
(1957) 04 PAT CK 0003
In the Patna High Court
Case No : First Appeal No. 298 of 1946

Jagdish Singh and after his death Ram Kishun Singh and Others APPELLANT

Vs

Kausal Kishore Singh and Others RESPONDENT

Date of Decision : 23-04-1957

Acts Referred:

Evidence Act, 1872 — Section 145, 65, 90

Citation : AIR 1958 Patna 294 : (1957) 5 BLJR 542

Hon'ble Judges : Dayal, J; Choudhary, J

Bench : Division Bench

Advocate : Mahabir Prasad, K.K. Singh, Medni Prasad Singh and Harihar Nath Sinha, for the Appellant; Lalnarain Sinha, Guneshwar Prasad and Ramdeo Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Choudhary, J.—This appeal is by the plaintiffs. They instituted a suit for declaration of their title to and recovery of possession over 13.27 acres of land out of plot No. 583 of khata No. 243 in village Burhee Pali Tajpur, Taraff Ramcharan, Tolo Mahrauchak, Kita Kohwarba. The said land admittedly was the bakasht land of one Ramdhan Singh who died before survey leaving behind two widows, (1) Musammat Manrup Kuer and (2) Musammat Pari Kuer. The case of the plaintiffs is that in Aswin, 1317 Fasli, corresponding to October, 1909, their ancestors took settlement of the said land orally from those two widows on an annual rental of Rs. 85/- and that they and their ancestors were all along in possession thereof as occupancy raiyats.

Subsequently, on the 18th of September, 1928 on partition between the members of their family the said land was divided amongst the co-sharers in live equal shares under a registered deed which was attested by defendants 1, 13 and 34 who had also acted as Panches in the partition. It appears that Musammat Manrup Kuer died in the year 1923 and on her death Musammat Pari

Kuer came in exclusive possession of the entire inheritance of the said Ramdhan Singh. On the 5th of April, 1933, she executed a registered deed of surrender in favour of Gaya Prasad Singh and Falgu Prasad Singh alleging them to be the daughter's sons of Ramdhan Singh and as such his next reversioners.

Later on, Musammat Pari Kuer died and on her death a dispute arose with regard to the inheritance of her husband's estate between Gaya Prasad Singh and Falgu Prasad Singh on the one hand and the defendants, who claimed to be his agnates, on the other. As a result of this dispute, cases cropped up between the parties in the Land Registration Department as well as in the criminal court u/s 145 of the Code of Criminal Procedure. In that proceeding plaintiff No. 1 along with other persons who also claimed to have taken settlement of other lands from the two widows made an application to be added as parties, but their application was rejected.

All those cases, however, terminated in favour of the said Gaya Prasad Singh and Falgu Prasad Singh and the defendants had to file five title suits against them for declaration of their title to and recovery of possession over that inheritance. All those suits were decreed in favour of the plaintiffs by the trial court and the decrees were maintained on appeal by this Court. In pursuance of the decrees passed by the trial court, the defendants took delivery of possession over the properties constituting the Inheritance of the said Ramdhan Singh.

Thereafter, trouble arose between the plaintiffs and the defendants with regard to the suit land, and a proceeding u/s 145 of the Code of Criminal Procedure was started as between them which ended in favour of the defendants on 22-10-1940. The present suit was, therefore, filed by the plaintiffs for the relief's stated above on the illegal ion that as a result of the order passed u/s 145 of the Code of Criminal Procedure, they were dispossessed by the defendants.

The suit was mainly contested by defendants 1 to 3, 5 to 8, 13 to 10, 20 and 21, who filed a joint written statement. They pleaded, inter alia, that the land in suit was never settled with the ancestors of the plaintiffs and that they were never in possession thereof. It was also alleged that Sundar Singh, brother of Musammat Pari Kuer, was the manager of her estate, that on her death he had falsely set up Gaya Prasad Singh and Falgu Prasad Singh, who were his relations, to claim being the daughter's sons of Musammat Manrup Kuer in order to deprive the defendants of the inheritance of Ramdhan Singh and that the plaintiffs are the creaturtes of the said Sunder Singh who, having failed in his first attempt to usurp the estate of Ramdhan. Singh by setting up the above Gaya Prasad Singh and Falgu Prasad Singh, has set up these plaintiffs to claim the land in Suit as being their raiyati land.

A plea of limitation also was taken in defence. It may be noted that the plaintiffs claimed to have acquired a right of occupancy in the suit land also on the ground that they were the settled raiyats of the village and the contesting defendants denied that they were the settled raiyats. This point has been decided in favour

of the plaintiffs and has not been challenged by the respondents in this appeal. It is not, therefore, necessary to deal with it any more and the finding of the court below that plaintiffs are the settled raiyats stands.

2. The trial court found that the plaintiffs had failed to prove that any settlement was made in favour of their ancestors or that they were ever in possession of the land in suit. It also held that the plaintiffs not being in possession within twelve years of the suit, it was barred by limitation. On these findings the suit of the plaintiffs was dismissed. They have, therefore, preferred this appeal.

3. During the pendency of the appeal, appellant No. 11 Umesh Singh, who was plaintiff No. 11 in the suit, died on 7-4-1954, leaving a widow and a daughter, but no substitution was made of his heir in his place. As a result of that the appeal abated on 7-7-1954, so far as that appellant was concerned. On 23-9-1954, however, counsel for the appellants mentioned before the learned Registrar that appellant No. 11 was dead and his heirs were already on the record and prayed for a note being made to that effect.

Accordingly, a note to that effect was made on the record of the case. On 4-11-1954, the respondents made an application in this Court stating that the deceased Umesh Singh had left a widow and a daughter and his heirs were not on the record. The appellants then put forward a case by filing an affidavit in reply to the application made by the respondents that before the expiry of 90 days after the death of Umesh Singh, his widow, on 30-6-1954, surrendered her interest in favour of her next reversioners who were already on the record.

It was contended on behalf of the respondents that the said deed of surrender is a fictitious document and was not executed on the above date. It appears that the deed of surrender which was produced in this Court on behalf of the appellants on 19-12-1955, though purported to have been, executed on 30-6-1954, was really registered on 1-9-1954. The contention put forward on behalf of the respondents was that even if the above deed of surrender be a genuine one, it was really executed and registered on 1-9-1954, after the appeal had already abated, and by reason of that document the abatement could not be saved.

In view of the submissions made on behalf of the parties, it became necessary to find out whether the deed of surrender was a genuine document or not and whether it was executed on the date it bears. An order was, therefore, passed by this Court on 3-9-1956, for an enquiry to be made by the learned Registrar and for his report on the above point. The learned Registrar, after taking evidence of the parties, gave a finding that the document was actually executed by the widow of Umesh Singh on 1-9-1954, on the date on which it was registered and not on 30-6-1954, the date which it bears.

No serious objection was taken to this finding by the Counsel for the appellants when the report was placed before a Bench of this Court on 6-2-1957, and the report was confirmed on that date by this Court.

4. Counsel for the respondents has now taken a preliminary objection that on account of the abatement of the appeal as against appellant No. 11, the whole appeal has become incompetent inasmuch as there will be two conflicting decrees if the appeal succeeds at the instance of the remaining appellants. In reply to this argument, Counsel for the appellants has submitted that appellant No. 11 was separate from the other appellants and his interest in the suit land was ascertainable. As such, it has been argued that there would be no question of two inconsistent decrees and the appeal is quite competent. Since, however, the appeal fails on the merit itself, I do not propose to decide this question in this case.

5. The appellants claimed to have taken settlement of the suit land some time in October, 1909. Their case, however, is that even before the settlement, they cultivated the suit land on batal for a period of about 15 to 20 years. This story as well as the story of settlement are falsified by the entry in the survey record-of rights which was finally published in October, 1910. Therein, the suit land is recorded as bakasht of the proprietor. It is an admitted fact in this case that during the survey operations a number of tenants laid claim to the bakasht land of the proprietor. But the plaintiffs or their ancestors did not lay any such claim. Had they really been in cultivating possession of the land in suit as bataidars, they could not be expected not to have put forward their claim before the survey authorities. It has, however, been contended on behalf of the appellants that whatever may be the inference for not raising any claim during the survey operations as bataidars and in allowing the land to be recorded as bakasht of the proprietor, there could not be any such inference as against the story of settlement on account of the above entry inasmuch as by the time the settlement was taken, all preliminary steps before the final publication of the record-of-rights must have been completed. I am, however, unable to agree with this contention.

The settlement is alleged to have been made about a year before the final publication. Even if the procedure for making entries in the record-of-rights had been completed by that time, the entry could have been sought to be corrected by making an application in that regard. There is discrepancy in the evidence of plaintiff No. 1 himself with regard to the time of the settlement in question. He has stated in the suit that the settlement was made about six months or one year after the removal of the survey camps in 1316 Fasli.

But in his previous deposition in the proceeding u/s 145 of the Code of Criminal Procedure, Exhibit N (1), he had stated that it was three years after the final publication of the record-of-rights. His attention was drawn to this statement, but he denied to have made it. It is said that the plaintiffs had to pay a sum of Rs. 3000/- as salami for taking the above settlement. But, curiously enough, no receipt was taken for the payment of such a huge sum of money. Nor any Hukumnama was obtained as regards the settlement.

Even a rent receipt was not granted at that time evidencing the settlement and

the payment of salami. It is not possible to believe that the plaintiffs or their ancestors could have parted with their good money to the tune of Rs. 3000/- without having obtained any document therefor. The witnesses who support the story of settlement are P. Ws. 2, 4 and 8. P. W. 2 has stated that at the time when the plaintiffs took the settlement several other persons also took settlement and a total sum of Rs. 12000/- was paid by different settlees for taking settlement of about 80 to 82 bighas of lands.

According to him, however, it was not settled as to how the lands would be specifically allotted to the various settlees on the spot. It is not possible to believe that without knowing the lands which the different settlees were to get, they would pay such a huge sum of salami. Moreover, the defendants have obtained a mortgage decree against this witness and, therefore, he must have animosity with the P.W. 4 who is plaintiff No. 1 himself. His evidence is contrary to the evidence of the previous witness.

He has stated that it had been settled what land would be settled with him before he paid the salami. According to him, he paid the money to Paras Nath, the Munshi of the two widows at the bungalow and the said Paras Nath went and made it over to them at the Deorhi. He demanded a receipt but he was told that he would get it in Sawan or Bhado. He asked Paras Nath to make a note of the payment, but he did not get any such note made in his presence. He never enquired even thereafter whether any such note was made.

In my opinion, this cannot be said to be the conduct of a person who has really advanced a huge sum of money for taking the settlement in question. His attempt to deprive the defendants of the suit land appears from the fact that he deposed against them in the title suits which they had brought against Falgu Prasad Singh and Gaya Prasad Singh. The last witness on this point is P.W. 8 who is a resident of a different village lying at a distance of four to five miles from the suit land.

He has stated that the lands to be settled with the plaintiffs were fixed up. He claims to have witnessed the settlement because he himself went there to take settlement of 15 to 16 bighas of lands, but he admits that the lands were not settled with him. I am unable to accept his presence at the time of the alleged settlement. If he had really gone to take settlement, it is unbelievable that he could not get it. Moreover, it is not possible to accept his version that he had gone to take settlement of lands lying at a distance of four to five miles from his village.

6. Oral evidence on behalf of the plaintiffs with regard to their possession is equally meagre. The witnesses examined on this point are P. Ws. 3, 4, 5 and 9. P. W. 3 claims to have land at distance of ten leggis from the suit land. He has however, stated that Noonu Babu Singh, Jalim Singh and Ram Sahay Singh and perhaps some others are the tenants of the intervening lands. If really he had land at a short distance of ten laggis only from the suit land, he could not have

said that there were perhaps some other tenants of the intervening lands.

That shows that he had no land near about the disputed land. No evidence has been produced in this case to show that actually he had any land there. This witness appears to be very much interested in the cause of the plaintiffs. He is an attesting witness on the deed of surrender executed by the widow of appellant No. 11 which has been found, as stated above, to have been antedated. Witness No. 4 is plaintiff No. 1 himself whose evidence on the question of settlement has already been discussed.

He has stated that from long before the survey he was cultivating the land in suit on batai system for about 15 to 20 years, as already observed, this story is unacceptable. Moreover, he is interested in his cause and it will not be safe to rely on his evidence in order to come to any finding on the point at issue. P.W.5 has also supported the possession of the plaintiffs. He, however, admittedly is on litigating terms with the defendants as a title suit was pending at that time between him and the defendants.

He has stated that the crops of the said land were twice attached and auction-sold in the Section 145 proceeding. The first attachment was made in 1346-1347 Fasli and the second attachment was in 1347-1348 Fasli. He is obviously wrong, because the first attachment was much before 1346 Fasli. Thus, it appears that he has actually got no idea of exact possession over the suit land. P. W. 9 is plaintiff No. 6. It appears that he was not contemplated to be a witness in the case and he had all along been presented in court when previous witnesses were examined.

As certain receipts had to be proved, he was examined as a last witness in this case to prove them, and while he came to do that, he also spoke about his possession over the suit land. His father is alive. He has not come to pledge his oath. Moreover, he being interested in his cause, it will not be safe to rely on his evidence. Thus, oral evidence adduced on behalf of the plaintiffs to prove settlement and possession is unsatisfactory and I am unable to accept the same.

7. There are certain circumstances which also belie the story of the plaintiff's possession. As already stated, there was a proceeding u/s 145 of the Code of Criminal Procedure (Ext. G) between Gaya Prasad Singh, Falgu Prasad Singh and some other persons on the one hand and the defendants on the other after the death of Musammat Pari Kuer. In that proceeding some rival claimants also were made parties. The dispute was with respect to about 1700 bighas of lands including the suit land and it appears that the crops of the lands in dispute in that proceeding were attached and auction-sold.

It also appears that the sale proceeds were withdrawn by the said Gaya Prasad Singh and Falgu Prasad Singh after they succeeded in that proceeding. An application (Ext. J) was made in that proceeding on behalf of the plaintiff No. 1 and several other claimants of lands other than the suit land for releasing their lands from attachment as the crops were alleged to have been grown by them. It

is not, however, known as to what order was passed on that petition.

No document has been produced to show that the suit land was released from attachment. An application has been filed in this Court for taking certain documents in additional evidence under Order 41, Rule 27 of the CPC as it is alleged that those documents will establish that the suit land was released from attachment and the plaintiffs harvested the crops thereof during that proceeding. These documents are, however, certified copies of certified copies which are not admissible in evidence and Counsel for the appellants has not, therefore, pressed that application.

It also appears that plaintiff No. 1 and several other persons made an application in that proceeding for being added as parties, but that application was rejected and an application in revision filed against that order before the Sessions Judge was also rejected. Subsequently, as already stated, that proceeding itself was decided in favour of Gaya Prasad Singh and Falgu Prasad Singh who were declared To be in possession of the lands in suit in that proceeding including the suit land.

No suit was filed by the plaintiffs for establishing their right with respect to the suit land. True it is that they were not parties in that proceeding, but they were really affected by the final order passed in that case inasmuch as the crops of the suit land were attached and sold and the price was delivered to the successful party. It was, therefore, necessary for them to have their title cleared up by a properly constituted suit. Their conduct in keeping quiet after the crops of the said land were taken by Falgu Prasad Singh and Gaya Prasad Singh, raises definitely an inference that they must not have been in possession over the land in suit.

8. Reliance has been placed on behalf of the plaintiffs on certain documents but, in my opinion, they also are of little assistance to them. The first document in point of time is exhibit 5, a certified copy of a road cess return, dated the 22nd of August, 1911. In that document, there is an entry that Ishwar Singh, father of plaintiffs 1 and 2, was the cultivating raiyat of 13.27 acres of land out of khata No. 243 at an annual rental of Rs. 85.

The original of that document is said to have been signed by the two widows of Ramdhan Singh. Since, however, the original was not produced, it is not possible, to ascertain if really they signed that document. The court below, however, has given a finding in favour of the plaintiffs on this point on the ground that it was not contended that the said document was not signed by the two widows. In my opinion, the court below was wrong in coming to this conclusion.

In paragraph 4 of the plaint it has been stated that the plaintiff's ancestor was recorded as raiyat in the road cess return with respect to the land in suit filed by the two widows. Nowhere it was mentioned in the plaint that they were signed by them. In the written, statement filed on behalf of the defendants who, as we know, came into picture only after the death of Musam-mat Pari Kuer, the above

allegation of the plaintiffs was not admitted and it was further pleaded that such entry might have been made for reducing the valuation in order to secure low cess assessment.

No witness examined on behalf of the plaintiffs stated that that document was signed by the two widows and, therefore, there could be no question of the defendants giving any evidence in rebuttal on that point. That being the position, the plaintiff's were not entitled to a finding in their favour on this point on the ground given by the learned. Subordinate Judge, The above certified copy being over thirty years old, was admitted in. evidence u/s 90 of the Indian Evidence Act.

Under that section where any document proved to be thirty years old, is produced from proper custody, presumption arises that the signature and every other part of that document, which purports to be in the hand-writing of any particular person, is in that person's hand-writing. The presumption that attaches under this section to the certified copy of the road cess return, therefore, in my opinion, is that the signature authenticating it is genuine. But there is no presumption that the original of that document was signed by the person who is said to have signed it.

On the basis of this certified copy, therefore, it cannot be said that it must be accepted that the two widows signed the original road cess return. This view is supported by a decision of the Judicial Committee in AIR 1935 132 (Privy Council) , wherein it has been held that Section 90 of the Evidence Act clearly requires the production to the court of the particular document in regard to which the court may make the statutory presumption and that if the document produced is a copy, admitted u/s 65 of the Evidence Act, as secondary evidence, and it is produced from proper custody and is over thirty years old, then the signatures authenticating the copy may be presumed to be genuine, but it is not sufficient to justify the presumption of due execution of the original u/s 90 of that Act.

Relying on this decision the Supreme Court, in H.P. Singh v. Deonarain Prasad 1956 PLR 85. ((S) AIR 1956 SC 305) (R) has held that where the exhibits are merely certified copies and not the originals, they cannot be presumed to be genuine as the presumption enacted in Section 900 can be raised only with reference to original documents and not to copies thereof. This document, therefore, does not assist the plaintiffs.

9. The next document is a registered deed of partition (Ext. 1) dated the 18th of September, 1928. By this document there was a partition amongst the different branches of the plaintiffs' family and the land in suit was also included therein and divided into five equal shares. It is contended, therefore, on behalf of the plaintiffs that had they not taken settlement of the above land and been in possession thereof, they would not have divided it amongst themselves so far back as in 1928 when there was no dispute with respect to it.

This partition deed is attested by defendants, 1, 13 and 34, and the case of the plaintiffs is that really these defendants were the panches who effected the partition and allotted the suit land in five different pattis. The argument is that had the suit land been bakasht in possession of the two widows, they (the said defendants), being the next reversioners, would not have divided the same as amongst the plaintiffs. These defendants have denied their signatures on this document.

But for the reasons given by the court below, which have not been challenged by the defendants before us, I agree with the view taken by it that they did attest the document. Mere attestation, however, does not impute any knowledge of the contents of the document to the attesting witnesses. Oral evidence, however, has been adduced on behalf of the plaintiffs to prove that the above defendants were Panches and effected the partition and that they attested the deed of partition after having read the contents thereof.

The evidence on this point consists of witness No. 1 and witness No. 4, one of the plaintiffs. Witness No. 1 claimed to have been one of the Panches. He has said that he along with the above defendants and one more man were the Panches and the parties and the Panches signed the deed of partition after duly understanding the contents thereof. In cross-examination, however, he has stated that the allotments were noted in the Ekrarnama and that they were not noted by the Panches on any other document.

He has further stated that the division was made by lottery & that on division the allotments were noted by the scribe on chithas. A large area of land was being divided between the parties. It is not possible to believe that the Panches made different pattis without noting anywhere as to which land would be given to which patti. It is difficult to believe that for the first time the different allotments were noted only after there had been actual division, He has admitted to have given some land in Bharna to Natho Singh, one of the plaintiffs.

I am unable to place any reliance on his evidence on the question of partition. P. W. 4 has stated that these defendants along with two other Panches divided the land amongst themselves and they also signed the registered Ekrarnama. In the proceeding u/s 145 of the Code of Criminal Procedure, however, plaintiff no. 1 gave his evidence which is exhibit N (1) in the suit. In that proceeding no case was made out of there being a Panchayati by these defendants.

The attention of this witness was drawn to that fact, but he said that he did not remember if he did not state about the Panchayati or about those persons acting as Panches in the 145 proceeding. In my opinion, there was no Panchayati. There is no other evidence on this point. No doubt, in the partition deed, the said land is allotted to five different pattis in equal shares. The total area of the different allotments comes to 13.65 acres, whereas the settlement was only of 13.27 acres. There is no explanation as to how they could get an excess area of .38 acre.

It is also noteworthy that though with regard to other lands under partition, plot numbers have been given, no plot number has been given with respect to the suit land and the description given therein is limited to that given in the road cess return, Exhibit 5. It appears to me that the parties were not in possession of the suit land at the time of partition. But since, however, they found that some lands are recorded in the road cess return in the name of their ancestor, they, though not in possession, thought it desirable to include them in the partition giving to each party an equal share therein so that if in future they may be able to discover their title to and get possession over the same, they might not be confronted with this deed of partition in putting forward their claim.

10. Our attention has also been drawn to the proceeding u/s 145 of the Code of Criminal Procedure (Ext. G) which was started on the 28th of October, 1933, and the petition (Ext. J). filed therein on behalf of plaintiff No. 1 along with several other persons, asserting the plaintiff's claim over the land in suit. Plaintiff No. 1 was petitioner No. 4 in that petition and he claimed the entire disputed land on his own behalf. But the above land had, according to the case of the plaintiffs, already been divided into five equal shares in 1928 by the registered deed of partition, exhibit 1.

I fail to understand how then plaintiff No. 1 could claim in that petition to be in possession of the entire disputed land. That also belies the story of partition of this land amongst the different cosharers.

11. It has already been stated that plaintiff No. 1 along with some other persons made an application in the proceeding u/s 145 of the Code of Criminal Procedure between Gaya Prasad Singh and Falgu Prasad Singh on the one hand and the defendants and several other persons on the other for being added as parties to that proceeding and that application was rejected.

Against that order an application in revision was made before the Sessions Judge who by his order (Ext. 10) dated the 29th of June, 1934, rejected that application. There is, however, a recital in that order that the dispute was between two sets of landlords who claimed khas possession over some lands and possession through raiyats over the remaining lands. Counsel for the appellants has relied on this recital and contended that this shows that out of 1700 bighas of lands which were in dispute in that proceeding, some were in possession of raiyats.

It may be noted that, though that proceeding was with respect to 1700 bighas of lands claimed by the defendants as bakasht, really the dispute between the parties related to the entire inheritance of Ramdhan Singh which included also the zamindari interest and, as such, there were certain raiyats cultivating some land within the said zamindari which was in dispute. Probably, the learned Sessions Judge was referring to that possession of the raiyats. The statements in writing made by the parties with regard to their claims in that proceeding have not been filed in this case.

It is not, therefore, possible to accept, on this recital, the contention of Counsel for the appellants that some portions of the lands claimed to be bakasht were in possession of raiyats.

12. Lastly, reliance has been placed on behalf of the appellants on rent receipts, exhibits 4 to 4(1). Out of them, exhibits 4 to 4 (h) are for the years 1320 to 1328 Fasli said to have been granted by the two widows, exhibits 4 (i) and 4 (j) are for the years 1335 and 1339 Fasli respectively, alleged to have been given by Musammat Pari Kuer after the death of Musammat Manrup Kuer and exhibits 4 (k) and 4 (1) are for the years 1343 and 1344 Fasli said to have been granted by Gaya Prasad Singh and Falgu Prasad Singh after they succeeded in the proceeding u/s 145 of the Code of Criminal Procedure.

The learned Subordinate Judge has observed that these receipts appear to have been written at one sitting with one pen and ink. Counsel for the appellants has, however, asked us to look to the receipts ourselves and to see how far this observation is justified. The above observation was made by the learned Subordinate Judge about ten years back and it is not possible to test the correctness of that observation by a look at those receipts after ten years. Even though at the time when the learned Subordinate Judge saw these receipts they appeared to be fresh, by this time they cannot appear to be so and must look like old as having been written several years ago.

There are, however, circumstances which support the finding of the learned Subordinate Judge that these receipts are not genuine. The rent receipt, exhibit 4 (h), is for the year 1328 Fasli. The date of the payment of rent has not been printed in the paper book. From the original document it appears that the payment was made on the 30th of Baisakh, but in that year there was no 30th Baisakh and the month ended on the 29th day. This clearly shows that it must not have been written in Baisakh, 1328 Fasli. All these receipts are for an area of 20 bighas.

That exactly fits in with the area given in the partition deed, exhibit 1, which comes to 13.65 acres. The settlement is said to have been made only of 13.27 acres which comes to about 10 kathas less than 20 bighas. If the receipts were given according to the alleged settlement, they could not have contained larger area than what was actually settled. The rent receipt, exhibit 4 (k), said to have been granted by Gaya Prasad Singh and Falgu Prasad Singh in the year 1343 Fasli, as appears from the original document, the relevant portion of which has not been printed in the paper book, was for the payment of rent for four years, that is to say from 1339 to 1343 Fasli. In 1341 Fasli, however, the crops of the land in suit had been attached and auction-sold and the price was withdrawn by Gaya Prasad Singh and Falgu Prasad Singh.

Even then the plaintiffs are said to have paid rent to the said two persons for that year also which cannot be accepted. From the petition (Ext. J) referred to above, it appears that some receipts in respect of the alleged settlement were

filed on behalf of plaintiff No. 1, in the proceeding u/s 145 of the Code of Criminal Procedure. The contention of Counsel for the appellants is that the observation of the learned Subordinate Judge in the year 1946 that the receipts appeared to have been written in one sitting, cannot be correct, they having been in existence for over twelve years before that period.

Counsel for the respondents, however, has contended that the receipts filed in the present case are not those receipts. In support of this contention, our attention has been drawn to the signature of the Sub-divisional Officer on the certified copy of the road cess return which also was filed on behalf of the plaintiffs in that proceeding and the absence of his signature on the receipts filed in this case, and it has been contended that if these receipts had been filed in that proceeding, they also would have contained the signature of the Sub-divisional Officer.

In the other proceeding u/s 145 of the Code of Criminal Procedure as between the plaintiffs and the defendants, plaintiff No. 1 gave evidence and his deposition is marked exhibit N (1). He stated therein as follows:

"The receipt which I have filed today is for the first time and it was not filed before the police or before any court."

From this statement it has been contended, and in my opinion rightly contended, that these are not the receipts which were filed in the first proceeding u/s 145 of the Code of Criminal Procedure. Counsel for the appellants has submitted that this statement is inadmissible in evidence as u/s 145 of the Indian Evidence Act the attention of the witness was not drawn to it. That Section states that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Counsel for the respondents has, however, contended that in this case, plaintiff No. 1 has not made any statement with regard to it which may be said to be inconsistent with his previous statement, and it is admissible in evidence as being his admission on a certain question of fact which is very relevant for the decision of point raised therein. It is true that there is no statement of this witness in the present suit showing that these receipts were filed before the police or before any court.

Therefore, the statement that is sought to be used from exhibit N (1) cannot be said to be inconsistent with any statement made in the suit and thus there can be no question of contra-dicting the witness by that statement. A pure and simple reading of the section makes it perfectly clear that the rule laid down in it is only applicable when a witness is sought to be contradicted by his previous statement. Where, however there is no statement in existence which could be

contradicted by previous statement, this rule does not apply and it is not necessary before it could be admissible in evidence to draw the attention of the witness to it.

The law on the subject has been clearly laid down, if I may say so with respect, by Mahajan, J. (as he then was), in a Full Bench decision of the Lahore High Court in *Firm Malik Des Raj Faqir Chand v. Firm Piara Lal Aya Ram* AIR 1946 Lah 65 (C) as under:

"An admission made by a party in proceedings antecedent to the suit or in letters and documents executed by him is a valuable piece of evidence against the party making those admissions and must be available to his adversary if that party during litigation pleads contrary to his own previous admissions. That principle of law, however, ceases to have any application where the party who had made the previous admissions goes into the witness-box and on oath gives evidence flatly inconsistent with what he had stated previous to the suit.

Before his opponent can be allowed on the basis of the previous admissions to argue that the party in the witness-box has perjured himself it is only fair that he is given an opportunity to explain his strange and inconsistent attitude. In other words, before a man is condemned as a liar, the material on the basis of which that charge is levelled against him must be placed before the witness and he must be confronted with those previous statements which form the basis of the charge of perjury against him.

If that is not done, then another principle of law comes into play which excludes the previous statements from being treated as legal evidence on the issue in question, and that principle is that no man should be condemned as a criminal till he is afforded an opportunity to defend himself and that opportunity cannot be offered till his attention is drawn to the matter on which the charge of perjury is laid against him. This principle, however, is inapplicable to the case where nothing has been said directly or indirectly by the witness against his previous statements or admissions and no contradiction is involved in his statement in the witness-box read as a whole of the previous admission made by him.

Again, that principle is wholly inapplicable when the party making the previous admissions has not appeared in the witness-box. No question of perjury arises in either of these two situations and, therefore, the principle that, to some extent, qualifies the general rule that admissions are good form of evidence and are relevant against the party making them, has no application in these two latter kind of cases."

Reliance, however, has been placed on behalf of the appellants on a decision in *Bal Gangadhar Tilak v. Shrinivas Pandit* 42 Ind App 135: AIR 1915 PC 7 (D), in which it was held that a court is precluded, both on general principles and by the Indian Evidence Act, 1872, Section 145, from treating the oral testimony of a witness as rebutted by statements by him contained in documents in evidence, unless those statements have been put to the witness in cross-examination. As

already observed, here there is no question of using the statement in question by way of rebuttal of any other statement made by the witness in the present case.

This decision, therefore, is of no assistance to the appellants. They have also relied on a decision of the Lahore High Court in Ghulam Murtaza v. Nagina AIR 1930 Lah 991 (E). In that case it was held that before a previous admission can be used against a party, it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation. In view of the later Full Bench decision of that Court referred to above, this cannot be accepted to be a good law so as to be applicable to a case like the present one where there is no question of contradicting a witness by his previous statement.

In my opinion, therefore, the above statement is admissible in evidence. It is thus clear that the receipts on which now reliance is sought to be placed in this case on behalf of the appellants are not those receipts which are said to have been filed in support of the settlement at the time of the first proceeding u/s 145 of the Code of Criminal Procedure referred to above.

13. On behalf of the defendants eleven witnesses have been examined.

(After discussing the evidence his Lordship concluded:)

14. On consideration of the entire evidence on the record and the circumstances of the case, I agree with the learned Subordinate Judge that the suit land is not the raiyati land of the plaintiff, but it is the bakasht land of the defendants and that the story of the plaintiff's possession and dispossession is not true. In the result, the judgment and the decree of the Court below are upheld. The appeal therefore, fails and is dismissed with costs.

Dayal, J.

15. I agree.