

(1953) 12 PAT CK 0013
In the Patna High Court
Case No : A.F.A.D. No. 1030 of 1951

Kanhaiya Singh and Others	Vs	APPELLANT
Bhagwat Singh and Others		RESPONDENT

Date of Decision : 15-12-1953

Acts Referred:

Bihar Tenancy Act, 1885 — Section 112A, 120, 20, 21, 3(2)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 100, 101, 103
Evidence Act, 1872 — Section 13

Citation : AIR 1954 Patna 326 : (1954) 2 BLJR 170

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

Bench : Division Bench

Advocate : Mahabir Prasad, Tarkeshwar Nath, Bhagwat Prasad, Harians Kumar and Purnendu Narain, for the Appellant; B.C. De and A.N. Chatterji, for the Respondent

Final Decision : Allowed

Judgement

Choudhary, J.—This appeal by the plaintiffs is directed against the judgment and decree of the first Additional Subordinate Judge of Arrah affirming those of the Munsif, 2nd Court, Buxar.

2. On 23-10-1907, plaintiff No. 1 and the ancestors of the other plaintiffs gave 10.25 acres of land appertaining to plot Nos. 122 and 125 of Khata No. 10 and plot No. 128 of Khata No. 21 in usufructuary mortgage to defendant No. 1 by means of a usufructuary mortgage bond, exhibit 2 (a). On 20-7-1909, they again gave 5.48 acres of land in usufructuary mortgage to defendant No. 1 by means of a usufructuary mortgage bond, exhibit 2, and one of the plots covered by that mortgage bond is plot No. 32 of Khata No. 21 having an area of 2.96 acres. On the same day they executed in his favour a third usufructuary mortgage bond, exhibit 2(d), in respect of 7.21 acres of land consisting of various plots one of which was plot No. 16 of khata No. 25 having an area of 1.59 acres. They also executed in his favour a fourth usufructuary mortgage bond with respect to 3.65

acres of land. The total area covered by all the four usufructuary mortgage bonds was 26.59 acres.

3. In 1941 the plaintiffs made payment of the mortgage dues to defendant No. 1 & redeemed all the four mortgages. After redemption, according to the case of the plaintiffs, they got possession over 11.79 acres out of which 2.52 acres related to the second usufructuary mortgage bond, exhibit 2, 5.62 acres related to the third usufructuary mortgage bond, exhibit 2 (d), and 3.65 acres related to the fourth usufructuary mortgage bond. The plaintiffs could not get possession over the remaining area, namely, 14.80 acres of land, which contained the entire 10.25 acres of the first usufructuary mortgage bond, exhibit 2(a), 2.96 acres of plot No. 32 in khata No. 21 of the second usufructuary mortgage bond, exhibit 2, and 1.59 acres of plot No. 16 in khata No. 25 of the third usufructuary mortgage bond, exhibit 2 (d). Therefore, the plaintiffs brought a suit for declaration of their title to and recovery of possession of the aforesaid 14.80 acres of land with mesne profits.

The case of the plaintiffs is that the lands in question were their "zirat" lands which they gave in usufructuary mortgage to defendant No. 1 and when, on redemption, they went to take possession over them, they were resisted by defendants 2 to 30 who were the creatures of defendant No. 1. Their further case is that defendant No. 1 fraudulently got the names of those defendants recorded in the cadastral survey record-of-rights, prepared in 1911, as being the occupancy raiyats of the lands in suit.

4. The suit was contested by defendants 9, 10, 13, 15, 17 and 24, who filed a joint written statement. Their case is that the lands in question were not the "zirat" lands of the plaintiffs, but were their ancestral occupancy "kast" lands & that they were in possession of them on payment of rent to the plaintiffs & their ancestors &, after the execution of the usufructuary mortgage bonds, to the mortgagee, the defendant No. 1. Their further plea is that they have occupancy right in the lands in question and they were recorded in the survey record-of-rights as their occupancy "kast" lands. It may be noted that according to the defence plot Nos. 128 and 32 belonged to defendants 9 to 14, plot No. 122 to defendants 15 to 19 and plot No. 125 to defendants 20 to 25. Plot No. 16 of Khata No. 25 was recorded in the survey record-of-rights in the name of defendant No. 26 and as defendants 26 to 30 belonged to the same family, all of them were impleaded in the suit as defendants. They, however, did not contest the suit.

5. The trial court held that the lands in suit were not the "Zirat" lands of the plaintiffs, but were the occupancy "Kast" lands of the defendants. It, therefore, dismissed the suit of the plaintiffs with respect to plot Nos. 122, 125, 128 and 32, but, as no contest was made by the defendants with respect to plot No. 16, an ex parte decree was passed in favour of the plaintiffs for recovery of possession over that land. No appeal was preferred by the defendants with respect to this plot, and, therefore, it is no longer in dispute now. The plaintiffs,

however, preferred an appeal against the judgment and decree of the trial court dismissing their suit for the aforesaid four plots. The court of appeal below reversed the findings of the trial court, held that the lands in question were the "Zirat" lands of the plaintiffs and not the ancestral "kast" lands of the defendants, and decreed the suit.

6. The defendants, however, pressed a further point before the lower appellate court that they were inducted on the lands by the mortgagee and their possession over the same was recognized by him by acceptance of rent from them and consequently they acquired the right of occupancy in the lands. In view of the pleading of the defendants that the lands in question were their ancestral "kast" lands, the court of appeal below held that it was not open to them to raise that question. The defendants preferred a second appeal in this Court which was numbered as "S.A. No. 20 of 1948 (Pat) (A)". That second appeal was allowed, the decision of the court of appeal below was set aside and the case was sent back on remand for a fresh decision on the following points:

"(a) Whether the lands are "Zirat" lands or not within the meaning of Section 120 of the Bihar Tenancy Act;

(b) Whether the appellants or their ancestors acquired any right of occupancy in the lands by reason of being brought on the lands by the mortgagee or by acceptance of rent, etc., by the mortgagee; and

(c) if the lands are held to be "Zirat" lands within the meaning of Section 120, then whether occupancy rights could be acquired in such lands under the provisions of Section 116 of the Bihar Tenancy Act.

7. After remand the lower appellate court affirmed the judgment and decree of the trial court. It held that the plaintiffs failed to prove that the lands were their "Zirat" lands within the meaning of Section 120, Bihar Tenancy Act and, therefore, the question of application of Section 116 of that Act did not arise, that there was no collusion between the mortgagee and the defendants and they have been in possession of the lands in question at all the time, even from before 1907, in their own rights as "raiyats", that the mortgagee was entitled to induct or recognize tenants by acceptance of rent, that the defendants have acquired occupancy right in these lands as recorded in the record-of-rights & that the presumption of correctness of the entry in the record-of-rights has not been rebutted. On these findings the appeal before the lower appellate court was dismissed and the plaintiffs have come up to this Court in second appeal.

8. The first contention raised by the Advocate-General on behalf of the appellants is that assuming that the lands in question are not the "Zirat" lands of the plaintiffs and that the mortgagee has a right to make settlement of the lands either by inducting tenants or by accepting rent from them, even then the defendants could not acquire the right of occupancy in law. According to Sections 20 and 21, Bihar Tenancy Act, in order that one should acquire the right of occupancy in the land, he must have held it as a "raiyat". "Raiyat" has been

defined in Sub-Section (2) of Section 5 of that Act to mean primarily a person who has acquired such a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right. Sub-section (3) of that section lays down that a person shall not be deemed to be a "raiyat" unless he holds land either immediately under a proprietor or immediately under a tenure-holder. According to this definition, in order that a person should be a "raiyat" so as to acquire a right of occupancy in the land, he must hold it immediately either under a proprietor or under a tenure-holder. It has, therefore, to be seen whether a usufructuary mortgagee can come under the terms proprietor or tenure-holder so as to confer the status of a "raiyat" to the settlee in order to acquire, the right of occupancy.

9. "Proprietor" has been defined in Section 3 (2) of the Bihar Tenancy Act to mean a person owning whether in trust or for his own benefit an estate or a part of the estate. A usufructuary mortgagee cannot, in any sense, be said to be a person owing the subject-matter of the usufructuary mortgage. "Mortgage" has been defined in Section 58 of the Transfer of Property Act to be the transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. The words "transfer of an interest" stand in contrast with the words "transfer of ownership" occurring in Section 54 of that Act in the definition of sale. It is, therefore, clear that a mortgage does not transfer the ownership in the mortgaged land to the mortgagee and, as such, the mortgagee cannot be said to own the mortgaged land or to be the owner of that land. A usufructuary mortgagee, therefore, is not a proprietor within the meaning of the Bihar Tenancy Act.

10. Next it has to be considered whether a usufructuary mortgagee can be said to be a tenure-holder. A tenure-holder is one of the three classes of tenants defined in Section 4 of the Bihar Tenancy Act. Therefore, in order to be a tenure-holder he must be, first, a tenant. "Tenant" has been defined in Section 3(3), Bihar Tenancy Act to mean a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person. A usufructuary mortgagee is not ordinarily liable to pay any rent for the mortgaged land to the mortgagor unless the mortgage is in the form of a lease or there is a contract to that effect. Where, however, there is no such contract or lease, he (the usufructuary mortgagee), in my opinion, cannot be said to be a tenant, and, if that be so, he cannot be a tenure-holder.

11. On a plain reading of the aforesaid sections of the Bihar Tenancy Act and the Transfer of Property Act there is no room for doubt to hold that a person inducted on the mortgaged land by the mortgagee can never be a "raiyat" as defined in the Tenancy Act and, as such, cannot acquire a right of occupancy in the land. This view is fully supported by a recent decision of the Supreme Court in --

Mahabir Gope and Others Vs. Harbans Narain Singh and Others, . In that case the ancestor of the plaintiff 1st party gave an "ijara" with possession to one Lakhandeo Singh, the ancestor of the defendants second party who made the settlement of the lands with one Ramlal Gope, the ancestor of the defendants 1st party. On redemption of the mortgage by the plaintiffs they wanted to take possession of the land, but were resisted by the defendants 1st party who claimed to have acquired a right of occupancy in the land. Their Lordships of the Supreme Court, while dealing with the question of acquisition of an occupancy right by the defendants 1st party, held as follows ;

"For these sections (Sections 20 and 21, Bihar Tenancy Act) to apply, we must be in a position to hold that the appellants were "settled" "raiyats". "Raiyat" is defined in Sub-clause (2) of Section 5 as meaning: "Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family" Sub-clause (3) provides that a person shall not be deemed to be a "raiyat" unless he holds land either immediately under a proprietor or immediately under a tenure-holder. Lakhandeo Singh was not a "proprietor" by which term is meant a person owning, whether in trust or for his own-benefit, an estate or part of an estate; he was only a mortgagee. Nor was he a tenure-holder or under tenure-holder, as he does not comply with the definition given in Sub-clause (1) of Section 5, namely, a person who had acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents, or for the purpose of bringing the land under cultivation by establishing tenants on it. Hence, Ramlal Gope could not claim that he was a settled "raiyat" of the village and that under the statute he secured occupancy rights in the lands which he took on lease from Lakhandeo Singh."

12. Mr. B. C. De appearing for the respondents has relied on a passage from the judgment of Chandrasekhara Aiyar J. in that Supreme Court case which runs as follows :

"A permissible settlement, by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether. It is an exception to the general rule. The tenant cannot be ejected by the mortgagor even after the redemption of the mortgage. He may become an occupancy "raiyat" in some cases and a non-occupancy "raiyat" in other cases. But the settlement of the tenant by the mortgagee must have been a "bona fide" one. This exception will not apply in a case where the terms of the mortgage prohibit the mortgagee from making any settlement of tenants on the land either expressly or by necessary implication.

"Where all the "zamindari" rights are given to the mortgagee, it may be possible to infer, on the proper construction of the document, that he can settle lands with tenants in the ordinary course of management and the tenants might

acquire certain rights in the land in their capacity as tenants. In the case of -- "Manjhil Lal Biswa Nath Shah Deo v. Mahiuddin" 8 Pat LT 92 (C), there was a "bona fide" settlement of mortgaged "raiya" land by the mortgagee with tenants and it was held that the mortgagor was not entitled to evict them after redemption. The earlier decision or -- "Bhairo Nath Roy v. Shanke Pahan" AIR 1926 Pat 605 (D), related to "Bakasht" lands and there was no provision in the "zurpeshgi" lease restricting the power of the mortgage lessee as regards settlement of tenants. "Khudkasht" lands and "Bakasht" lands are really in the nature of "raiya" lands which come into the possession of the proprietor by surrender, abandonment or purchase."

13. Belying on the above passage Mr. B.C. De has advanced an argument that their Lordships of the Supreme Court did not rule out every possibility of the usufructuary mortgagee being in a position of a proprietor or a tenure-holder so as to confer the right of occupancy in the person inducted by him on the land, and, as a matter of fact, the Supreme Court decision supports the view that in some cases where it may be permissible either under a contract or under the provisions of law to settle the land under mortgage, the settlee from the mortgagee can acquire the right of occupancy and the argument that a usufructuary mortgagee can never be called a proprietor or a tenure-holder so as to confer the right of occupancy on the settlee has not been accepted. He has also argued that the cases of 8 Pat LT 92 (C) and Kusunda Nayadi Collieries Vs. Bholanath Sarkar and others , were referred to in that judgment and the correctness of the decisions in those cases was not doubted by their Lordships. The contention of Mr. B.C. De is that the present case comes within the ambit of the decisions in the aforesaid two Patna cases and, therefore, the defendants can acquire in law the right of occupancy in the lands in question.

14. The judgment of the Supreme Court, no doubt, makes it clear that in special cases a usufructuary mortgagee can confer the right of occupancy on the settlee under him. Their Lordships, however, did not think it necessary to give details of such cases where settlees from mortgagees could acquire the right of occupancy. Probably, their Lordships were referring to the cases in which usufructuary mortgages are in the form of leases and where the usufructuary mortgagees stand in the position of lessees and the mortgagors in the position of lessors. The case of Kusunda Nayadi Collieries Vs. Bholanath Sarkar and others , was a case of zurpeshgi lease and, therefore, there was a relationship of landlord and tenant between the usufructuary mortgagee and the mortgagor. In the case of 8 Pat LT 92 (C), the facts given therein do not indicate as to the exact form in which the usufructuary mortgage was created. But there is a passage in the judgment that the mortgagee to whom the proprietor's interest in the village was transferred under the mortgage bond of 1902 acquired the right to hold the land in possession and to manage it as a person of ordinary prudence would manage if it were his own. From this it appears that the usufructuary mortgage in that case was of a type by which the ownership of the mortgaged land was transferred to the mortgagee. These cases therefore do not, in my opinion, militate against the

proposition that a pure and simple usufructuary mortgagee is not a proprietor or a tenure-holder so as to confer the right of occupancy on the settlee under him.

15. Even assuming the contention of Mr. B.C. De to the effect that the Supreme Court decision does contemplate a case in which a settlee by a usufructuary mortgagee can acquire the right of occupancy, to be correct, he has yet to establish two things, namely, that the mortgagee was entitled to make settlement of the lands and that the settlement with the tenants by the mortgagee was a "bona fide" one. So far as the settlement in this case is concerned, on the authority of the case of 8 Pat LT 92 (C) itself, it is clear that the settlement could not be said to be a "bona fide" one. In the present case no part of the "zamindari" right was given in usufructuary mortgage and the lands which were given in usufructuary mortgage were those which were in "khas" cultivation of the mortgagor. The settlement of those lands affected the mortgagor's right to take khas possession of them after redemption and was thus injurious to their rights.

It cannot, by any stretch of imagination be said that where a mortgagor gives a piece of land in his possession to the mortgagee in usufructuary mortgage, a settlement of that land with another person by the mortgagee so as to deprive the mortgagor for all time to come to have "khas" possession over it, is not injurious to the rights of the mortgagor and is such a prudent act which the mortgagee could have been expected to do if it were his own. In my opinion, therefore, on the very face of it, the settlement in the present case could not be said to be a "bona fide" one and as having been entered into under a prudent management by the mortgagee. (16) Then remains the question whether under the document the mortgagee was entitled to make settlement. It has been contended by Mr. B.C. De that in the remand order made by this Court it had already been held that the right of settlement was given to the mortgagee and this question cannot now be agitated afresh before us. It has been held in -- "Brij Raj Krishna v. Chathu Singh" AIR 1923 Pat. 226 (E) that the order of remand made by the Division Bench of the High Court, which set aside the decision of the lower appellate court, was final on the point of law decided between the parties and a court of co-ordinate jurisdiction could not go behind it on appeal against the decision passed after remand. There is no doubt a passage in the remand order from which it appears that their Lordships did take view that the mortgagee had the right to make a settlement. That passage runs as follows :

"The courts below concurrently found that the mortgagee had the right to make a settlement. Having perused the mortgage bond, I see no reason to differ from that conclusion. The mortgage bond states in clear terms "It is desired that the said Sahu shall take possession of the land forming the "rehan" property, cultivate it himself or "settle it with others"". I have underlined (here into " ") the words above which clearly show that the right of settlement was given to the mortgagee. It is true that in the concluding part of the document it is stated that on repayment the mortgagor shall get back the "zirat" land. In my opinion, that

does not, in any way, militate against the right of settlement expressly given in the earlier part of the document."

17. Their Lordships, however, made it clear in the earlier part of the judgment that they were not expressing any final or concluded opinion on the question in issue between the parties, other than those on which it was necessary to give their findings in order to explain and justify the order of remand. Their Lordships felt the necessity of remanding the case for a fresh decision because the question of the "zirat" character of the lands had been determined in ignorance of the provisions of the Tenancy Act and the alternative plea of the defendants that they had acquired the right of occupancy by having been inducted or recognized by the mortgagee, was not considered by the court of appeal below. It was not at all necessary for their Lordships to have said anything on the question of the right of settlement given under the document for the purpose of explaining or justifying the remand order, and, therefore, in my opinion, that finding was not final and the court of appeal below could go into that question. The court of appeal below has, however, found that the mortgagee was entitled to induct or recognise tenants by acceptance of rent etc., on the lands in question. So far as plot No. 32 is concerned, which was given in usufructuary mortgage by exhibit 2, the document does not give any right of settlement to the mortgagee.

But the other usufructuary mortgage bond evidenced by exhibit 2 (a) shows, no doubt, that there was a recital in the document that the mortgagee could settle the lands and the court of appeal below has relied on that passage for coming to the finding that he had the right of settlement, but it has not considered the subsequent passage which finds place in the document, namely, that on redemption the mortgagor was to get back the "zirat" lands. Since the determination of this point has to depend on the construction of the usufructuary mortgage bond under which the mortgage in question was given, it becomes a question of law as being a construction of a document of title, and this Court can go into that question in second appeal. Having read the document, exhibit 2(a), as a whole, I am of opinion that it was clearly stipulated in it that, though the mortgagee would be entitled to settle the land for the purpose of getting their usufruct during the continuance of the mortgage, he was not authorized to make such settlement which might deprive the mortgagor to get khas possession over them after redemption of the mortgage.

18. Mr. B.C. De has next contended that the defendants were recorded as being occupancy "raiyats" in the record-of-rights, and the presumption of its correctness not having been rebutted as found by the court of appeal below, it was perfectly entitled to draw an inference from such entry that the defendants were occupancy "raiyats" and that such inference is an inference of fact with which the High Court can-not interfere in second appeal. As an abstract principle of law it is, no doubt, correct to say that where the decision as to the nature and character of a tenancy depends upon inference to be drawn from entries in a record-of-rights, the inferences are inferences of fact with which the High Court

cannot interfere u/s 100, Civil P.C. upon a second appeal, vide. -- AIR 1934 5 (Privy Council) . I will deal with the question of presumption of correctness of the record-of-rights and its rebuttal later on, but this much is clear that the proposition that the High Court cannot interfere in second appeal with the inference of fact where the finding as to the nature and character of the tenancy has been arrived at upon inferences drawn from the entries in the record-of-rights, does not apply to the point raised in the present case.

The question whether the defendants, as being settlees from the usufructuary mortgagee could acquire the right of occupancy has not to depend for its decision on the inferences from the entries in the record-of-rights, but is to be determined on the interpretation of the provisions of the Tenancy Act, which is purely a question of law and has been found to be against them. No doubt, the survey record-of-rights shows that they are occupancy raiyats and there is a presumption of correctness to that entry. This re-cord-of-rights was prepared in. 1911, and the Court of appeal below has taken the view that the defendants must have, therefore, been in possession for at least twelve years before the preparation of the record-of-rights which takes their possession even prior to the dates of the mortgages. It was not open to the court of appeal below to come to any decision with regard to their possession prior to the dates of the mortgages in view of the finding in the remand order, a discussion about which will be made later on. The question of their having acquired the right or occupancy is to be determined with reference to their possession since after the dates of the mortgages, but, as I have already found, any possession of the defendant subsequent to the mortgages will not, in law, confer on them the status of an occupancy "raiya". The presumption of correctness of the entry in the record-of-rights is rebutted simply on the interpretation of the law itself.

Mr. B.C. De, however, contended that this Court cannot interfere in second appeal with a finding of fact if the lower appellate court had before it any evidence proper for its consideration in support of its finding, and he has relied, in support of this proposition, on the case of -- AIR 1929 286 (Privy Council) . But in the present case that question does not arise. There cannot be any evidence to support the finding that the defendants acquired the right of occupancy by virtue of their being in possession subsequent to the execution of the mortgage bonds when, as already held, the law does not permit the accrual of such a right in them.

19. On consideration of the authorities and the aforesaid facts and circumstances of the case I am of opinion and hold that the defendants could not in law acquire the right of occupancy in the lands in question even if they were in possession of the same during the continuance of the mortgages, and, as such, they had no right to be on the lands after their redemption. The appeal could have been disposed of on the decision of this point, but since the other points have been argued at length by the counsel of the parties, I would like to give my decision on these points also.

20. Before discussing the other points it may perhaps be necessary to deal with as to why it was not open to the court of appeal below to consider the question of the defendants' possession prior to the dates of the mortgages. From the remand order it appears that their Lordships accepted the finding that the appellants had failed to prove that they held the lands as raiyats prior to 1907. Their Lordships observed as follows :

"The learned Subordinate Judge did not accept as correct the receipts of the year prior to 1907. We must, therefore, proceed on the assumption that the appellants had failed to prove that they held the lands as "raiyaats" prior to 1907."

It is this finding that necessitated the remand of the case for a decision on the alternative plea of the defendants that they were inducted on the lands by the mortgagee or that the mortgagee recognised them as raiyats by acceptance of rent, and, as observed by their Lordships themselves that only such findings would be taken to be concluded which were necessary for explaining and justifying the order for remand, the finding that the defendants failed to prove their possession as raiyats prior to 1907 is final. It was, therefore, not open to the court of appeal below to enter into any discussion or to come to any finding with regard to the defendants' possession as "raiyaats" prior to the dates of the mortgages. It is also clear from that remand order that their Lordships did not accept the receipt of the years prior to 1907 as genuine. Even then the court of appeal below has taken those receipts into consideration for finding defendants' possession prior to 1907. In view of the remand order, however, this finding cannot be maintained.

21. It appears that there was a proceeding for reduction of rent at the instance of the defendants on the ground that they were occupancy "raiyaats", to which plaintiff No. 1 and Sakhichand, one of the ancestors of the plaintiffs along with others were made parties. The Court of appeal below has relied on this fact also to hold that the defendants had the right of occupancy in the lands in question. Mr. B.C. De appearing for the respondents has contended that in view of the facts that the rent was reduced in the presence of plaintiff No. 1 and the ancestors of the other plaintiffs and that they did not raise before the revenue court the point that the defendants were not occupancy "raiyaats", it was not open to them (the plaintiffs) to challenge the occupancy character of the lands. I do not think there is any substance in this contention. In a recent Division Bench case of this Court in -- Bhagwat Rai and Others Vs. Ramasis Rai and Others, , it was held as follows :

"The revenue officer conducting Section 112A proceedings cannot finally adjudicate upon the issue whether the defendants had the status of occupancy "raiyaats" of the holding or not. The jurisdiction of the revenue officer is contingent in the sense that no such jurisdiction can be exercised unless the fact is admitted or established that the defendants had the status of occupancy "raiyaats" and that the holding was an occupancy holding. This is one of the conditions precedent to the jurisdiction of the revenue officer. But the decision of

the latter is not binding and conclusive."

A Full Bench decision of this Court in Ramranbijaya Prasad Singh Vs. Ram Kawal Upadhya and Others, is a clear authority for the proposition that the revenue court in a proceeding for reduction of rent has no jurisdiction to conclusively determine the status of the tenant and its decision on the point can be impeached in a civil court in a collateral proceeding.

22. The next argument raised by the Advocate-General on behalf of the appellants is that the finding of the court of appeal below that the lands in question were not the "zirat" lands of the plaintiffs is wrong in law. His contention is that the recitals as to the character of the lands in question made in the mortgage bonds, exhibits 2 series, have been wrongly excluded from evidence by the court of appeal below as being inadmissible, whereas they are admissible in evidence u/s 13 of the Evidence Act. Mr. B. C. De on behalf of the respondents, however, raises two objections to these recitals being taken into evidence. He contends, firstly, that in the previous second appeal their Lordships came to a definite finding that they were not admissible in evidence, and, secondly, that, at any rate, those recitals were not admissible in evidence u/s 13 of the Evidence Act. In support of the first contention Mr. B.C. De has relied on the following passage occurring in the judgment of their Lordships in the remand order :

"The other documentary evidence on which the learned Subordinate Judge relied consisted of the "rehan" bonds, Ext. 2 series. They contained statements by the plaintiffs respondents themselves, and it is difficult to see how the plaintiffs respondents could take advantage of statements made by them in their own favour."

No doubt, there is such a finding of their Lordships in the remand order as appears from the above quoted passage. But the question is was this finding necessary for explaining or justifying the remand order. In my opinion, it was not at all necessary for their Lordships to give any final adjudication on the point because it could not be taken to be either for the purpose of explaining. or justifying the remand order. As already observed, their Lordships had made it clear that any finding not necessary for explaining or justifying the order of remand would not be taken to be a concluded finding. Thus there is no merit in this contention of Mr. B. C. De.

23. Now remains the question whether those documents were admissible in evidence. There are no doubt, recitals in those documents that the lands in question are "zirat" lands of the plaintiffs, and if they be held to be admissible in evidence, the finding of the court of appeal below, in the absence of consideration of those recitals, will not be binding on us in second appeal. Section 13 of the Evidence Act runs as follows;

"Where the question is as to the existence of any right or custom, the following facts are relevant:

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from."

24. The contention of Mr. B.C. De is that the section has no application to a recital in a document where it is not made in assertion of a right which is created by that document. He submits that in every case an executant is entitled to execute a deed in respect of his land whether he holds it under one title or another, and, the mere fact that in the document the character of that title is recited, does not constitute an assertion of such a title within the meaning of Section 13 of the Evidence Act. He has relied on the cases of-- Brojendra Kishore Roy Chaudhuri Vs. Mohim Chandra Bhattacharji and Others, , and -- Kumud Kanta Pahari and Others Vs. Province of Bengal and Others, .

These two cases, no doubt, support his contention, but there is a recent Division Bench case of this Court -- "Ashfaq Ali Khan v. Asharfi Mahaseth" AIR 1951 Pat 641 (L), which has taken a different view. In that case the plaintiff had brought a suit for recovery of possession and, in the alternative, for assessment of fair and equitable rent, the defendant pleaded that the land in suit was an old rent-free "fakirana" grant, and in support of his contention, produced two documents, namely, a patta of the year 1905 and a sale deed of the year 1922, in favour of the predecessor-in-interest of the defendant mentioning the suit land as a rent-free "fakirana" grant. Their Lordships on an interpretation of the language used in Section 13 of the Evidence Act and on consideration of the various authorities of this Court as well as of the other High Courts, held that the recital in those documents that the land was a rent-free Fakirana grant, was admissible in evidence.

The case of -- Brojendra Kishore Roy Chaudhuri Vs. Mohim Chandra Bhattacharji and Others, " was considered by their Lordships who held the observations made therein to be mere obiter as the kebalā in which the recital was made was held in that case to be a fictitious document, and, as such, it did not amount to a transaction. We are bound by the decision of this Division Bench case, and, therefore, there is no room for the contention that such recitals are not admissible in evidence to prove the character of the land.

25. We would have remanded the case for a fresh decision as to whether the lands in question were "zirat" or not, but the matter has been hanging on from the year 1943 when the suit was filed, and, in that view of the matter, we considered it proper to decide the point ourselves. Learned Counsel appearing for both the parties have also submitted that instead of remanding the case for a fresh decision we may ourselves decide it here. Where a final court of fact has come to a finding of fact without considering material evidence on the record, this court is competent to decide the question of fact on consideration of such

evidence u/s 103, Civil P. C.

26. Section 120, Bihar Tenancy Act so far as is relevant for the present enquiry, runs 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, Zirat, Sir, nij, 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, Zirat, Sir, nij, 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".

It has, therefore, to be seen whether the evidence available on the record brings the case under any of those provisions.

27. So far as plot Nos. 125 and 128 are concerned, apart from the recitals in the mortgage bonds, reliance has been placed on exhibit 1, the irrigational khesra of 1877 in which these two plots are recorded as zirat. Plot No. 128 is recorded as zirat of one Ganesh who was admittedly the ancestor of the plaintiffs. Plot No. 125 was recorded as Zirat of one Gulam who was not the ancestor of the plaintiffs. The plaintiffs, however, claimed to have acquired this land, by exchange. As there was no satisfactory evidence to prove the story of exchange, the court of appeal below did not rely on this entry for proving the Zirat character of this land. I fail to understand this reasoning. This plot was undoubtedly given in usufructuary mortgage by the plaintiffs. Therefore, it must have been acquired by them. It is not the case of any of the parties that this plot belonged to anybody else other than the plaintiffs. The question about the acquisition of the plot was not in dispute. Therefore the entry of this land as being zirat in the irrigational khesra cannot be ignored merely on this ground.

Nothing specifically has been said by the Court of appeal below with respect to plot No. 128 which no doubt, was recorded in exhibit 1 as zirat of the plaintiffs' ancestor. If this document is admissible in evidence, it undoubtedly establishes that in 1877 these two plots were recorded as being zirat by the Irrigation Officer. It is, however, contended by Mr. B. C. De on behalf of the respondents that the Irrigation Officer was only concerned with the payments of water-tax and it was not a part of his duty as a public servant to record the character of the lands in the irrigational Khesra. I think, there is much substance in this argument. It is not known as to how and on whose claim and assertion and on

what authority the entry with respect to the lands being zirat was made by the Irrigation Officer. Section 13 of the Evidence Act, therefore, is not applicable to this recital, and in my opinion, it is not admissible in evidence to prove the zirat character of the land.

With respect to the other two plots, namely, plot Nos. 32 and 122, there is no other documentary evidence except the recital in the mortgage bonds in question. As a matter of fact, Mr. G. P. Das, Advocate, appearing for the appellants before the lower appellate Court frankly conceded that it was not possible for the plaintiffs to prove the zirat character of plot No. 32. The only evidence, therefore, available on the record to prove the zirat character of the lands consists of the recitals in the mortgage bonds in question. No doubt, they are admissible in evidence to prove a claim or assertion of a right in those transactions, but they in themselves, in my opinion, are not sufficient to establish that the lands in question are zirat within the meaning of Section 120 of the Bihar Tenancy Act. The Court of appeal below has not relied on the oral evidence adduced by the parties on this point. There is no evidence, therefore, to prove that the lands in question were cultivated as zirat by the proprietor himself with his own stock for twelve continuous years immediately before the passing of the Bihar Tenancy Act and the case cannot, therefore, come within the provisions of Section 120, sub-Section (1) Clause (a).

There is also no evidence that these lands were recognised as proprietor's Zirat lands by village usage. The recital in the irrigational khesra has been held to be inadmissible in evidence for this purpose. Even if it be assumed that they are admissible, a single instance of such assertion is no proof of a usage which must be established by satisfactory evidence. The case, therefore, does not come also within Sub-clause (b) of Section 120 Sub-Section (1). Sub-section (2) of Section 120 also has no application to this case. There is nothing to show that there is any local custom or that the land was before 2-3-1883, specifically let as proprietor's private land. Nor is there any other evidence to prove that the lands were the zirat lands of the plaintiffs. Thus even on the consideration of the recitals in the mortgage bonds, I have no hesitation to come to the conclusion that the lands in questions have not been proved to be zirat lands of the plaintiffs, and the court of appeal below has correctly come to a finding that the plaintiffs had failed to establish the Zirat character of these lands as required by Section 120, Bihar Tenancy Act.

28. On consideration of the entire evidence and circumstances as well as the provisions of law applicable to the case, I am of opinion that though the plaintiffs have failed to prove that the lands were their zirat lands within the meaning of Section 120, Bihar Tenancy Act yet the defendants could not in law acquire the right of occupancy on these lands even though they might have been inducted on them by the mortgagee or they might have been recognised as settlees by the mortgagee by acceptance of rent. In that view of the matter, the defendants had no right to resist the possession of the plaintiffs who are entitled to recover

possession with mesne profits.

29. In the result, the appeal is allowed, the judgment and decree of the lower appellate court are set aside and the suit is decreed with costs throughout. The plaintiffs will be entitled to recover possession of the disputed lands from the defendants with mesne profits which will be ascertained in a subsequent proceeding.

Ahmad, J.

30. I agree.