Privy Council Appeal No. 60 *of* 1929.
Patna Appeals Nos. 24 *and* 25 *of* 1927.

Kishun Prasad Pandey and others - - - - *Appellants*

v.

Durga Prasad Thakur and others - - - - - *Respondents*

Same - - - - - - - - *Appellants*

v.

Neku Tewari and others - - - - - - *Respondents*

Consolidated Appeals.

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1931.

Present at the Hearing:

LORD RUSSELL OF KILLOWEN.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* SIR DINSHAH MULLA.]

The dispute in this appeal relates to certain lands situated in village Hasanpur Sangama, also known as Chaita, in the district of Darbhanga, amounting to about 192 bighas and bearing Tauzi No. 8176. The suit was instituted by the plaintiffs, who are the appellants before this Board, against four groups of defendants, who are the respondents on this appeal, for a declaration that the lands were *zirdat* of the proprietors of the village. The plaintiffs own a share of 11 annas in the village, and the second and fourth groups of defendants the remaining 5 annas. The lands are in the possession of the first and third groups of defendants, and it is they who are contesting the plaintiffs' claim. The main question for determination in this appeal

is whether the lands are *zirâat* or proprietor's private lands within the meaning of the Bengal Tenancy Act.

The plaintiffs acquired their interest in the village under three deeds of sale, one of 5 annas 6 gundas, from Musammat Jighri Begam, dated the 1st April, 1914, another also of 5 annas 6 gundas from Syed Nawab Ali, dated the 11th June, 1919, and the third of about 6 gundas from Ram Bahadur, dated the 31st October, 1919. The share sold by Syed Nawab Ali to the plaintiffs was purchased by him from Umatul Mehdi on the 4th July, 1913.

All the 16 annas share were held at one time by an indigo factory, known as the Rewari Indigo Factory under various leases from the proprietors of the village. It appears that one E. S. Lleweyn was the owner of the factory, and M. H. Mackenzie represented his estate. The last of these leases expired on the 26th September, 1912, but the factory continued in possession of most of the lands, and paid rent to the proprietors. None of the leases has been produced, and it does not appear when the other leases expired.

In 1914, Mackenzie, as representing the estate of Lleweyn, sold 103 out of the 192 bighas to the first group of defendants. In 1915 he sold another 69 bighas to the third group of defendants.

On the 24th September, 1919, the plaintiffs, alleging that the lands were *zirâat*, filed a petition under the Estate Partition Act, 1897, for a partition of their share. The first group of defendants appeared in the proceedings, and claimed that Mackenzie had acquired a right of occupancy in the lands, and that they, as purchasers from him, were entitled to that right. The Board of Revenue upheld the defendants' claim, and directed partition on that footing.

Thereupon the plaintiffs filed the present suit on the 28th April, 1922, in the Court of the Subordinate Judge of Darbhanga, for a declaration that the first and third groups of defendants (who will be referred to as the defendants) had no right of occupancy in the lands, that the lands were *zirâat* and should be partitioned as such, and for an injunction restraining the defendants from taking further action in the partition proceedings until the disposal of the suit. The main defence was that the lands were *raiyati* lands, and that the defendants had a right of occupancy in them.

The Subordinate Judge held that the lands were *zirâat*, and decreed the plaintiffs' claim. From that decree the defendants appealed to the High Court at Patna. The High Court found that the defendants had a right of occupancy in the lands, and they reversed the decree of the Subordinate Judge, and dismissed the suit. From this decree the plaintiffs have appealed to His Majesty in Council.

It is, indeed, remarkable that though the plaintiffs rely in support of their case on the presumption laid down in section 103 B, cl. (3), of the Bengal Tenancy Act, no entries from the record of rights have been produced. That clause provides

that an entry in a record of rights " shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect." It is, however, common ground that the lands were recorded under three categories, one comprising 18 bighas, 5 kathas, another 65 bighas, 5 kathas, and the third 108 bighas, 17 kathas. The 18 bighas are stated in the plaint to have been recorded as *raiyati* lands in the name of M. H. Manners, who represented the Rewari factory, and the 65 bighas, as lands in the possession of tenants. As to the 108 bighas it is not clear what the entry was in the record of rights. In the plaint they are stated to have been recorded as " Bakasht of maliks held in Thika by Rewari Factory "; in the judgment of the Subordinate Judge, who disposed of the application for interim injunction, as " Bakasht malikan, Kothi Rewari "; in the judgment of another Subordinate Judge who tried the suit, as " Bakasht Thiccadar "; and in the judgment of the High Court as " Bakasht malik in the possession of the Kothi Rewari as ticcadars."

The Subordinate Judge thought that the entries raised a presumption in favour of the plaintiffs that the lands were *ziráat*, and he placed the onus on the defendants to show that they had a right of occupancy in the lands. The defendants, in proof of their case, put in evidence several documents, some of which related to the parcel of 108 bighas, and some to all the three parcels. The Subordinate Judge held that the documents did not support the defendants' case, and found that the lands were *ziráat*. Upon appeal the learned Judges of the High Court disagreed with him as to the presumption arising from the entries in respect of the 18 and 65 bighas. As to the 18 bighas they observed that the lands having been recorded as *raiyati* lands, the entry should be presumed to be correct until the contrary was proved. As to the 65 bighas recorded as tenants' lands, they were of opinion that the entry raised no presumption that they were *ziráat*. They did not express any opinion as to the entry in respect of the 108 bighas, but held, upon an examination of the documents, that even if the entry were assumed to be against the defendants, the documents relied upon by them showed that they had a right of occupancy in all the three parcels.

It has been urged before their Lordships on behalf of the plaintiffs that the entries in the record of rights created a presumption that the lands were *ziráat*, and that, therefore, no right of occupancy could be acquired in them in view of the provisions of section 116 of the Bengal Tenancy Act. It was also urged as to the 108 bighas that the question whether they were *ziráat* was *res judicata*, and the defendants were estopped from denying that they were *ziráat*.

Their Lordships are of opinion that the entries, as they are described to be, do not establish the plaintiffs' case as to any of the three parcels. The 18 bighas are said to have been recorded

as *raiyati* lands. The presumption, therefore, is that these lands, far from being *ziráat*, are *raiyati* lands, and that presumption has not been rebutted by any evidence in the case. The 65 bighas are described as lands in the possession of tenants, and it could not possibly be presumed that they were *ziráat*. As regards the 108 bighas, it is not at all clear how they were recorded, and no presumption can be made in favour of the plaintiffs. Nor was it suggested on behalf of the plaintiffs that there was any other evidence to show that the lands were of the character claimed by them. The plaintiffs having failed to establish that the lands are *ziráat*, no question can arise under section 116 whether Mackenzie, under whom the defendants claim, could have acquired any right of occupancy in them. For the same reason it is unnecessary to consider whether the defendants have proved affirmatively that Mackenzie had acquired such a right.

The only other question is that of *res judicata*. That plea has been founded upon a decision of the Subordinate Judge of Muzaffarpur in a suit, being suit No. 53 of 1906, instituted by two of the proprietors of the village, who owned a share of 13 gundas and 1 cowrie against (1) the Rewari factory as represented by Mackenzie, the predecessor in title of the defendants, and (2) the other proprietors of the village, under some of whom the plaintiffs claim. The plaint alleged that the factory held 108 bighas of land in the village under leases for different terms from the proprietors of the village, that the lands were *ziráat*, and that though the lease of the plaintiffs' share had expired the factory continued in possession of the entire lands on the strength of the other leases which had not yet expired. The plaintiffs claimed that the factory had "no right to retain possession of the *ziráat* lands of the plaintiffs' share," and they prayed for a partition of their share and for possession and mesne profits.

One of the issues raised in the suit was, "whether the above 108 bighas . . . are *ziráat* or private lands of the proprietors or are they the *kasht* lands of the defendant No. 1?" The Subordinate Judge found that the lands were *ziráat*, and he passed a preliminary decree for partition, and eventually a final decree awarding possession to the plaintiffs of a specific portion of the lands. The plaint, the judgment and the two decrees are in evidence in the present suit, but not the written statement of either of the two sets of defendants.

The contention of the plaintiffs-appellants has been that the above finding operated as *res judicata* between Mackenzie and his co-defendants under section 11 of the Code of Civil Procedure, and that the defendants-respondents, who claim under Mackenzie, are estopped from denying that the 108 bighas are *ziráat* of the proprietors. Two objections have been raised to the estoppel so set up. The one is that this plea was not taken in either of the two Courts in India; the other is that the conditions necessary to constitute *res judicata* as between co-defendants have not been fulfilled.

As to the first objection their Lordships find on an examination of the record that the plea of *res judicata*, though not raised in the plaint, was raised in the written statement of defendants Nos. 29 and 30, who are in the same interest as the plaintiffs-appellants, that a specific issue was raised on it, being issue No. 4, and, further, that evidence was actually led on it. No doubt, the issue was not pressed as stated in the judgment of the Subordinate Judge, and it seems to have been abandoned in the High Court, but that is no reason why it should not be dealt with on this appeal. Their Lordships will therefore proceed to consider the second objection.

The conditions under which a decision may operate as *res judicata* as between co-defendants were considered in a recent case before this Board: *Munni Bibi* v. *Tirloki Nath* (Privy Council Appeal No. 15 of 1928). In that case their Lordships said :—

> "In such a case, therefore, three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided."

As regards the first condition all that can be said is that there might have been a conflict of interest between Mackenzie and his co-defendants. The written statements are not in evidence as they ought to have been to support such a case, and their Lordships are unable to say whether there was a conflict in fact. But even assuming that there was, it was not necessary, in their Lordships' opinion, to decide the conflict in order to give the plaintiffs in that suit the relief claimed by them. The plaintiffs were claiming possession of their own share, which was a very small fraction of the whole, and the leases granted by the other proprietors had not yet expired. Moreover, the suit as framed was not such that no relief could have been granted to the plaintiffs without adjudicating upon the conflicting interests; nor was there, in their Lordships' opinion, any adjudication upon those interests. Their Lordships think that the second and third conditions mentioned above have not been established, and the alleged estoppel under section 11 fails.

In the result their Lordships are of opinion that the appeals fail, and that they should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In tne Privy Council.

KISHUN PRASAD PANDEY AND OTHERS

v.

DURGA PRASAD THAKUR AND OTHERS

SAME

v.

NEKU TEWARI AND OTHERS.

DELIVERED BY SIR DINSHAH MULLA.

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