scope of Section 120.

In 1905 *Masudan Singh* v. *Gobda Nath Panday* (1 Cal. L.J. 455), which came before Harington and Mookerjee, JJ., in January and February, 1905, and was a suit in ejectment brought by a zamindar against a raiyat, and in which the defendant alleged that he had a right of occupancy in the lands, it was proved that he had admitted that the lands were kamat lands of the plaintiff. The Trial Court had dismissed the suit, but the Lower Appellate Court, whose findings of fact, but not of law, had to be accepted as final by the High Court in second appeal, had found, on an admission made by the defendant that the lands were kamat lands, and had given the plaintiff a decree in ejectment. In that case Mr. Justice Harington, referring to Sections 116, 120 and 178 of the Act, pointed out that the Court of first instance had found that the plaintiff had failed to prove that the defendant had held for a term or under a lease from year to year before the kabuliyat was made, in which was the admission that the lands were kamat lands, and held that the suit must be dismissed. Mr. Justice Mookerjee, treating kamat and zerait as synonymous terms, and referring to *Nilmoni* v. *Bykant*, *Sher Bahadur* v. *Mackenzie*, and *Sobhab Koeri* v. *Mahabir Prasad*, observed that the question raised in the appeal before them, that

is, that the admission made by the defendant in the kabuliyat was not admissible in evidence, was not free from doubt, and that it was not necessary to discuss it, as the appellant, the defendant, was entitled to succeed on another ground, and agreed that the suit should be dismissed. The other ground need not be discussed by their Lordships, as it does not arise in this suit.

In 1908, in *Bhagtu Singh* v. *Raghunath Sahai* (13 Cal. W. N. 135), which came before Mitra and Ball, JJ., on the 3rd July, 1908, in second appeal, the Lower Appellate Court had found that the land then in question was zerait land, on an admission made by the tenant in a kabuliyat which was dated after the 2nd March, 1883. Mitra and Ball, JJ., held that the admission in the kabuliyat as to the character of the land was relevant evidence and admissible, and the question of its probative force was a question of fact for the Lower Appellate Court, and dismissed the appeal.

In 1914, in *Ganpat Mahton* v. *Rishal Singh* (20 Cal. W.N. 14), Mookerjee and Beachcroft, JJ., held that a statement made in a kabuliyat executed after the 19th September, 1902, being after the 2nd March, 1883, that the land was zerait, was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced," but for the reason that when the Legislature expressly made evidence of letting before the 2nd March, 1883, in proof of the character of the land, admissible, the Legislature must have intended to exclude evidence of letting after the 2nd March, 1883, and they held that the defendants in that case must consequently be regarded as settled raiyats, as, in fact, they had been recorded.

Their Lordships agree with the construction of Section 120, before it was amended in 1907 by Bengal Act No. 1 of 1907, as adopted in 1908 by Mitra and Ball, JJ., in *Bhagtu Singh* v. *Raghunath Sahai*. Did the addition of (2a) by the amending Act make any and what difference so far as this appeal is concerned ?

Sub-section (2) of Section 120, as their Lordships construe it, does not exclude as inadmissible evidence that subsequent to the 2nd March, 1883, the tenant admitted that the lands let to him were zerait lands of the landlord ; such an admission is relevant and admissible evidence, but it is probative evidence only, which, like any other relevant fact, has to be considered, and such weight given to it as under the circumstances of the case it is entitled to have. For instance, to put an extreme case, if it should appear to the Judge trying such a case that the admission was made contrary to the fact by a person anxious to obtain a lease of the lands from the landowner refusing to let unless the admission was made, its probative value would be worthless and might be disregarded ; but if the admission were made in a case in which it was doubtful on the evidence whether the lands were the zerait or sir lands of the proprietor, the admission might in the opinion of the Judge hearing evidence be valuable as enabling him to arrive at a conclusion on contradictory evidence of fact.

The question is' What does (2a) of Section 120 mean ? It is clear that land cannot be recorded as a proprietor's private land by reason of its having been decided to be such private land by a decree which was proved to the satisfaction of the Revenue officer to have been obtained from the Court by collusion or fraud. And it is also clear that nothing in such a decree can affect the character of the land if it is proved to the satisfaction of the Court in a suit of ejectment that the decree was obtained by collusion or fraud. But what is the meaning of " any agreement or compromise " in (2a) ? In their Lordships' opinion " any agreement or compromise " in (2a) must refer only to an agreement or compromise of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If when land is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, it is difficult for their Lordships to understand why the agreement for letting of the land, lease, putta, or kabuliyat, which contains a statement of the character of the land, should not be admissible in evidence against a party to it. It does not therefore appear to their Lordships that Sub-section (2a) displaces the view taken in the case of *Bhagtu Singh* v. *Raghunath Sahai* (*supra*), which their Lordships have approved.

But quite apart from that and even if their Lordships had taken a strict view in favour of the appellant of Section 120 the Bengal Tenancy Act, 1885, as it now stands, and irrespective of the putta of 1902 and the kabuliyats of 1883 and 1892, still having regard to the facts that the lands which the Government held for 30 years were used by the Government for similar purposes as they would have been used by the Maharaja of Dumraon if he had been the owner of a stud farm, that no one claimed any right in any of them as a settled raiyat or, except trespassers without any title, as having an occupancy right in any of them, and to the statements as to the character of the land by the defendants and their mother in the plaints of 1910, when they were plaintiffs in the suits against trespassers to which their Lordships have referred, and to the kabuliyat given in 1908 by Musammat Radha Kuar to the manager of the Court of Wards, their Lordships find that there was ample admissible evidence that the lands were zerait of the Dumraon Raj, and that the defendants had no right of occupancy in them.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.

In the Privy Council.

BINDESHWARI PRASAD SINGH

v.

MAHARAJA KESHO PRASAD SINGH BAHADUR.

DELIVERED BY SIR JOHN EDGE.

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